Reconsideration Request

Union of Orthodox Jewish Congregations of America, *et al.*

Annex A

Union of Orthodox Jewish Congregations of America vs. Kosher Marketing Assets LLC,
EXP/424/ICANN/41 (14 Jan. 2014)

THE INTERNATIONAL CENTRE FOR EXPERTISE OF THE

INTERNATIONAL CHAMBER OF COMMERCE

CASE No. EXP/424/ICANN/41

UNION OF ORTHODOX JEWISH CONGREGATIONS OF AMERICA

(USA)

vs/

KOSHER MARKETING ASSETS LLC

(USA)

This document is an original of the Expert Determination rendered in conformity with the New gTLD Dispute Resolution Procedure as provided in Module 3 of the gTLD Applicant Guidebook from ICANN and the ICC Rules for Expertise.

Before the International Centre for Expertise
of
The International Chamber of Commerce

EXP/424/ICANN/41

in re ".kosher" gTLD

EXPERT DETERMINATION

Union of Orthodox Jewish Congregations of America
(USA)
– Objector –

vs.

Kosher Marketing Assets L.L.C.
(USA)
– Applicant –

Expert

Professor Luca G. Radicati di Brozolo

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This Expert Determination is rendered in the dispute settlement proceedings arising from the community objection to the application for the ".kosher" general top level domain (gTLD) within the framework of the ICANN gTLD Application Process governed by the ICANN gTLD Applicant Guidebook, version 2012-06-04 (the "**AGB**").

I. INTRODUCTION

1. The community objection to the application for the ".kosher" gTLD dated March 13, 2013 (the "**Objection**"), which is at the origin of these proceedings, was filed by the Union of Orthodox Jewish Congregations of America (OU Kosher), Contact nformation Redacted Contact Information Redacted (the "**Objector**"). The Objector is represented in these proceedings by Mr. David E. Weslow, Wiley Rein LLP, Contact Information Redacted Contact Information Redacted

2. The Objection is supported by[1]: (*i*) Star-K Kosher Certification, Inc, 122 Slade Ave, Contact Information Redacted (*ii*) Chicago Rabbinical Council, Inc., Contact nformation Redacted Contact Information Redacted ; (*iii*) Kosher Supervision Service, Inc. (Kof-K), Contact n ormation Redacted Contact Information Redacted (*iv*) The Kashruth Council of Canada (COR), Con ac nforma ion Redac ed Contact Information Redacted (*v*) Kehilla Kosher Los Angeles, Contact Information Redacted USA; (*vi*) Orthodox Rabbinical Board of Broward and Palm Beach Counties, Contact nformation Redacted Contact Information Redacted (*vii*) Kosher Miami, Contact Information Redacted Contact Information Redacted (*viii*) Rabbinical Council of California, Contact n ormation Redacted Contact Information Redacted (*ix*) Orthodox Vaad Ha Kashrus of the Ashkenazi Kehila in Mexico, Contact Information Redacted Mexico; (*x*) The Rabbinical Court of Moscow Kashruth Department, Contact nformation Redacted Contact Information Redacted *xi*) London Beth Din Kashruth Division, Contact Information Redacted (collectively the "**Supporters of the Objection**").

3. The application for the ".kosher" gTLD (the "**Application**") was filed by Kosher Marketing Assets LLC, Contact Information Redacted (the "**Applicant**"). The Applicant is represented in these proceedings by Mr. Brian J. Winterfeldt, Katten Muchin Rosenman LLP, Contact Information Redacted Contact Information Redacted Contact Information Redacted he Applicant filed its Response to the Objection (the "**Response**") on May 13, 2013.

4. On June 4, 2013 the Chair of the Standing Committee of the International Centre for Expertise of the International Chamber of Commerce (the "**Centre**") appointed as sole member of the Panel of Experts Professor Luca G. Radicati di Brozolo, Arblit - Radicati di Brozolo Sabatini, Contact Information Redacted Contact Information Redacted (the "**Expert**"), who submitted his declaration of acceptance and availability and statement of impartiality and independence on the following day.

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[1] *See* Objection, p. 8.

5. The file of the case was transmitted by the Centre to the Expert on July 5, 2013.

6. These proceedings are administered by the Centre pursuant to Article 3(d) of the New gTLD Dispute Resolution Procedure (the "**Procedure**"),[2] which is applicable by virtue of its Article 1(d).

7. These proceedings are governed, as to matters of procedure, by the Procedure and by the Rules for Expertise of the International Chamber of Commerce, as supplemented by the ICC Practice Note on the Administration of Cases under the Attachment to Module 3 of the gTLD Applicant Guidebook, New gTLD Dispute Resolution Procedure of the gTLD Applicant Guidebook (Article 4(a) and 4(b)(iv) of the Procedure).

8. As dictated by Article 20 of the Procedure, the merits of the dispute before the Expert are to be decided by reference to the relevant standards defined by ICANN, in particular in Section 3.5.4 of the objection procedures in Module 3 of the AGB (the "**Objection Procedures**"), as well as to any rules and principles that the Expert determines to be applicable, having due regard to the statements and documents submitted by the Parties. The burden of proof that the Objection should be sustained rests with the Objector in accordance with the applicable standards.

9. Following an exchange of correspondence with the Objector and the Applicant (collectively the "**Parties**"), the Expert issued the Expert Mission on August 1, 2013.

10. Pursuant to Article 5(a) of the Procedure, the language of all submissions and proceedings was English. Moreover, in accordance with Article 6(a) of the Procedure, all communications by the Parties, the Expert and the Centre were submitted electronically.

11. In conformity with the procedural timetable fixed in the Expert Mission, the Objector filed its supplemental pleading on August 13, 2013 ("**Supplemental Pleading**") and the Applicant filed its response on August 27, 2013 ("**Response to the Supplemental Pleading**").

12. On September 2, 2013 the Expert requested the Applicant to provide two clarifications and granted the Objector the opportunity to reply. The Applicant's clarifications were submitted on September 4, 2013 and the Objector's reply on September 9, 2013, according to the timetable agreed with the Parties.

13. In accordance with Article 19(a) of the Procedure, and in the absence of any request by the Parties, no oral hearing was held.

14. Article 21(a) of the Procedure provides that the Centre and the Expert shall make reasonable efforts to ensure that the Expert renders his decision within 45 days of the "constitution of the Panel". The Centre considers that the Panel is constituted when the Expert is appointed, the Parties have paid their respective advances on costs in full and the file is transmitted to the Expert. In this case, the Panel was

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[2] Attachment to Module 3 of the AGB.

constituted on 5 July 2013. The Centre and the Expert were accordingly to make reasonable efforts to ensure that his determination was rendered no later than 19 August 2013 (as calculated in accordance with Articles 6(e) and 6(f) of the Procedure).

15. Pursuant to Article 21(b) of the Procedure, the Expert submitted a draft of his Determination to the Centre for scrutiny as to form prior to its signature.

II. THE OBJECTOR'S STANDING

16. In accordance with Section 3.2.2 of the Objection Procedures and Article 8(a)(ii) of the Procedure the Expert must first satisfy himself that the Objector has standing to object to the ".kosher" gTLD string. As provided in Section 3.2.2.4 of the Objection Procedures, for these purposes he must satisfy himself that the Objector

(i) is an established institution; and

(ii) has an ongoing relationship with a clearly delineated community.

17. Both Parties have addressed the requirements for standing in two rounds of written submissions.

(a) *The Position of the Objector*

18. The Objector claims to be "*the oldest and largest kosher certification organization of the world*" which traces its roots to 1924. As of February 2013 it certified over 270,000 consumer products and over 430,000 industrial products, and its certification mark has achieved global recognition.

19. In support of its contention that it has an on-going relationship with "*the clearly established community of kosher certification agencies*" the Objector avers that it is "*a leading member of the worldwide community of kosher certification organizations*", i.e. the "*organizations [that] provide supervision and certification to help consumers identify products that meet the dietary requirements of Jewish Law*". It adds that it maintains offices in New York, Los Angeles, Jerusalem and Beijing and certifies kosher facilities in 101 countries and that its standards "*are accepted in the widest range of Orthodox Jewish communities*". The Objector is regularly consulted by other organizations for assistance in the development of policies modeled after those of the Objector and consumers frequently turn to it for guidance in compliance with Jewish dietary laws. The Objector is also a member of the eighty-member Association of Kashrus Organizations ("**AKO**").

20. In its Supplemental Pleading the Objector portrays itself as "*an organization that works for the benefit of the Community*", adding that "*because kosher certification is communal rather than authoritative, kosher certification organizations rely on each other in fulfilment of their duties to the broader community of kosher manufacturers and consumers*". It concludes that "*the Community derives substantial benefit from its ongoing relationship with [the Objector]*".

