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ARBITRATION AWARD

.IN REGISTRY – NATIONAL INTERNET EXCHANGE OF INDIA

.IN domain Name Dispute Resolution Policy

INDRP Rules of Procedure

IN THE MATTER OF:

Chocoladefabriken Lindt & Sprungli AG

Seestrasse 204, 8802 Kilchberg,

Switzerland

..... Complainant

VERSUS

Mr. Qian Jin,

Quojiashan 29-82-4, Nanjing,

Jiangsu, 210037,

China

..... Respondent

1. **THE PARTIES:**

The Complainant in this administrative proceeding is Chocoladefabriken Lindt & Sprungli AG, having its address at Seestrasse 204, 8802 Kilchberg, Switzerland represented through Lall and Sethi Advocates, D-17, South Extension-II, New Delhi - 110 049, National Capital Region, India.

The Respondent is Mr. Qian Jin, Quojiashan 29-82-4, Nanjing, Jiangsu, 210037, China.

2. **THE DOMAIN NAME AND REGISTRAR**

The disputed domain name <LINDT.IN> has been registered by the Respondent. The Registrar with whom the disputed domain is registered is Name.com LLC.

3. **PROCEDURAL HISTORY**

The Complaint was filed with the .In Registry, National Internet Exchange of India (NIXI), against Mr. Qian Jin, Quojiashan 29-82-4, Nanjing, Jiangsu, 210037, China. The NIXI verified that the Complaint together with the annexures to the Complaint and satisfied the formal requirements of the .in Domain Name Dispute Resolution Policy ("The Policy") and the Rules of Procedure ("The Rules").

- 3.1 In accordance with the Rules, Paragraph-2(a) and 4(a), NIXI formally notified the Respondent of the Complaint and appointed me as a Sole Arbitrator for adjudicating upon the dispute in accordance with The Arbitration and Conciliation Act, 1996, Rules framed there under, .In Dispute Resolution Policy and Rules framed there under on **3rd February, 2012**.



The parties were notified about the appointment of an Arbitrator on **3rd February, 2012**.

- 3.2 The Panel has submitted the Statement of Acceptance and Declaration of Impartiality and Independence, as required by NIXI to ensure compliance with the Rules (paragraph-6). The arbitration proceedings commenced on **3rd February, 2012**. In accordance with the rules, paragraph 5(c). The Respondent was notified by me about the commencement of arbitration proceedings and the due date for filing his response.
- 3.4 The Respondent failed and/or neglected and/or omitted to file formal response to the Complaint within 10 days as was granted to him by the notice dated **3rd February, 2012**. The respondent was further granted a final opportunity of 3 days vide notice dated **1st March, 2012**, however, the Respondent failed and/or neglected and/or omitted to file any response.
- 3.5 The Panel considers that according to Paragraph-9 of the Rules, the language of the proceedings should be in English. In the facts and circumstances, in-person hearing was not considered necessary for deciding the Complaint and consequently, on the basis of the statements and documents submitted on record, the present award is passed.

4. FACTUAL BACKGROUND

- 4.1 The Complainant in these administrative proceedings is Chocoladefabriken Lindt & Sprungli AG, having its address at Seestrasse 204, 8802 Kilchberg, Switzerland.
- 4.2 The complainant claims to be the proprietor of the trade mark – service mark – domain names, containing LINDT as an

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essential feature thereof. The trade mark LINDT is also stated to be registered in more than 100 countries in the world. The respondent has registered impugned domain name Lindt.in without any right or legitimate interest therein and in bad faith.

- 4.3 The Complainant submits that the present dispute is properly within the scope of INDRP and the Constituted Panel appointed by INDRP has the jurisdiction to decide the suit. The Registrar of the disputed Domain Name has adopted the INDRP Rules as per its Registrar Accreditation Agreement.

5. PARTIES CONTENTIONS

5A COMPLAINANT

5A(1) The Complainant Chocoladefabriken Lindt & Sprungli AG submits that he is the owner of trade & service Mark LINDT and other trade & service marks in which LINDT mark appears as Complainant thereof.

5A(2) The Complainant submits that the Complainant has registered trade mark and/or pending registrations in more than 100 countries around the world.

5A(3) The Complainant submits that the Complainant is registrant of the Domain Name <LINDT.IN> and the said Domain was registered by the Complainant much prior to the Respondent's registration thereof of impugned Domain Name.

