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**NATIONAL INTERNET EXCHANGE OF INDIA**  
Incube Business Centre, 5<sup>th</sup> Floor,  
18, Nehru Place,  
NEW DELHI - 110 019

FLSmidth A/S, v. Development Services Telepathy Inc.,

**AWARD**

**1. The Parties**

The Complainant is FLSmidth A/S of Copenhagen, Denmark. The said Complaint has been filed through FLSmidth, House 34, Egatour, Kelambakkam (Rajiv Gandhi Salai), Chennai, 603103, India

The Respondent is Development Services, Telepathy, Inc., P.O. Box 11077, Washington, District of Columbia 20008, U.S.A.

**2. The Domain Name and Registrar**

The disputed domain name is <www fla.in>. The said domain name is registered with Directi Internet Solutions Pvt. Ltd.

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### 3. Procedural History

- (a) A Complaint dated January 06, 2012 has been filed with the National Internet Exchange of India. The Complainant has made the registrar verification in connection with the domain name at issue. The print outs so received are attached with the Complaint as Exhibit A. It is confirmed that the Respondent is listed as the registrant and provided the contact details for the administrative, billing, and technical contact. The Exchange verified that the Complaint satisfied the formal requirements of the Indian Domain Name Dispute Resolution Policy (INDRP) (the "Policy") and the Rules framed thereunder.
- (b) The Exchange appointed Dr. Vinod K. Agarwal, Advocate and former Law Secretary to the Government of India as the sole arbitrator in this matter on January 12, 2012. The arbitrator finds that he was properly appointed. The Arbitrator has submitted the Statement of Acceptance and Declaration of Impartiality and Independence, as required by the Exchange.
- (c) In accordance with the Rules, on January 16, 2012 the Sole Arbitrator formally notified the Respondent of the Complaint through the e mail address admin@telepathy.com. The Respondent was required to submit his defence within 20 days from the date of receipt of the e mail. The Respondent was informed that if his response was not received within 20 days, he would be considered in default and the matter will proceed ex-parte. No response has been received from the Respondent.

### 4. Factual Background

From the Complaint and the various annexure to it, the Arbitrator has found the following facts:

#### **Complainant's activities**

The Complainant is a global engineering company incorporated according to the laws of Denmark. It was founded in the year 1882 and is based at Copenhagen, Denmark. The name of the Complainant is "FLS". (These words are abbreviation of "F" – Frederik, "L" – Laessoe, and "S" – Smidth).

The Complainant is engaged in the supply of equipment and



services to the global cement and materials industries, such as, plants, machinery, and services and know how, etc. The Complainant is listed on the Copenhagen Stock Exchange. The Complainant says that it has registered at least 485 domain names around the world that incorporates its “FLS” or “fls” trademark or a variation thereof.

### **Respondent’s Identity and Activities**

Respondent did not file any reply. Hence, the Respondent’s activities are not known.

## **5. Parties Contentions**

### **A. Complainant**

The Complainant contends that each of the elements specified in the Policy are applicable to this dispute.

In relation to element (i), the Complainant contends that it is the proprietor of the trademark “FLSmdith” / “FLS” under various classes.

The Complainant is also the registrant and proprietor of various domain name registrations at international and domestic levels, such as, <flsmdith.com>; <flsautomation.es>; <flsmith.com>; <flsmith.org>; <flsmith.net>; <flsmdith.com>; < flsmdith.com.au>; < flsmdith.com.cn>; <flsmdith.com.mx>; < flsmdith.com.ua>; < flsmdith.com.vn>; etc. Therefore, the Complainant is well known to its customers as well as in business circles as “FLSmdith” or “fls” all around the world.

The Respondent’s domain name <www.fls.in> is phonetically, visually and conceptually identical or similar to the trademark “FLSmdith” of the Complainant.

In support of its contentions, the Complainant has relied on a decision in the case of *Wal Mart Stores, Inc. v. Richard MacLeod*, (WIPO Case No. D2000-0662) wherein it has been held that “When the domain name includes the trademark, or a confusingly similar approximation, regardless of the other terms in the domain name” it is identical or confusingly similar for purposes of the Policy.



In relation to element (ii), the Complainant contends that the Respondent (as an individual, business, or other organization) has not been commonly known by the mark “fls”. Further, the Respondent is not making a legitimate or fair use of the said domain name for offering goods and services. The Respondent registered the domain name for the sole purpose of creating confusion and misleading the general public.

In support of its contentions, the Complainant has relied on the decisions in the cases of Bennet Coleman & Co., v. Steven S. Lafwani, WIPO Case No. D2000-0014; SeekAmerica Network Inc., Tariq Masood and Solo Singh, WIPO Case No. D2000-0131, and Imperial College v. Christopher Dessimoz, WIPO Case No. D2004-0322 where in it has been held that a passive holding of a domain name is an evidence of a lack of legitimate rights and interests in that name.

Regarding the element at (iii), the Complainant contends that the main object of registering the domain name <www.flis.in> by the Respondent is to earn profit by selling the domain name and to mislead the general public and the customers of the Complainant. The Complainant has stated that the use of a domain name that appropriates a well known trademark to promote competing or infringing products cannot be considered a “*bona fide offering of goods and services*”.

#### **B. Respondent**

The Respondent did not submit any evidence or argument indicating his relation with the disputed domain name <www.flis.in> or any trademark right, domain name right or contractual right.

### **6. Discussion and Findings**

The Rules instructs this arbitrator as to the principles to be used in rendering its decision. It says that, “a panel shall decide a complaint on the basis of the statements and documents submitted in accordance with the Policy, the Arbitration and Conciliation Act, 1996, the Rules and any rules and principles of law that it deems applicable”.