(b) *The position of the Applicant*

21. The Applicant does not dispute the Objector's claim to be the oldest and largest kosher certification organization ("**KCO**") in the world.

22. It states that the Objector fails to discuss an ongoing relationship with a clearly delineated community, merely submitting that it has such a relationship with "*an established community*", and thereby apparently equating "*established*" with "*delineated*", notwithstanding that the terms are not equal and do not have the same meaning in the AGB. It then contests that the ongoing relationship between the Objector and the community of KCO is "*for the benefit*" of the community itself, since the other members of the community are not the Objector's beneficiaries but its commercial competitors. The Objector's activities benefit itself and its clients rather than other KCOs and the wider kosher industry. It then posits that the community of KCOs and the wider kosher community lack formal boundaries, since anyone can claim to be a KCO and, even under Jewish law, different certifiers follow different rules.

23. In its Response to the Supplemental Pleading, the Applicant adds that the Objector has no mechanisms for participation in or establishing and sustaining a relationship with other KCOs.

(c) *Determination of the Expert*

24. There is no dispute between the Parties that the Objector is "*an established institution*" and thereby satisfies the first requirement for standing.

25. As to the requirement of an "*ongoing relationship with a clearly delineated community*", the Applicant's arguments turn essentially on whether the community to which the Objector claims to be associated, i.e. the community of KCOs, is clearly delineated and on whether the relationship between the Objector and that community is for the benefit of the latter.

26. On the issue of the clear delineation of the community, the Applicant's arguments do not differ fundamentally from those developed to contest the satisfaction of the first substantive standard for community objections, which turns on the existence of a clearly delineated community (Section 3.5.4 of the Objection Procedures). For the reasons set out in detail in Section III.A(c) below, the Expert is satisfied that the community of KCO's on whose behalf the Objection is filed satisfies the criteria to be considered clearly delineated.

27. As to whether the relationship between the Objector and the invoked community of KCOs is for the benefit of the latter, there is merit in the Objector's argument that, due to the communal nature of kosher certification, KCOs rely on each other, and that therefore other KCOs draw some benefit from the Objector's activities. The fact that other KCO's are competitors of the Objector does not necessarily detract from that.

28. In any event, the two factors that relate to the "*benefit of the associated community*"

(the "*institutional purpose*" and the "*regular activities*") are only two of the ones to be taken into consideration for a finding of standing mentioned in Section 3.2.2.4 of the Objection Procedures. As discussed below (§ 43), the Expert is satisfied as to the satisfaction of the fourth factor, the one relating to the existence of formal boundaries around the invoked community.

29. Moreover, from Section 3.2.2.4 of the Objection Procedures it is clear that the judgment as to the existence of an ongoing relationship can be the result of an overall balancing of a variety of factors. In the Expert's opinion, the fact that the Objector is a leading member of the worldwide community of KCOs, that it maintains offices in a large number of countries and that it is regularly consulted by other KCOs for assistance in the development of policies and by consumers for guidance on Jewish dietary laws is a significant factor in determining the Objector's relationship with the community. These elements, which are alleged by the Objector, are not contested by the Applicant.

30. In light of these considerations the Expert is satisfied that the Objector meets the standing requirements in conformity with Section 3.2.2.4 of the Objection Procedures and is therefore eligible to file the Objection.

III. THE MERITS OF THE OBJECTION

31. In accordance with Section 3.5.4. of the Objection Procedures, the Objection can be sustained if the Expert ascertains the existence of substantial opposition from a significant portion of the community to which the string may be targeted. For a showing of such opposition the Objector must prove that:

(i) the community invoked by the Objector is clearly delineated;

(ii) there is substantial community opposition to the Application;

(iii) there is a strong association between the community invoked by the Objector and the ".kosher" gTLD string;

(iv) the Application creates a likelihood of material detriment to the rights or legitimate interests of a significant portion of the community to which the ".kosher" string may be explicitly or implicitly targeted.

32. The Parties have amply debated each of these criteria in their written submissions.

III.A Whether the community invoked by the Objector is clearly delineated

(a) The position of the Objector

33. The Objector posits that for over a century KCOs have played an essential role in Jewish life by providing a basis upon which consumers can easily determine whether food and related products adhere to kashrut requirements. When a respectable KCO, such as the Objector, places its seal on a product, it signals to the kosher consumer that the product adheres to the highest standard of Jewish law. The

community of KCOs began in earnest when the Objector entered the field of kashrut in 1924. Due to the increased complexity of manufacturing processes and the growing demand for kosher certification the number of KCOs has increased very significantly, reaching more than 1,100 today, spread out in many different countries. Amongst these a key role is played by a "Big Five" group of generally recognized KCOs, which certify approximately 75% of kosher ingredients worldwide. The AKO serves as an umbrella organization for KCOs worldwide.

34. The Objector considers that its position on the existence of a community of KCOs is confirmed by the Application, which describes the mission and purpose of the ".kosher" gTLD string as, *inter alia*, "*to promote food certification in general*", stating that "*the .kosher TLD and all the domains under it will be used to provide reliable information about Kosher certification, as an industry and as concerns Kosher certified products*" and "*.kosher TLD aspires to become the premiere reliable source of information on the internet about everything to do about Kosher certification*". The Objector draws further support from an *amicus curiae* brief filed, *inter alia*, by the Applicant in an action before US courts, wherein it was asserted that the courts were ill-equipped to determine whether a product is 100% kosher and that such determinations can be made only by Jewish religious authorities.[3] According to the Objector, further admissions regarding the existence of a clearly delineated KCO community comes from the statement in the Applicant's website that, when an organization or an individual puts a kosher certification on a product, they attest that the contents and manufacturing meet their kashrut standards. Finally the Objector notes that the kosher certification community is the focus of several publications and newsletters, one of which has a distribution of more than 80,000 copies and some of which serve as industry monitors.

35. In its Supplemental Pleading the Objector underlines the observation of ICANN's Independent Objector that "*the notion of 'community' is wide and broad, and is not perfectly defined*"[4] and stresses again that the existence of a clearly delineated KCO community has been recognized by the Applicant. It adds that the Applicant's definition of community is excessively limited, since the level of "*formal boundaries*" is only one of the relevant factors. It refers to the Independent Objector's position that a community can include a "*community of interests, as well as a particular ethnical, religious, linguistic or similar community*" and that "*a community can be defined as a group of individuals who have something in common [...] or share common values, interests or goals*". The kosher community is unique in that it is defined by the community itself. Finally the Objector contests the relevance of the Independent Objector's lack of objection to the application for the ".Catholic" string in particular because, unlike the Catholic Church, "*kosher is decentralized and*

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[3] *See* Brief of *Amicus Curiae* in support of Defendant, *Wallace v. ConAgra Foods, Inc.,* No. 12-cv-01354 (D. Minn.) (Objector's Annex D to the Objection).

[4] *See* Prof. Alain Pellet, Independent Objector, The Issue of "Closed Generic" gTLDs, http://www.independent-objector-newgtlds.org/english-version/the-issue-of-closed-generic-gtlds/ (Objector's Annex B to the Supplemental Pleading).

governed by a community".[5] The existence of other potential communities associated with kosher does not detract from the separate, delineated community of KCOs.

(b) The position of the Applicant

36. The Applicant contests the characterization of the KCO community as clearly delineated on several grounds. *First* there is no internal awareness or recognition as a community, since there is uncertainty within KCOs and the "*greater kosher community*" about what persons or entities are included in either community. There is no exhaustive or authoritative list of KCOs, and anyone can claim to be a certifier, due to the absence of any accreditation or common standards. *Second*, there is also no public recognition as a community on the part of consumers. *Third*, the community lacks a formal boundary, which the Applicant equates with "*an officially recognized limitation on membership that defines with certainty what persons or entities are part of the community*". In the case at hand the criteria as to who can be considered a KCO are uncertain. *Fourth*, the alleged community's age and distribution are unquantifiable. *Fifth*, the alleged community is not clearly delineated due to a diversity of goals, values and interests. The Applicant refers to the Independent Objector's position that generic strings would not meet the clearly delineated criteria due to the broad definition of community in the AGB, because they are used by people who do not necessarily share the same goals, values and interests, and to its finding that the ".Catholic" gTLD does not refer to a clearly delineated community.[6] If clear delineation is impossible for the Catholic Church, which is centralized, a fortiori it is impossible for KCOs which relate to a decentralized religion with widely varying definitions, membership and procedures. The Applicant disputes that the Application is evidence of the invoked community, since it includes food manufacturers, whom the Objector does not consider part of the KCO community. The kosher community includes service providers, such as restaurants, caterers, hotels and trucking companies.

37. In the Response to the Supplemental Pleading, the Applicant insists that any purported kosher community is much broader than KCOs. The lack of common certification standards and procedures entails disagreement about the legitimacy of membership of the community, which in turn is fatal to clear delineation of the community.