5A(4) The Complainant submits that he is the registered proprietor of the trade mark LINDT in India, bearing registration No.



641399, dated September 28, 1994 for the goods under the international class 30.

5A(5)The Complainant submits that the use of their well-known and prior trade mark has been extensive, exclusive and continuous all across the world. Given the nature of the Complainant's use of its trade mark, anyone with access to a computer and the Internet, has access to the Complainant's web site wherein the Complainant's trademarks are featured throughout this web site.

5A(6)As a result of the Complainant's marketing and promotion of its goods under its trade mark LINDT, the mark has gained worldwide recognition and goodwill and has become very well-known. Moreover, the Complainant's trade mark has firmly been associated with the Complainant prior to the Respondent's registration of the Disputed Domain Name.

5A(7)The Complainant further submits that he has adopted the mark LINDT in the year 1845 for premium chocolates and has been continuously and extensively using the same. The Complainant has long history in the chocolate business and due to its high quality and taste it has gained confidence of the market and consumer therein. The domain name LINDT.COM is being used since December 16, 1997.

5A(8)The Complainant provides the sales figures of the products sold by the Complainant under the brand LINDT in India for the years 1997 to 2010 are as mentioned herein below.

Year	Sales figures in 1000 CHF (Swiss Franc)
1997	90.4
1998	125.4
1999	156.15



2000	219.13
2001	209.65
2002	276.77
2003	333.52
2004	434.68
2005	321.39
2006	386.61
2007	626.31
2008	737.4
2009	599.61
2010	1237.1

Global net-net trade sales in 2008 were 2,071,606,000 CHF (2,07 Billion), in 2009: 2,119,397,000 CHF (2,12 Billion) and in 2010: 2,270,368,000 (2,27 Billion).

5A(9) The Complainant further submits that he has expended huge monies towards advertisement and promotion of its brand LINDT, both globally and in India.

5A(10) The Complainant further submits that it sells its product in India and other South Asian countries through its exclusive dealers and distributors.

5A(11) The Complainant further submits that the trade mark LINDT has been extensively advertised and promoted on the internet *inter alia* through the Complainants websites WWW.LINDT.COM. The said websites contain extensive information about the Complainant and the products marketed and sold under the trade mark LINDT. This information is accessible by any person from anywhere in the world.



B. RESPONDENT

5B(1) The Respondent has twice been given opportunities to file his/her response to the Complaint by the panel by its notice dated February 3, 2012 and notice dated March 1, 2012. However, the respondent has failed to file any response within the prescribed time or to seek any extension of time. The case of the complainant, therefore, remain unrebutted.

6. DISCUSSIONS AND FINDINGS

6.1 The Complainant, while filing the Complaint, submitted to arbitration proceedings in accordance with the .In Dispute Resolution Policy and the Rules framed thereunder in terms of paragraph (3b) of the Rules and Procedure. The Respondent also submitted to the mandatory arbitration proceedings in terms of paragraph 4 of the policy, while seeking registration of the disputed domain name.

6.2 Paragraph 12 of the Rules provides that the Panel is to decide the Complaint on the basis of the statements and documents submitted and that there shall be no in-person hearing (including hearing by teleconference video conference, and web conference) unless, the Arbitrator, in his sole discretion and as an exceptional circumstance, otherwise determines that such a hearing is necessary for deciding the Complaint. I do not think that the present case is of exceptional nature where the determination cannot be made on the basis of material on record and without in-person hearing. Sub-Section 3 of Section 19 of The Arbitration & Conciliation Act also empowers the Arbitral Tribunal to conduct the proceedings in the manner it considers appropriate including the power to determine the admissibility, relevance, materiality and weight of any evidence.