According to the Policy, the Complainant must prove that:

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- (i) The Registrant's domain name is identical or confusingly similar to a name, trademark or service mark in which the Complainant has rights;
- (ii) The Registrant's has no rights or legitimate interests in respect of the domain name that is the subject of Complaint; and
- (iii) The Registrant's domain name has been registered or is being used in bad faith.

#### **A. Identical or Confusingly Similar**

As per the whois information, the Respondent has created the disputed domain name <www.flis.in> on March 24, 2005. The expiration date is March 24, 2012. In other words, the said domain name is in existence for the last about 7 years. It is not known as to why the Complainant has not taken any action during all this period.

The Complainant's trademark "FLSmidt" is registered in many countries of the world such as, Algeria, Argentina, Brazil, Canada, Chile, Colombia, Egypt, Indonesia, Jordan, Mexico, Malaysia, Nigeria, Peru, Pakistan, Saudi Arabia, Thailand, South Africa, United States of America, etc., in various Classes. In India also the trademark "FLSmidt" is registered.

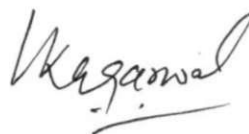
The present dispute pertains to the domain name <www.flis.in>. The Complainant possesses a large number of other domain names with the word "flis" and "FLSmidt" or "FLSmidt Minerals" as indicated above and in Exhibit B to the Complaint. The Complainant is also the owner of trademark "FLSmidt" etc. Most of these domain names and the trademarks have been created by the Complainant much before the date of creation of the disputed domain name by the Respondent.

Therefore, I hold that the domain name <www.flis.in> is very much identical or confusingly similar to the Complainant's marks.

#### **B. Rights or Legitimate Interests**

The Respondent may demonstrate its rights to or legitimate interest in the domain name by proving any of the following circumstances:

- (i) before any notice to the Registrant of the dispute, the Registrant's use of, or demonstrable preparations to use,



the domain name or a name corresponding to the domain name in connection with a *bona fide* offering of goods or services; or

- (ii) the Registrant (as an individual, business or other organization) has been commonly known by the domain name, even if the Registrant has acquired no trademark or service mark rights; or
- (iii) The Registrant is making a legitimate non-commercial or fair use of the domain name, without intent for commercial gain to misleadingly divert consumers or to tarnish the trademark or service mark at issue.

The Respondent's response is not available in this case. There is no evidence to suggest that the Respondent has become known by the disputed domain name anywhere in the world. Based on the evidence adduced by the Complainant, it is concluded that the above circumstances do not exist in this case and that the Respondent has no rights or legitimate interests in the disputed domain name.

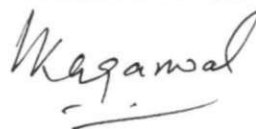
The Respondent is known by the name of Development Services, Telepathy Inc. It is evident that the Respondent can have no legitimate interest in the domain name. Further, the Complainant has not licensed or otherwise permitted the Respondent to use its name or trademark or to apply for or use the domain name incorporating said name.

I, therefore, find that the Respondent has no rights or legitimate interests in the domain name.

### **C. Registered and Used in Bad Faith**

Any of the following circumstances, in particular but without limitation, shall be considered evidence of the registration or use of the domain name in bad faith:

- (i) circumstances indicating that the Registrant has registered or acquired the domain name primarily for the purpose of selling, renting, or otherwise transferring the domain name registration to the Complainant who bears the name or is the owner of the trademark or service mark, or to a competitor of that Complainant, for valuable consideration in excess of the Registrant's documented out of pocket



costs directly related to the domain name; or

- (ii) the Registrant's 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 the Registrant has engaged in a pattern of such conduct; or
- (iv) by using the domain name, the Registrant has intentionally attempted to attract the internet users to the Registrant's website or other on-line location, by creating a likelihood of confusion with the Complainant's name or mark as to the source, sponsorship, affiliation, or endorsement of the Registrant's website or location or of a product or service on the Registrant's website or location.

The contention of the Complainant is that the present case is covered by the above circumstances. There are circumstances indicating that the Respondent has intentionally attempted to attract, for commercial gain, internet users to its web site, by creating a likelihood of confusion with the Complainant's mark. The Respondent's registration of the domain name <www.fls.in> is likely to cause immense confusion and deception and lead the general public into believing that the said domain name enjoys endorsement or authorized by or is in association with and/or originates from the Complainant.

The Complainant also believes that the disputed domain name may be available for sale at a high price. In the Complaint it is stated that "The Respondent has made a calculated approach wherein he has not created any content to his website but is merely offering his Domain for sale."

The foregoing circumstances lead to the presumption that the domain name in dispute was registered and used by the Respondent in bad faith.

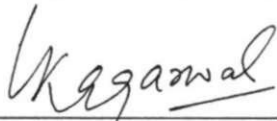
Therefore, I conclude that the domain name was registered and used by the Respondent in bad faith.

## **7. Decision**

In light of the foregoing findings, namely, that the domain name is confusingly similar to a mark in which the Complainant has rights,

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that the Respondent has no rights or legitimate interests in respect of the domain name, and that the domain name was registered in bad faith and is being used in bad faith and for the purposes of sale, in accordance with the Policy and the Rules, the Arbitrator orders that the domain name <www.fls.in> be transferred to the Complainant.



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Vinod K. Agarwal  
Sole Arbitrator  
Date: 20<sup>th</sup> February 2012