(c) Determination of the Expert

38. The Expert recalls that, in accordance with Section 3.5.4 of the Objection Procedures, the factors that can be balanced to determine whether the invoked

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[5] *See* Prof. Alain Pellet, Independent Objector, ".CATHOLIC" – General Comment, http://www.independent-objector-newgtlds.org/english-version/the-independent-objector-s-comments-on-controversial-applications/catholic-general-comment/ (Objector's Annex C to the Supplemental Pleading).

[6] *See supra*, footnote 5.

community is clearly delineated include, but are not limited to, (*i*) the level of the community's public recognition, (*ii*) the level of formal boundaries around it and what persons or entities are considered to form it, (*iii*) the length of time it has been in existence, (*iv*) its global distribution and (*v*) the number of people or entities that make it up.

39. In the case at hand the community invoked by the Objector, i.e. the one that the Objector "*has identified itself as representing*" (in the words of Objection Procedures), is the community of KCOs.

40. The Expert does not accept the Objector's argument that the Application itself and the *amicus curiae* brief filed by "*several major kashrut supervision agencies*", including the Applicant, in proceedings before the US courts[7] constitute an acknowledgement of the existence of a KCO community. Those documents merely confirm the importance of certification and the pre-eminence of KCOs over courts in determining when a product can be defined as kosher.

41. Other elements cited by the Objector are, instead, relevant. Particularly important is the undisputed fact that KCOs have existed since at least almost a century and that they play a very significant role in what the Applicant refers to as the "*greater kosher community*", because they perform the fundamental function of certifying what products comply with the strict requirements of Jewish law. Their role and authority are recognized by all those who seek to follow the dictates of kosher. It is equally not disputed that today there are over one thousand KCOs that operate in a wide range of countries.

42. It is true that there is no official roster of KCOs or "*officially recognized limitation on membership*" of the community at stake, since anybody can engage in kosher certification, and the exact number and identity of all the KCOs in existence and operating at any one moment is impossible to certify.

43. These factors are not of themselves sufficient to deny the existence of a community or its clear delineation. The community of KCOs is made up only of KCOs, and these entities can be identified as such. This is sufficient to conclude that there are sufficient formal boundaries around the community. The fact that anybody can engage in kosher certification is not a bar to the identification of the members of the community, in particular considering that it is not necessary that the identity of every single member of a given community be known. There is no requirement that the existence of the community or the identity of the individual members be certified through any type of formality.

44. Also the fact that different KCOs follow different certification standards is not conclusive. It does not entail that, considered overall, KCOs do not share common values, interests and goals, which are those of providing certification according to the standards of kosher in the interests of the broader community of those who seek to abide by kosher rules.

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[7] *See supra*, footnote 3.

45. The Expert is also not persuaded of the relevance of the consideration that there may be other communities with an interest in the term "kosher" and that the kosher community includes other categories of individuals and entities besides KCOs. The existence of a community, and its clear delineation, is not precluded by the existence of other communities to which a given string may be targeted. From the Objection Procedures (in particular at 3-22 and 3-23) it is clear that there need not be a coincidence between the community to which the string is targeted by the applicant and the one on behalf of which an objector can purport to express opposition. In any event, even if the KCO community were characterized as a sub-community of a broader community of all those with stake in kosher, it would unquestionably remain an important part of the overall community.

46. The refusal of the Independent Objector to object to the ".Catholic" string is not pertinent.[8] In that case, the Independent Objector found that the public comments on the ICANN website did not tend to prove the existence of a delineated community and did not necessarily pretend to express an opinion in the name of such a community. In the present case the Expert considers that the arguments advanced by the Objector do indicate the existence of a clearly delineated community and there is no doubt that the Objector claims to express the opinion of the community.

47. All these elements support the conclusion that the community of KCOs invoked by the Objector enjoys a certain level of public recognition and encompasses a significant number of entities and can be distinguished from other communities by its characteristics and specificities.

48. More specifically, based on the evidence, the Expert considers that the community of KCOs enjoys a significant level of public recognition, is characterized by formal boundaries in the sense that it is possible to identify the entities that form part of it, has been in existence since a considerable amount of time, is distributed in many parts of the world and is composed of over one thousand entities.

49. The Expert is therefore satisfied that the community of KCOs, in the name of which the Objection was filed, is clearly delineated.

III.B Whether there is substantial community opposition to the Application

(a) The position of the Objector

50. In positing that opposition to the Application is substantial within the invoked community the Objector points to the "*sheer number of expressions of opposition*", and in particular to the declarations of opposition from eleven leading KCOs attached to its Objection. All these opposing organizations express concern that the global kosher community is likely to suffer serious detriment from the monopolization of the ".kosher" string by a single KCO for its own benefit. The entities expressing opposition to the Application include "*some of the largest and*

[8] *See supra*, footnote 5.

most influential kosher certification organizations in the world". Finally, since no single entity controls the right to the term kosher, there are few other channels through which the Objection could have been conveyed.

51. The Supplemental Pleading argues that the Applicant uses quantity over quality and that the "*substantial*" nature of the opposition, which is what is required by the AGB, cannot be denied. The supporters of the Application do not have the Objector's and the Supporters of the Objection's "*size or clout within the community*" and some are not even impartial. The fact that the Applicant is a respected KCO does not mean that the issuance of ".kosher" domains should be exclusively and subjectively determined by a single KCO to the detriment of the community.

(b) The position of the Applicant

52. According to the Applicant, the Objection is supported by less than 1% of the purported community, of which the entities expressing opposition are unrepresentative. In particular, the Objector and the Supporters of the Objection represent only certification of kosher ingredients and food products, leaving out many other essential sectors, including restaurants, caterers, bakeries etc. Moreover, the parties to this dispute are of equal weight and stature. The opposition comes from large commercial entities and "*an unrepresentative sample of regional certification organizations*", whilst the Applicant's support comes from 21 countries. Also, the Applicant has passed over a significant opportunity to defend KCOs. Finally, unlike the Applicant that has borne significant costs for the Application, the Objector rejected the Applicant's offer of joint control of the ".kosher" string "*citing fiscal reservations*". The Objector's true reason for the opposition is that "*ideally .kosher would not exist*", which is of itself a reason for dismissal of the Objection since it is based on obstruction, in contrast to the principle laid down in Section 4.2.3 of the AGB (at 4-19).

53. The Response to the Supplemental Pleading notes that the Objector relies on the "*sheer number*" of ingredients purportedly certified by the opponents of the Application and that the numbers are based on "*dubious statistics*". In any event, the number of certified products is a measure of work product, which is not an AGB factor. For the Applicant there is no evidence of world-wide opposition, the opposition is limited to "*a handful of 'heavyweight' class entities*" and "*[a] divided community is not substantial opposition*". It also alleges intimidation by the Objector.

(c) Determination of the Expert

54. According to the Objection Procedures (Section 3.5.4) the factors that can be balanced to establish substantial opposition to the application within the community purported to be represented by an objector include (*i*) the number of expressions of opposition relative to the composition of the community, (*ii*) the representative nature of the entities expressing opposition, (*iii*) their stature and weight, (*iv*) their distribution or diversity, (*v*) their historical defense of the community in other contexts and (*vi*) the costs incurred by the objector to convey

opposition.

55. The Objection is submitted by an entity that is generally recognized as the "*oldest and largest*" KCO in the world and is supported by a significant number of other well established KCOs, including four of the "Big Five" KCOs that are alleged to certify approximately 63% of kosher ingredients worldwide, and leading entities in several major countries. The fact that the number of KCOs objecting to the Application (twelve) is fairly small in absolute terms would not of itself be a bar to considering their opposition substantial. Although the AGB refers to the "*number of expressions of opposition*", in the Expert's opinion this does not prevent him from also weighing the expressions of opposition to the Application.

56. Given their recognized stature and weight within the KCO community, the Objector and the Supporters of the Objection can also be held to be sufficiently representative of a significant portion of that community. The fact that the Applicant has equivalent stature within the community does not detract from the fact that the Objectors' opposition can be substantial. In the opinion of the Expert, "*substantial*" does not necessarily mean "*overwhelming*" or require that the opposition be the expression of the majority of the community. The objecting entities' leading roles and weight within the community in a variety of countries could be sufficient for a finding that also the fourth factor listed in the AGB (the one relating the distribution or diversity amongst the sources of opposition) is satisfied.

57. As pointed out by the Applicant, the Objector has provided no evidence as to the satisfaction of the two remaining factors, i.e. the historical defense of the community in other contexts and the costs incurred by the objector in expressing opposition. This does not necessarily entail a finding that opposition is not substantial, since the factors listed in Section 3.5.4. of the Objection Procedures are only examples of those that can be considered by the Expert, who has discretion in deciding whether the individual criteria are satisfied.