- 6.3 It is therefore, appropriate to examine the issues in the light of statements and documents submitted as evidence as per Policy, Rules and the provisions of the Act.
- 6.4 In accordance with the principles laid down under order 8 Rule 10 of the Code of Civil Procedure, the arbitrator is empowered to pronounce judgment against the Respondent or to make such order in relation to the Complaint as it think fit in the event, the Respondent fails to file its reply to the Complaint in the prescribed period of time as fixed by the panel.
- 6.5 The award can be pronounced on account of default of Respondent without considering statements or averments made by the Complainant on merit. However, in view of the fact that preliminary onus is on the Complainant to satisfy the existence of all conditions under the policy to obtain the relief's claimed, the panel feels it appropriate to deal with the averments made by the Complainant in its Complaint in detail and to satisfy itself if the conditions under the policy stand satisfied.
- 6.6 The Respondent has not filed its reply or any documentary evidence in response to the averments made in the complaint. The averments made in the complaint remain unrebutted and unchallenged. There is no dispute raised to the authenticity of the documents filed by the Complainant.
- 6.7 The onus of proof is on the Complainant. As the proceedings are of a civil nature, the standard of proof is on the balance of probabilities. The material facts pleaded in the Complaint concerning the Complainant's legitimate right, interest and title in the trade mark, trade name and domain name



WWW.LINDT.COM and the reputation accrued thereto have neither been dealt with nor disputed or specifically denied by the Respondent. The Respondent has not also denied the correctness and genuineness of any of the Annexures/Exhibits filed by the Complainant along with the Complaint.

- 6.8 Under the provisions of Order 8 Rule 5 of the Code of Civil Procedure, 1908 the material facts as are not specifically denied are deemed to be admitted.
- 6.9 The decision of Hon'ble Supreme Court of India in the matter of **Jahuri Sah Vs. Dwarika Prasad** – AIR 1967 SC 109, be referred to. The facts as are admitted expressly or by legal fiction require no formal proof. (See Section 58 of the Indian Evidence Act, 1872).
- 6.10 The Panel therefore accepts the case set up and the evidence filed by the Complainant and concludes that the same stand deemed admitted and proved in accordance with law.
- 6.11 Paragraph 10 of the Policy provides that the remedies available to the Complainant pursuant to any proceedings before an arbitration panel shall be limited to the cancellation or transfer of domain name registration to the Complainant.
- 6.12 Paragraph 4 of the Policy lists three elements that the Complainant must prove to merit a finding that the domain name of the Respondent to be transferred to the Complainant or cancelled:



A. IDENTICAL OR CONFUSINGLY SIMILAR

- 6A.1 The Complainant contends that the Registrant's Domain Name is identical or confusingly similar to a trade mark in which the Complainant has rights.
- 6A.2 The Respondent registered the Disputed Domain Name on September 10, 2008.
- 6A.3 The dominant and distinctive feature of the Disputed Domain Name is the incorporation of the Complainant's trade marks, as it is.
- 6A.4 At the time Respondent registered the Disputed Domain Name LINDT.IN, the Complainant had already been using its LINDT mark as a trademark and domain name and had firmly established rights in the said mark. Furthermore, at the time the Respondent registered the Disputed Domain name, the Complainant's LINDT trade mark had acquired the status of a well-known mark. The Respondent has not claimed or shown any right to the Disputed Domain Name that are superior to Complainant's rights in its LINDT marks, as evidenced by Complainant's prior and well-known use of the mark and registration thereof. Nor can the Respondent demonstrate that it was unaware of Complainant's Mark at the time the Disputed Domain Name was registered.
- 6A.5 The Complainant relied upon the case Yahoo! Inc. v. Akash Arora & Anr. (1999 PTC (19) 210 Delhi) seeking injunctive relief against the defendants who were attempting to use the domain name 'yahooindia.com' for internet related services. Yahoo! Inc., which was the owner of the trade mark "Yahoo" as well as the domain name <yahoo.com>, contended that by adopting the



deceptively similar domain name, the defendants had copied the source code of the plaintiff's prior created website. Moreover, the defendant's domain name could be perceived as being another one of the plaintiff's.

6A.6 Internet users are likely to believe that the Disputed Domain Name is related to, associated with, or authorized by the Complainant. Considering the Complainant already uses sites such as LINDT.COM the internet users would be confused into thinking that the Respondent enjoys authorization of the Complainant to do business in India or is in fact their Indian website considering that the country code top-level domain name in the disputed domain name is ".IN".

6A.7 The Respondent has not disputed any contentions raised by the Complainant in the Complaint. The Panel also finds and holds that the disputed Domain Name WWW.LINDT.COM is identical and/or deceptively similar to the earlier registered trade marks and Domain names of the Complainant. The whole of Complainant's trade mark /domain name has been incorporated in the disputed domain name and there is bound to be confusion and deception in the course of trade by the use of disputed domain name. Therefore, the Complainant has been successful in proving that the domain name WWW.LINDT.COM is identical and/or confusingly similar to the trademark HERSHEY'S of the Complainant.