58. Nonetheless, in this case not only has the Objector not provided any evidence on the last two factors listed in the Objection Procedures as indicating substantial opposition. Also for some of the other factors discussed above it could be doubted that the required standard of proof has been satisfied in full. One could therefore hesitate to conclude that, considering the relevant standards individually or collectively, there is strong and unequivocal evidence of substantial opposition to the Application within the community. The Objector has not put forth other elements that the Expert would be permitted to consider in this context and that could buttress the Objector's case.

59. In light of the Expert's conclusion in relation to the fourth factor required for a community objection to be successful (Section III.D(c) below), it is in any event not necessary to reach a final conclusion on the substantial opposition criterion.

III.C Whether there is a strong association between the KCO community and the ".kosher" gTLD string

(a) The position of the Objector

60. For the Objector the association between ".kosher" and the KCO community is evidenced by the string's declared mission to "*promote Kosher food certification in general and OK Kosher certification and its clients in particular*". This demonstrates the existence of a kosher certification community and the intertwining of the concepts of kosher and certified products. Further unequivocal acknowledgement of the strong association between the string and the KCO community comes from the statement in the Application that "*.kosher TLD aspires to become the premiere reliable source of information on the internet about everything to do with Kosher certification*". On the other hand, the Application, shows no particular association between the Applicant and the string that would justify its exclusive dominion over the string. The strong association between kosher and the KCO community extends beyond orthodox Jews. The need for certification for foods to be considered kosher appears clearly from internet searches.

61. The Supplemental Pleading criticizes the Applicant's reliance on the possible association of other communities with the term kosher on the ground that the AGB does not require that the objecting community's association with the applied-for string be exclusive.

(b) The position of the Applicant

62. The Applicant argues that KCOs are a subset of the individuals and entities targeted by the Application and understood to be associated with kosher, which are intended to include manufacturers, distributors, service providers, sellers and consumers of kosher food. The Applicant contends that the association between kosher and KCOs is no stronger that that between art appraisers and the word art. Kosher is defined, even by the Objector, as meeting Jewish standards, regardless of certification. KCOs are only part of a broader industry of entities and individuals that use the word kosher. Any association between kosher and the alleged community is ancillary to the much stronger one with the greater community. The fact that the Application's purpose is to provide information on everything to do with kosher certification is not evidence of a strong association, whilst the lack of a special connection between the Applicant and kosher is irrelevant, since no such connection is required by the AGB. Consumers do not associate kosher with anything other than food products and certainly not exclusively with KCOs.

63. In the Response to the Supplemental Pleading, the Applicant labels as "*misleading*" the suggestion that there can be no practice of kosher law without certifying organizations and reiterates the weakness of the association between KCOs and kosher, "*whereas a strong association actually exists between the string and the producers and consumers of kosher food*".

(c) Determination of the Expert

64. Under Section 3.5.4 of the Objection Procedures, the factors that can be taken into consideration to determine whether there is a strong association between ".kosher" and the KCO community represented by the Objector include (*i*) the statements contained in the Application, (*ii*) other public statements by the Applicant and (*iii*) associations by the public.

65. As noted by the Objector, the association between the ".kosher" string and kosher certification is unequivocally pointed to by the Applicant itself. The Application (para. 18(a)) describes "*[t]he mission*" of the string as "*to promote kosher food certification*". In para. 18(b)(i) it adds that the domains will be used to provide information about "*Kosher certification*", in para. 18(b)(ii) that the string "*will specialize in Kosher Certification*", in para. 18(b)(iii) that it "*aspires to become the premiere reliable source of information on the Internet about everything to do with Kosher certification*" and in para. 18(b)(iv) that that the domain will be made available only to companies that intend to use it "*to promote Kosher certification*". This in itself is a powerful indication of the link between the string and the KCO community.

66. The link between the string and kosher certification is in any case almost inherent. It is true that kosher food does not require a specialized organization, as remarked by the Applicant. It is equally true, however, that KCOs play a predominant role in determining what is kosher, and that this role is recognized and relied upon by the great majority of those who use kosher products.

67. The fact, to which the Applicant points, that the term kosher can be associated to a broader group that KCOs, or even that the Applicant intends to "target" such a broader group, does not demonstrate a lack of a relationship with the community in question. The Expert agrees with the Objector that nothing in the Objection Procedures requires that the community represented by the Objector be the only one having a "strong association" with the applied for string.

68. The Expert is therefore of the opinion that the criterion of strong association is satisfied, in that there is a strong association between the ".kosher" string and the community of KCOs.

III.D Whether the Application creates a likelihood of material detriment to a significant portion of the KCO community

(a) The position of the Objector

69. The Objector submits that, were the Application granted, there would be a substantial confusion as to the certification of food products. Consumers understand that there is no central organization responsible for certifying items as kosher. The Application would damage the community-oriented nature of kosher certification, and thereby the individual entities that compose the KCO community. The Application makes it apparent that the ".kosher" domain is intended to be operated

in a manner that is not in the interests of that community, since the Applicant intends to "*promote […] OK Kosher Certification and its clients in particular*". The closed nature of the registry indicates that the Application would not promote kosher food certification in general and that only KMA and OK Kosher would be able to declare a food manufacturer kosher. This would preclude the use of the ".kosher" domain by companies that meet the rigorous standards of Jewish law simply because they are not "*personally visited and inspected*" by the Applicant. The restrictive use of ".kosher" would interfere with the core activity of the community of KCOs, which is providing guidance to kosher consumers. By proposing to operate the ".kosher" gTLD as a closed registry, the Application would run counter to the expectation of consumers that the domain would be a central repository for information about kosher needs. The granting of the Application would "*usurp the communal word 'kosher', such that it will become exclusively associated with KMA and OK Kosher in the minds of food manufacturers and consumers*". Moreover, "*the concept of a single entity determining what is kosher is antithetical to the community nature of kosher certification*".

70. The Supplemental Pleading argues that upholding the Application would entail that "*consumers will come to rely on .kosher as a trusted indicator of kashrut and will associate a <brand name>.kosher domain as indicative of a product's status* ". This would cause confusion as to the basis for determining what brands receive ".kosher" domain names and whether a brand without such a domain name is actually kosher, as well as competitive harm because a single privately-owned organization would have authority to determine who receives a ".kosher" domain name. The Applicant's argument that it would not be the sole centralized source for kosher certification is contradicted by the Application's statements that the gTLD "*aspires to become the premiere reliable source of information on the internet about everything to do with Kosher certification*" and that the gTLD at issue "*will only be available to companies that have been personally visited, inspected and are known to be using the domain to promote Kosher Certification*". Regardless of the Applicant's stated intentions as to how it will act in attributing ".kosher" domain names, the Applicant's "*monopoly status*" over such domain names would allow it to engage in "*exclusionary practices*" to the detriment of the community. The Objector points to the concerns raised by ICANN's Governmental Advisory Committee ("**GAC**") regarding the application for ".halal", which are equally applicable to ".kosher".[9] Finally, it argues that the recently amended Specification 11 ("**Specification 11**") of the draft Registry Agreement between registry operators and ICANN (the "**RA**") would not limit the Applicant's ability to apply its own subjective standards to exclude the Objector and its clients or to contradict the Objector's certification standards, so long as it did so openly and equally.

71. In the Supplemental Pleading the Objector pleads that the Applicant cannot "*escape the actual language of its Application*" and failed to respond to the Expert's inquiry into who will "*personally*" visit the registrants of the domains. Allowing the language

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[9] *See* ICANN Governmental Advisory Committee, *Beijing GAC Communiqué* issued on April 11, 2013 (Objector's Annex M to the Supplemental Pleading).

of the Application to be supplanted by arguments in an adversarial proceeding would render moot the ICANN objection process. The Application's ills are not cured by Specification 11, Article 2 of which does not permit the incorporation into the RA of counsel's statements in these proceedings, in particular the one about who will visit prospective registrants. Furthermore, the Applicant does not address how the "*inspection*" and "*known to be using*" criteria may be satisfied by third parties. It will "*maintain authority to determine all standards for 'visitation, inspection and certification'*" and will "*maintain complete discretion*" as to the standards it will apply. The Applicant's clarification contradicts its expressed mission to use ".kosher" to promote its certification and clients. In any event, Specification 11 could not curtail the Applicant's ability to operate ".kosher" in a manner that will cause detriment. Notably, Article 3(c) and (d) of Specification 11 impose no meaningful restrictions on how the Applicant can operate ".kosher", and in particular would not prevent it from subjectively determining registrant eligibility criteria and, ultimately, unilaterally controlling access to the ".kosher" registry.

(b) The position of the Applicant

72. The Applicant contests that the Application can entail any consumer confusion because there is no evidence that it will change consumer understanding of the decentralized nature of certification or prevent individual KCOs from carrying out their mission. The ".kosher" gTDL will actually supplement the existing sources of kosher information, and serve as a reliable source with additional authority for the benefit of consumers, manufacturers and diverse other parties. It is not meant to provide certification services. Even if it were used in that way, it would not prevent other certifiers from existing and flourishing. There is also no indication that the Applicant will not act in accordance with the interests of KCOs, consumers and other users. Furthermore, the gTLD will not be closed and will not interfere with the core activities of KCOs. The eligibility requirement is not limited to verification by the Applicant, which has a long history of inclusive online practices and will continue to promote kosher certification and encourage demand by including those who certify, manufacture and sell kosher food, to the benefit of all industry players. Such restrictions as the Applicant proposes to apply in the registration of ".kosher" domain names are necessary to provide user confidence that the information provided on the domains is about legitimate and verified products and establishments. There is also no basis for the assertion that the Objector would be precluded from a ".kosher" domain registration, since it would "*obviously*" be allowed to register such a domain. In any event, the Objector does not explain how such preclusion would interfere with the Objector's activity. The allegation is furthermore irrelevant, given that "*allegations of detriment*" based solely on the applicant being delegated the string instead of the objector are barred by the AGB (Section 3.5.4 at 3-24). Finally, the claim that the Application would lead to usurpation of the ".kosher" gTLD is unsupported, particularly in the light of the statement of members of ICANN's Noncommercial Stakeholders' Group position that a TLD cannot impart ownership to a registry operator over the generic word represented by the string. The Objector has "*ulterior motives*", in that, as explicitly declared by it, its interest is that there should be no ".kosher" gTLD at all, as

demonstrated by its refusal to accept the Applicant's good faith proposals to address its concerns.

73. The Response to the Supplemental Pleading contests the claim that consumers will rely exclusively on the ".kosher" string for kosher status, thereby incurring in confusion. It reiterates that the Applicant's original intention was to sublicense domain names to certified second level registrants and to develop close affiliations with other KCOs and that it never intended exclusive control of the TLD. To alleviate any concern, the Applicant also declared its readiness to execute a public interest commitment at no cost, thereby further binding it in a manner enforceable by ICANN and third parties. Additionally, the Applicant offered the Objector an equal partnership in operating the TLD, subject to a sharing of costs. It notes that its RA is contractually binding, such that any unfairly exclusive operation by the Applicant would entail a breach thereof. Any claims by allegedly harmed parties would be subject to the Public Interest Commitment Dispute Resolution Policy ("**PICDRP**") provided for at Article 2 of Specification 11. The Applicant's failure to file a community-based application under Section 1.2.3. of the AGB is not evidence that it will operate the ".kosher" domain to the detriment of the community. The Application is in no way closed and does not allow for exclusive control of the domain, particularly because the Applicant will be subject to Specification 11 requiring registry operators to abide by fair and transparent registration and non-discriminatory policies. The Applicant concludes that it would have no choice as to whether to accept Specification 11.

74. In reply to the Expert's request for clarifications the Applicant confirmed that the verification of the eligibility requirements for registration of the domains will not be limited to the Applicant, and that "*[a] prospective registrant's own kosher certification organization will be responsible for personally visiting companies seeking to register a domain name*". It also clarified the statement in the Application about the intended limits to the registration of domains. It explained that the reference to "*affiliates*" was not intended in the strict legal sense of "*entities under common control*" and that in any event its initial intentions were superseded by the recent guidance from the ICANN Board requiring compliance with Specification 11, "*which entirely obviates Objector's concerns*". It added that "*there is no question that [the Applicant] would be subject to the obligations […] under Specification 11*".

(c) Determination of the Expert

75. Section 3.5.4 of the AGB lists the following factors that can be taken into account to assess whether an application is likely to create material detriment to the rights and legitimate interests of a significant proportion of the community: (*i*) the nature and extent of the damage to the community's reputation; (*ii*) evidence that the applicant does not act, or intend to act, in accordance with the interests of the community; (*iii*) interference with core activities of the community; (*iv*) dependence of the community represented by the objector on the DNS for its core activities; (*v*) nature and extent of the concrete or economic damage to the community and (*vi*) level of certainty of alleged detrimental outcomes.

76. The AGB specifies in Section 3.5.4 that "*[a]n allegation of detriment that consists only of the applicant being delegated the string instead of the objector will not be sufficient for a filing of material detriment.*"

77. The Objector has not explained how the operation of the ".kosher" domain by the Applicant would damage the community-oriented nature of kosher certification. There is no evidence that only the Applicant would be able to declare a food manufacturer kosher, thereby excluding other KCOs from this activity. Likewise, there is no persuasive evidence that the operation of the TLD by the Applicant would lead to significant confusion in consumers or others with a stake in kosher. Equally unsupported is the argument that the word kosher will become "*exclusively associated*" with the Applicant, as is the one that there would be a "*single entity*" with "*unilateral authority*" to determine what is kosher. There is also no indication that ".kosher" will be used to provide certification services.

78. While the statement in the Application that the Applicant "*intends to promote OK Kosher certification and its clients in particular*" might give the impression that the Applicant intends to operate the domain in a self-serving manner and as a closed gTLD, the likelihood of that happening is not established. An intention to use the TLD in an improper manner is not even proven by the statements in the Application that ".kosher" will only be available to companies that have been "*personally visited, inspected and are known to be using the domain to promote kosher certification*" and that the TLD "*aspires to become the premiere reliable source on the internet about everything to do with Kosher certification*".

79. Specifically, the Application does not indicate that only the Applicant will verify the eligibility to use the ".kosher" domain. The Expert disagrees that the Applicant has failed to respond to his request for clarification as to who will personally visit prospective registrants to certify their compliance with the appropriate standards. Indeed, in response to the Expert's request, the Applicant explicitly stated that responsibility for the verification will lie with the "*prospective registrant's own kosher certification organization*". This seems evidence enough of the lack of ground of the Objector's claim that only the Applicant will verify eligibility and will be able to determine arbitrarily what registrants will have access to ".kosher" domains. On the other hand, the fact that registration will be subject to some form of third party verification of the conformity to objective standards provides precisely reassurance that the ".kosher" gTLD will only be available to registrants who use the domain for legitimate uses, in line with concerns voiced by the Objector.

80. The Objector's reference to a purported opposition of the GAC to the registration of the ".halal" gTLD is incorrect, as the opposition was by some members of the GAC only.

81. On the other hand, the Applicant's intention to take the broader interests of the community into consideration is borne out by its offers to cooperate with the Objector in the operation of the domain and to give them an equal partnership.

82. What is more significant, and ultimately dispositive, however, is that the ICANN mechanism for operating gTLDs provides significant safeguards against any type of

abuse. As correctly remarked by the Applicant, the RA that it would be required to execute as a condition for registration of the ".kosher" domain would obviously be binding on it and would oblige it to comply with all the commitments, statements of intent and business plans stated in the Application.

83. The Applicant would furthermore be subject to the obligation set out in Article 3(c) of Specification 11 to operate ".kosher" in "*a transparent manner consistent with general principles of openness and non-discrimination by establishing, publishing and adhering to clear registration policies*". The Expert cannot accept the argument that the openness and non-discrimination obligations laid down in that provision would not prevent the Applicant from resorting to restrictive criteria, if it applied them openly and even-handedly. That argument presupposes an interpretation of Article 3(c) that would render it completely meaningless and is therefore untenable. Article 3(c) is a fundamental provision in the overall system, and it must be assumed that it will be interpreted constructively and not in a formalistic manner.

84. The enforceability of the commitments in question in the event of alleged violation by the Applicant would be assured by the PICDRP provided for by Article 2 of Specification 11. This will be binding on the Applicant because, contrary to the Objector's contention, the Applicant will not have the option of not subscribing to Specification 11. There is no evidence that the Objector, or any third party for that matter, would be unable to rely with confidence on the PICDRP, should it turn out that the Applicant will operate ".kosher" improperly. Accordingly, there is no basis for the Objector's argument that the Applicant would be in a position to apply "*subjective standards to exclude the Objector and its clients or to contradict the Objector's certification standards, so long as it did so openly and equally*". The whole purpose of the RA and of the public interest commitments and of the PICDRP is precisely to avoid similar outcomes.

85. The Expert is unable to follow the Objector's argument that the Applicant "*cannot escape*" the language of its Application and that allowing the arguments put forward in these proceedings to supplant the language of the Application would render the ICANN objection process moot. In the opinion of the Expert, whether an application for a gTLD may give rise to some form of detriment must be assessed by reference, not to the moment of submission of the application, but by reference to the time when the gTLD will be active, and taking into consideration any intervening circumstances. It is only at that time that any detrimental effect of the application will become concrete and relevant.