6A.8 The Respondent registered the Disputed Domain Name after the Complainant had established rights in the LINDT marks through extensive use and registration.

6A.9 The Complainant relied upon WIPO decision in the matter of Guerlain S..A. v. PeiKang, WIPO Case No. D2000-05555; see also Venue Clicquot Ponsardin v. The Polygenix Group Co.,



WIPO Case No. D2000-0163 it was held that bad faith is found where a domain name "is so obviously connected with such a well-known product that its very use by someone with no connection with the product suggests opportunistic bad faith".

6A.10 The Complainant further relied upon WIPO decision in the matter of Charles Jourdan Holding AG v. AAIM, WIPO Case No. D2000-0403 it was held that "...given the relative notoriety of the Complainant's mark as well as the ease for any user of the Internet to assess on its own whether or not the registration and use of a domain name is likely to encroach on another's rights, the Panel is of the opinion that Respondent acquired the Domain Name primarily for the purpose of selling, renting, or otherwise transferring the Domain Name registration to the Complainant or to a competitor of the Complainant, for valuable consideration in excess of his out-of-pocket costs directly related to the Domain Name, an act which constitutes bad faith pursuant to paragraph 6(i) of the Policy".

6A.11 There exists no relationship between Complainant and Respondent that would give rise to any licence, permission, or authorization by which Respondent could own or use the Disputed Domain Name, which is identical to Complainant's Mark. The Respondent is not commonly known by the Disputed Domain Name and is not making legitimate non-commercial or fair use of the Disputed Domain Name.

6A.12 The Complainant further relied upon Domain Name Dispute Case in the matter of Caravan Club v. Mrgsale, NAF Claim Number: FA0007000095314 (thecaravanclub.com; registration of a well-known trademark by a party with no connection to the owner of the trademark and no authorization and no legitimate purpose to utilize the mark reveals bad faith.

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- 6A.13 The Complainant further relied upon WIPO Domain Name Case in the matter of CBS Broadcasting Inc. v. Worldwide Webs, Inc., WIPO Case No. D2000-0834 (ILOVELUCY.COM; Respondent sought to profit from the mere registration of the Complainant's trademark and service mark as a domain name, which constituted bad faith within the meaning of paragraph 6(i) of the policy; domain name transferred).
- 6A.14 The Complainant further relied upon WIPO Domain Name Case in the matter of Bennett Coleman & Co. Ltd. v. Steven S. Lalwani (Case No. D 2000-0014) and Bennett Coleman & Co. Ltd. v. Long Distance Telephone Company (Case No.D2000-0015) decided by WIPO, the Complainant, publisher of the daily newspaper "The Economic Times" and "The Times of India" held domain names, <economictimes.com> and <timesofindia.com> for publication of their respective newspapers. The two respondents had registered the sites <theeconomictimes.com> and <thetimesof india.com> and the Complainant contended that this was use of identical marks in which it had prior rights. Moreover, the site <thetimesofindia.com> redirected traffic to the site <indiaheadlines.com> while the site <the economic times.com> redirected traffic to <ifindyouperfectmate.com> without having any legitimate interests in respect of the domain names. Hence, the Complainant alleged that the respective respondents' registrations and use of the domain names was in "bad faith" in the sense that their use amounted to an attempt to intentionally attract, for commercial gain, internet users to their websites by creating a likelihood of confusion with the Complainant's marks as to the source, sponsorship, affiliation or endorsement of those websites and the services offered thereon. The Administrative Panel held that it is not a sufficient answer to suggest that defendant will dispel any misleading first impression by use of a different design of the web site. The



Panel further held that the necessary implication is that the domains were specifically selected in order to take advantage of the Complainant's very considerable reputation in the two titles of its publications by misleading internet users into believing that the respondent's sites came from or were associated with the Complainant. The Panel ordered that the two domain names be transferred to the Complainant.

6B.15 The Respondent did not dispute any of the contentions raised by the Complainant in its Complaint. The case set up by the Complainant is deemed to be admitted as not disputed by the Respondent. The Panel also finds, on the basis of the material available on record, that the respondent has no legitimate right or interest in the disputed domain name. The respondent has failed to show any justification for the adoption, use or registration of disputed domain name.