86. In the present instance, subsequent to the filing of the Application ICANN introduced a mechanism to ensure the respect and enforcement of public interest commitments (Specification 11). In the eyes of the Expert this mechanism is capable of providing adequate safeguards against any improper behaviors by the Applicant in the use of the ".kosher" gTLD to the detriment of other members of the KCO community.

87. Moreover, in the course of these proceedings the Applicant gave assurances as to the accessibility of the registry to other members of the KCO community. The Expert

rejects the Objector's argument that such assurances cannot be relied upon, because they allegedly contradict the statements of the Application and would not be incorporated in the Applicant's public interest commitments. The assurances given on behalf of the Applicant in these proceedings appear convincing and made in good faith. More importantly, they have been given in the context of adversarial proceedings, the outcome of which will be public,[10] in response to specific concerns of the Objector and with a view to achieving the rejection of the Objection. The general principles of good faith and of the prohibition of inconsistent behavior, which are clearly applicable to the relationships at issue, would prevent the Applicant from reneging on the assurances given in these proceedings. In the event that an access dispute were submitted to the PICDRP in relation to the use of the ".kosher" gTLD, such assurances would certainly have to be taken into consideration to interpret and supplement the commitments.

88. Also considering its latest assurances, there is therefore no evidence that the Applicant intends to operate ".kosher" as a "closed" registry and that there would not be sufficient safeguards were it eventually to attempt to do so.

89. Like the Expert in Case No. EXP/493/ICANN/110 (§ 58), also in this case the Expert cannot find with certainty that the Applicant will in future unfailingly operate ".kosher" in all respects in conformity with its commitments. Yet, like in that case, "*neither has the Objector offered convincing reasons to believe that the Applicant will not do so, though that is its burden*".

90. Accordingly, having regard to the assurances given by the Applicant and to the current safeguards, in the opinion of the Expert there is today no serious ground for the accusation that the Application is designed to confer "*monopoly status*" on the Applicant over ".kosher" domain names and to permit the Applicant to engage in "*exclusionary practices*", or in any event that it could lead to such a result. Nor does it seem likely that upholding the Application would lead to a "*usurpation*" of kosher by the Applicant or, more simply, that the Objector will not be permitted to register a domain under ".kosher". Finally, no relevance can be attributed in this context to the simple interest of the Objector "*that there should not be a .kosher gTLD at all*" (Applicant's Annex AE).

91. Furthermore, the Objector has provided no indication as to any other factor capable of evidencing a likely material detriment according to the AGB. It has not shown that the KCO community is dependent on the use of the ".kosher" gTDL for its core activities.

92. To conclude, the Expert finds that the Objector has not convincingly proven its claim that the Application will impact negatively on itself, the community of KCOs or the broader community of persons or entities with a stake in kosher. Specifically, it has not demonstrated that the Application could damage the economic or other interests of the KCO community or its reputation or could interfere with that

[10] The present Expert Determination will be published in accordance with Article 21(g) of the Procedure.

community's core activities, or that the Applicant does not intend to act in accordance with the interests of the community. Absent such evidence, there can be no finding of material detriment to the community or to a substantial portion of it, as required by the Objection Procedures.

IV. CONCLUSION

93. Section 3.5.4 of the Objection Procedures provides that for a community objection to prevail all four tests laid out in that Section must be met.

94. In the present case the Expert has found that the first (clear delineation of the community: Section III.A above) and third (strong association between the string and the community: Section III.C above) tests are met. In relation to the second test (substantial opposition within the community: Section III.B above) the Expert has not deemed it necessary to come to a definitive finding in light of its conclusion on the fourth test. In relation to the fourth test (material detriment: Section III.D above) the Expert has found that the Objector has failed to provide convincing evidence and to satisfy its burden of proof.

95. Since at least one of the four tests contemplated by Section 3.5.4 of the Objection Procedures (detriment) is not met, the Expert must conclude that the Objection cannot be sustained.

V. DECISION

96. For the reasons set out above, in accordance with Art. 21(d) of the Procedure, the Expert's final and binding decision is as follows:

(i) The Objection is rejected and the Applicant accordingly prevails;

(ii) The Applicant shall be refunded by the Centre the costs advanced to the International Chamber of Commerce.

Place of the Expertise: Paris

January 14, 2014

The Expert

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Professor Luca G. Radicati di Brozolo

Reconsideration Request

Union of Orthodox Jewish Congregations of America, *et al.*

Annex B

DotMusic Request for Reconsideration,
Request No. 13-22 (22 Dec. 2013)

Reconsideration Request Form

1. Requester Information

Name: Constantinos Roussos

Address: Contact Information Redacted

Email: Contact nformation Redacted **with a copy to counsel,** Contact Information Redacted

2. Request for Reconsideration of:

_X_ Staff action/inaction

3. Description of specific action you are seeking to have reconsidered.

DotMusic is challenging ICANN's inaction on 3 issues:

1) In not properly supervising and ensuring that appropriately qualified Expert candidates of the International Chamber of Commerce ("ICC") were a) selected; and b) adequately, trained to address the unique issues presented by Community Objections and the gTLD Program. The community expected that the ICC would be required to appoint and advise an appropriately qualified "expert," (not just an arbitrator) familiar with the unique needs and requirements presented in the gTLD Program, intellectual property and anti-competitive issues, and the needs and composition of the relevant community (e.g. a music or intellectual property expert for music-themed Objections)(Point 1);

2) In not recognizing the relevance and impact of the exceptional GAC Advice on the Community Objection process and Community Applicants, and in not advising the ICC and Community Objection Panelists on the GAC Beijing Communique of April 11, 2013 and subsequent GAC related issues: Responses to GAC Advice, Board Resolutions, Material Changes in Applicant positions through their GAC Advice Category 2 Exclusive Access Responses, and revisions to the new gTLD Registry Agreement[1] that addressed GAC

[1] 3(c) and 3(d) of Specification 11 provided that: (c) Registry Operator will operate the TLD in a transparent manner consistent with general principles of openness and non-discrimination by establishing, publishing and adhering to clear registration policies. (d) Registry Operator of a "Generic String" TLD may not impose eligibility

Concerns pertaining to exclusive access which were directly related to the anti-competitive issues raised in Community Objections. (Point 2); and

3) In not creating an appropriate appeal process for Community Objections and denying parties procedures to protect their fundamental rights and legitimate interests (Point 3).

4. Date of action/inaction:

The relevant Expert Determinations EXP_461_ICANN_78 (c EXP_479_ICANN_96 EXP_480_ICANN_97) were published on December 9, 2013 (See Annex 1).

5. On what date did you became aware of the action or that action would not be taken?

The Decisions were presented to Objector and made public on December 9, 2013.

6. Describe how you believe you are materially affected by the action or inaction:

DotMusic Limited is a privately-held Cyprus limited liability company representing Community Objectors and Related-Objector Entities in Community Objections. Objector and/or Related-Objector Entities constitute a significant portion of the music community.[2]

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criteria for registering names in the TLD that limit registrations exclusively to a single person or entity and/or that person's or entity's "Affiliates" [. . .]. "Generic String" means a string consisting of a word or term that denominates or describes a general class of goods, services, groups, organizations or things, as opposed to distinguishing a specific brand of goods, services, groups, organizations or things from those others" (New gTLD Registry Agreement, July 2nd, 2013, https://www.icann.org/en/groups/board/documents/resolutions-new-gtld-02jul13-en.htm#1.d).

[2] Objector Associate members include Pandora (http://a2im.org/groups/pandora), the world's largest streaming music radio with over 72 million active members (http://investor.pandora.com/phoenix.zhtml?c=227956&p=irol-newsArticle&id=1860864) and Apple iTunes (http://a2im.org/groups/itunes). iTunes accounts for 63% of global digital music market (http://appleinsider.com/articles/13/04/16/apples-itunes-rules-digital-music-market-with-63-share) – a majority - with 575 million active global members (http://appleinsider.com/articles/13/06/14/apple-now-adding-500000-new-itunes-accounts-per-day) abiding to strict terms of service and boundaries (http://www.apple.com/legal/internet-services/itunes/ww/index.html) have downloaded 25 billion songs from iTunes catalog of over 26 million songs, available in 119 countries, regardless whether artist is independent or in a major label (http://www.apple.com/pr/library/2013/02/06iTunes-Store-Sets-New-Record-with-25-Billion-Songs-Sold.html). Related Objector Entities include: an international federation of nearly 70 government ministries of culture and arts councils, music distributors that distribute over 70% of global music on retailers such as iTunes and Amazon (e.g. Tune core, with over 500,000,000 sales, distributes more music in one month than all major labels have combined in 100 years, http://blog.tunecore.com/2012/02/what-the-riaa-wont-tell-you-tunecores-response-to-the-ny-times-op-ed-by-the-riaa-ceo-cary-h-sherman.html), an international association of music information offices from over 30 countries, music coalitions from leading music territories such as Canada, Brazil, France and others, music communities representing over 3 million musicians, industry professionals and organizations, the national association of recording industry professionals and others (http://music.us/supporters.htm).

The American Association of Independent Music is a non-for profit company representing its Members (both Labels and Associates), the U.S. Independent label music community, the World Independent Network, the Association of Independent Music, the Independent Music Companies Association (IMPALA) and the Merlin Network who collectively constitute a majority of the music community (emphasis added) to which the string is explicitly or implicitly targeted. (the "Affected Parties").

On the 13th of March, 2013 Objections (cases EXP_461_ICANN_78 (c EXP_479_ICANN_96 EXP_480_ICANN_97) were filed against Amazon EU S.A.R.L in connection with music-themed Applications to run an exclusive access registry for .music, .song and .tunes (the "Objections"). The Objections raised concerns, among other things, about Applicant's Applications to run exclusive-access registries thereby controlling the most semantically significant music-themed-strings and an entire scarce vertical for the distribution and monetization of music.

As to Point 1 – Lack of adequate supervision to ensure appropriately qualified Expert candidates of ICC were selected and adequately trained.

a) According to the "Selection of Expert Panels" Section 3.4.4 of the new Applicant Guidebook[3], the Objector(s) relied upon specific language that the "panel will consist of appropriately qualified experts (emphasis added) appointed to each proceeding by the designated DRSP." This is also consistent with ICC's language that "the ICC will constitute a pool of qualified candidates (emphasis added) who can be appointed as experts in the new gTLD proceedings.[4]"

The expert appointed to render decisions in EXP_461_ICANN_78 (c EXP_479_ICANN_96 EXP_480_ICANN_97) is not a music, intellectual property, competition regulator or cultural expert versed in the unique music, intellectual property, competition and cultural issues that strongly relate to the music community. The Determinations published on December 9, 2013 (the "Decisions"), demonstrated that the panelist had limited knowledge on the functions of the music community and was ill-prepared to understand and address these unique music community matters.

[3] http://newgtlds.icann.org/en/applicants/agb/objection-procedures-04jun12-en.pdf
[4] http://www.iccwbo.org/Products-and-Services/Arbitration-and-ADR/Expertise/ICANN-New-gTLD-Dispute-Resolution/Experts/

A glance at the Panelist Francisco Orrego Vicuna's qualifications[5] reveal that his specialties are: international law, international trade and investment. ICANN and the ICC failure to select qualified expert candidates (such as experts in competition regulation, intellectual property professors/judges/attorneys, or musicologists, ethnomusicologists, or music industry professors/attorneys), was a breach of the AGB and the obligation to create a meaningful evaluation of community concerns. The panelist, while being an arbitrator, was ill-equipped to address the unique issues presented and the Objectors relied to their detriment on the fact that the ICC would select an appropriate expert to review the Objections. Especially given the significant costs involved, it was reasonable to assume that the appropriate experts would be identified. These failures are evident, as follows:

First, the panelist agreed with Applicant's misleading statement that the music community does not rely on the DNS/Internet, holding that:

> It is thus not possible to conclude that there is in this case a likelihood of concrete or economic damage to the community or that the Applicant intends to act contrary to the interests of such community or interfere with its activities. The dependence of the community on the DNS for its core activities has not been proven (emphasis added)" (Expert Determination, Section 71, p.24)

Any reasonably qualified expert should have taken judicial knowledge of the indisputable fact that the music community is heavily dependent on the DNS for the core of its activities. It is publicly acknowledged and commonly-known that the community most affected and impacted by the DNS was the music community. The DNS has changed the structure of how music (both legal and illegal) is distributed, marketed and consumed (See Annex 2). The DNS has also contributed to massive illegal piracy (e.g. via search engines, P2P networks or sites such as PirateBay) financially harming the community.

Secondly, the panelist lacked qualifications as an expert to render an opinion on whether the Applicant would be anti-competitive, and in his own words, the panelist claimed that competition regulators were the ones qualified to make such a determination:

> Whether there is… anti-competitive behavior…is not something that can be established beforehand and is thus purely speculative... competition regulators will very well know how to address this problem (Section 70, Pg. 25)

[5] http://www.arbitration-icca.org/about/governing-board/MEMBERS/Francisco_Orrego_Vicuna.html

As such, the panelist declined to render an opinion on a key issue of alleged material harm concerning Applicant's exclusive access gTLD policies (an opinion that an appropriately-qualified expert with experience working with competition regulators would have been equipped to render). Similarly, the panelist also ignored Objector's request to review the overall context of the Applicant's strategy to register close over 60+ gTLDs, all of which were closed generic strings, including, not one, but three music related strings, which presents significant anti-competitive concerns and would warrant further investigation as they are likely to create harm to the community and others. Instead, the panelist treated each music-themed gTLD objection in a mutually exclusive manner contrary to how the cases where presented, calling the Objector's reasonable assertion of likelihood of harm with respect to the Applicant's anti-competitive behavior "speculative" (Section 70, Pg. 25). Notably, the GAC Advice, ICANN revisions to the Registry Agreement and the Applicant's own change of position (from exclusive access to open) – pertinent evidence -- was rejected by the panel. Such evidence - if it had been transmitted by ICANN to the ICC for all Community Objection Panelists to consider - would have required panelists to appropriately opine and address as to the merits of such actions.

The panelist also stated that support for pirate networks does not prove harm "that can be established beforehand and is purely speculative" (Section 70, p.24). This statement flies in the face of irrefutable evidence and knowledge that copyright infringement is illegal and it harms the music community's legitimate interests. Such evidence of the Applicant's activity in pirate networks was ignored without reason and referred to as "speculative."

b) The panelist also denied Objector's standing by ignoring the size, composition and breadth of the Related Objector Entities and by failing to consider the standing of an Objector consisting of globally-recognized Label Members and ignoring Associate Members altogether (who have formal membership boundaries with Objector) that cover hundreds of millions of music community members having formal boundaries with Objector's Members. Furthermore the panel disingenuously asserted without any concrete proof or evidence that independent musicians were not strongly associated with the string "music":

> While an association exists of course between the gTLD applied for and the term "music", this is by definition a generic term that might relate to music in general but not specifically to the "independent music community..." (Expert Determination, Section 66, p.24)

Objector Label Members include Labels representing the world's two best-selling artists of 2012, Adele and Taylor Swift,[6] who are globally recognized and distributed. Associate members, include Apple iTunes (the world's largest music retailer with majority market share), which formally requires hundreds of millions of music fans to create formal Apple accounts and abide to strict terms of service in order to consume music. This is because objector Associate Members providing legal music (e.g. Apple iTunes or Pandora, the world's largest music radio) must ensure that royalties are paid to the music community rights-holders using clearly delineated, organized systems that identify rights-holders corresponding to each song sold or streamed (See Annex 3).

It is a fact that nearly all musicians (over 99%) are considered "independent" i.e. not signed to a major label. In fact, "70% of new music being bought is from artists not tied into old industry[7]" (the non-independents referred to as major labels). If one removes independent musicians from the music community then 99% of all music created would not exist. This undeniably proves the panel's lack of qualifications and incontrovertibly disproves the panelist's disingenuous assertion that the independent music community is not strongly associated with the "term" music. According to the AGB, "Community" is defined as "meaning "fellowship" – while still implying more of cohesion than a mere commonality of interest." The Independent Objector reiterates this definition "as a group of individuals who have something in common." (emphasis added). The common interest universally shared by the community is the "promotion and distribution of music." Furthermore, ICANN's definition of "Size" and "Substantial Opposition" relates to "a significant portion of the community[8]" – i.e. not the entire community. Substantial opposition should be taken within "context rather than on absolute numbers[9]" of a substantial portion of the community. The panelist did not follow the AGB language in regards to what constitutes a significant portion and that substantial opposition should be taken in "context rather than absolute numbers" i.e. not requiring "billions" of written expressions. However the panel curiously stated that "with billions of users the expressions of opposition would need to run in high numbers to meet this test." (Section 63, Pg.23). This clearly showed the panel's lack of understanding to these proceedings' rules that "opposition" relates to (i) opposition from the music community, (ii)