6B.16 The Panel, therefore holds that the circumstances listed above demonstrate rights or legitimate interests of the Complainant in the domain name WWW.LINDT.COM and holds that Respondent has infringed the rights of the Complainant by registering the Domain Name and has no legitimate right or interest therein.

C Registered and used in Bad Faith

6C.1 For a Complainant to succeed, the Panel must be satisfied that a domain name has been registered and is being used in bad faith.

6C.2 Paragraph 6 of the Policy states circumstances which, if found shall be evidence of the registration and use of a domain name in bad faith:

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1. That circumstances indicating that the Registrant has registered or the Registrant has acquired the domain name primarily for the purpose of selling, renting, or otherwise transferring the domain name registration to the Complainant who is the owner of the trademark or service mark or to a competitor of that Complainant, for valuable consideration in excess of our documented out-of-pocket costs directly related to the domain name; or
2. The Registrant has registered the domain name in order to prevent the owner of the trademark or service mark from reflecting the mark in a corresponding domain name, provided that you have engaged in a pattern of such conduct; or

6C.3 Given the fame of the Complainant's Mark as a trademark and domain name, it is not possible to conceive of a use by Respondent of the Disputed Domain Name that would not constitute an infringement of Complainant's rights in its Trade Mark.

6C.4 The Complainant relied upon WIPO Domain Name case in the matter of Veuve Clicquot Ponsardin v. The Polygenix Group Co., WIPO Case No. D2000-0163 at Section 6. Mere registration by Respondent of the Disputed Domain Name is thus further evidence of Respondent's bad faith.

6C.5 The Complainant relied upon WIPO Domain Name Case in the matter of Playboy Enterprises International, Inc. v. Hector Rodriguez, WIPO Case No. D2000-1016 (playboychannel.com and playboynetwork.com, "People, who manifest an intent to traffic in domain names that incorporate well-known or famous trademarks, as the Respondent does here, simply do not expend their efforts with the sole intention



of relinquishing those domain names for just their out-of-pocket registration costs. The goal of their efforts, simply put, is an expectation of receiving an adequate reward, i.e. sufficient profit, from this trafficking" transfer awarded). Consequently, the Complainant submits that bad faith use of the Disputed Domain Name is quite clear in this case, given the content on the Respondent's web site and his intent to sell the Disputed Domain Name to the highest bidder. The activities of Respondent rise to the level of a bad faith usurpation of the recognition and fame of Complainant's Mark to improperly benefit Respondent financially, in violation of applicable trademark and unfair competition laws. The facts provided above make it clear that Respondent was and is taking advantage of the goodwill and fame of Complainant's well-known trademark LINDT for its own substantial commercial profit and gain.

6C.6 The domain has been parked with Sedo, a domain brokerage service provider and when internet users log onto the disputed domain name LINDT.IN, the site leads them to a totally different page also provided by Sedo which contains links to pay per click sites dealing with chocolates, which does not reflect and nowhere closely relates to the Complainant's marks or the site. The Respondent is trying to make unlawful commercial gain by using the Complainant's trade mark to direct the traffic to its website and then re-directing it to third parties website who are dealing with goods identical to the Complainant thus causing loss to its interest. This clearly evidences the fact that Respondent is using the disputed domain name in "bad faith" with the intention of diverting traffic by attracting internet users for commercial gain to its website by creating a likelihood of confusion with the Complainant's well-known mark as to the source, sponsorship, affiliation or endorsement of its websites and



the services on them. This is also to be noted here that the Complainant has put on the domain for sale as evident from the site itself.

6C.7 The Respondent does not dispute any of the contentions raised by the Complainant. The facts and circumstances explained in the complaint coupled with the material on record clearly demonstrate that the domain name WWW.LINDT.COM was registered by the respondent in bad faith and to attract the internet users, through disputed domain, to the website of the competitor.

6C.8 The panel accepts the contentions of the Complainant as have been raised by them and holds that the registration of the domain name on part of the Respondent is in bad faith.

7. DECISION

In view of the fact that all the elements of Paragraphs 6 and 7 of the policy have been satisfied and in the facts and circumstances of the case, the panel directs the

- A. Transfer of the domain name WWW.LINDT.IN to the Complainant.
- B. Respondent to pay to the Complainant cost of Rs.25,000/- in the above proceedings.



AMARJIT SINGH

Sole Arbitrator

Dated: 26th April, 2012