[6] International Federation of the Phonographic Industry, http://ifpi.org/content/library/dmr2013.pdf, P.11
[7] http://blog.tunecore.com/2012/02/what-the-riaa-wont-tell-you-tunecores-response-to-the-ny-times-op-ed-by-the-riaa-ceo-cary-h-sherman.html
[8] https://community.icann.org/display/newgtldrg/community+objection+grounds
[9] http://newgtlds.icann.org/en/applicants/agb/string-contention-procedures-04jun12-en.pdf, Module 4-11

not generically by Internet users, and (iii) be taken "within context" not literally. With such an unreasonable and unjustified statement the panel set an impossible threshold for any Objector to meet since using the number "billions" as a reference point to prove "substantial opposition" is irrational, unfair and ensures that any Objector would fail to meet such a standard (emphasis added). In context, in 2012 there were 42,100 employed musicians[10] in the U.S, a country which represents 58% of the global digital music market[11] and 27% of the global music market share.[12] In this context, some Objector U.S Label Members alone represent a significant portion of the global community. As such, denying the Objector standing leads to serious procedural and fairness questions. If the panelist's statements are taken literally no objector would ever qualify to have their concerns be heard since according to the panelist, **"music" is a generic term and can never have a shared, common interest, nor can a generic term be dependent on the DNS for core activities:**

> A broad community may exist at the generic level… but this is not conducive to the clear delineation envisaged under this standard (Section 60, Pg.21)
>
> While an association exists of course between the gTLD applied for and the term "music", this is by definition a generic term that might relate to music in general but not specifically to the "independent music community" (66, Pg. 22)
>
> The dependence of the community on the DNS for its core activities has not been proven (Section 71, Pg.24)

These statements run contrary to the Independent Objector who states there are many cases of strictly delineated communities and even filed many new gTLD Community Objections (.charity, .healthcare, .hospital, .indians, .med and .medical)[13] based on his own definition of "community":

> It can include a community of interests, as well as a particular ethnical, religious, linguistic or similar community… a community can be defined as a group of individuals who have something in common … or a common characteristic … or share common values, interests or goals.[14]

[10] U.S Department of Labor, http://www.bls.gov/oes/current/oes272042.htm
[11] http://www.billboard.com/biz/articles/news/digital-and-mobile/1556590/ifpi-2013-recording-industry-in-numbers-global-revenue
[12] http://www.ifpi.org/content/section_resources/rin/RIN_Contents.html
[13] http://www.independent-objector-newgtlds.org/home/the-independent-objector-s-objections/
[14] http://www.independent-objector-newgtlds.org/home/the-issue-of-closed-generic-gtlds/, Community Objections, Section 3

While “music” is a generic term, it is dependent on a clearly delineated community which shares the common interest of promoting and distributing unique “music” through clearly delineated systems to compensate music community rights holders attributed to each song (emphasis added).

ICANN’s lack of action in ensuring appropriate selection and training of experts created a material harm to Objectors and the community proceedings.

As to Point 2: lack of consideration of the relevance and impact of the GAC Advice on the Community Objection process and failure to advise the ICC and Community Objection Panelists on the GAC Advice.

The Community Objection filing pre-dated the Beijing Communique and raised the same concerns set forth by the GAC and subsequently recognized by ICANN NGPC Resolutions and actions. After the Community Objection proceedings commenced, GAC and ICANN called into question Applications that were filed to run generic gTLDs as exclusive-access registries. This very question was presented by Objector at Objector’s significant expense. ICANN should have either advised the ICC and Panelists or required the ICC and Panelists to review and evaluate the impact and relevance of GAC Advice, Board Resolutions, and Applicant Responses to Category 2 on Exclusive Access, and revisions to the Registry Agreement to address these concerns.

When extremely significant, indeed program wide, issues were raised, the Board should have taken appropriate measures to either: a) suspend the proceedings to avoid further waste of resources addressing Applications that were called into question by GAC Advice; b) ensured that the ICC and Panelists were appropriately advised and educated regarding the importance and effect of the GAC Advice; and/or c) provided clear guidelines to address these issues without harming Objector(s).

As to Point 3: lack of an appeal process for Community Objections thereby denying parties procedures to protect their fundamental rights.

The failure of the Board to address a chorus of voices that called for an appeal mechanism to allow appropriate review of cases has prejudiced Objector’s ability to protect their members’ fundamental and legitimate rights.

ICANN's lack of action forced the parties to: a) bear significant expense; b) detrimentally rely on ICANNs stated policies and procedures for Community Objections; c) led to a breach of process; d) has resulted in Applicants materially changing their positions (e.g. from an exclusive access registry to an open registry) in the middle of a proceeding; and e) resulted in the selection and appointment of an expert that was not prepared to address the unique issues presented.

As a result of the Decisions, the Affected Parties suffered direct financial harm in order to prepare and file the Objections. The Affected Parties will also suffer financial harm, and their members will be globally affected should Applicant ultimately be awarded the most semantic music themed gTLDs, effectively controlling an entire music-related space on the Internet with unclear and unspecified polices, while disallowing the community from their legitimate right to registering their names under a public-resource gTLD.

The Affected Parties suffered a breach of due process in the proceedings because in the middle of the proceeding the Applicant was allowed to seemingly materially change (make a 180-degree shift) their Application from applying to run an exclusive-access registry to accepting GAC Advice on Category 2 Advice to intentionally open its registries. Affected Parties further suffered a breach in the proceedings when the panel, incredulously, refused to evaluate and consider relevant GAC Advice and other pertinent evidence presented.

7. Describe how others may be adversely affected by the action or inaction, if you believe that this is a concern.

Other groups adversely affected by the inaction are community applicants who have serious concerns about the unintended consequences and precedents created in the new gTLD Program in relation to Material Changes[15] which are inconsistent to the AGB.

ICANN has opened the floodgates for allowing material changes without any consequences or accountability mechanisms to protect community applicants in a contention set by permitting standard Applicants to submit material changes in their Applications in the form of Public Interest Commitments (PICS) to remedy any faults an Application may have. In context, Community Applications already abide to the Registry Dispute Resolution

[15] http://newgtlds.icann.org/en/applicants/customer-service/change-requests

Procedure (RRDRP) built-in accountability mechanism[16] while standard Applicants do not. Community Applicants also have appropriate restrictions, including policies relating to authentication, Eligibility, Name Selection, Content/Use, and Enforcement to safeguard their communities.

Furthermore, Applicants with exclusive access Applications were also given the opportunity to respond to GAC Category 2 Advice. Nearly all exclusive access Applicants stated their intent to change their Applications to non-exclusive. Such public Responses negatively interfered with Community Objections since objected-to Applicants submitted GAC Category 2 Responses which directly contradict and are contrary to their Community Objection Responses. This is misleading and undermines the credibility of the new gTLD process. Objected-to Applications were given the opportunity to defend their exclusive access position – like they had in the Objection Responses – but decided against it since there are no repercussions for making inconsistent statements or any accountability mechanisms to prevent misleading the panelists. Also other Applicants used PICs – another form of material changes – in their Community Objection Responses which are not in their current Applications. Such changes of position occurring during Community Objection proceedings not found in current Applications indicates the procedural flaws of the Community Objection process and also vindicate Community Objectors' positions. ICANN has even took this issue a step further by revising the new gTLD Registry Agreement during Objection proceedings with language vindicating Objectors views. According to the AGB, any information that is deemed "false or misleading may result in denial of the application."

Such material changes, whether they are ones relating to changing a registry from "exclusive" to "non-exclusive" access or incorporating Public Interest Commitments (PICs) are clear, material changes, because they materially change an Applicant's business model and other critical components in their Application, such as financial statements and their Letter of Credit. Under the ICANN AGB rules such material "changes" will likely "involve additional fees or evaluation in a subsequent application round."

ICANN has introduced and allowed such procedural loopholes which objected-to Applicants have used to circumvent dispute resolution processes and the AGB, while

[16] http://www.icann.org/en/news/public-comment/rrdrp-15feb10-en.htm

Community Applicants with responsible and accountable Applications are not allowed to incorporate such public interest changes to meet the CPE threshold. Loopholes, including Responses to GAC Category 2 advice, PICs or new ICANN NGPC Resolutions materially change Applications, negatively affect contention sets, circumvent Community Objections and create material harm to Objectors and community applicants in a contention set. NGPC Resolutions and ICANN's actions have introduced a harmful precedent to the ICANN new gTLD Program without any repercussions, consistent standards followed or accountability. In some cases, Panels have used NGPC Resolutions, the registry agreement revision and PICs against Objectors to prove that with these new resolutions material harm is avoided. This precedent used is a clear loophole benefiting objected-to Applicants at the Objectors' expense as Applicants argued that accepting GAC advice, new NGPC resolutions, new registry agreement revisions and adding PICs – all material changes – prove there is no possibility of material harm. As such, the existing new gTLD process has lost meaning since any standard Applicant is now allowed to "shift" their position without accountability of any sort or ICANN action to prevent such violations. Furthermore, ICANN is also in the process of once again favoring standard Applicants by giving brands special exemptions.[17]

Furthermore, community applicants and objectors in general have been materially harmed financially and procedurally as the selection of Community Objection experts was inconsistent with the AGB and the published CPE Guidelines which clearly say that experts are "selected based on their knowledge of specific countries, regions and/or industries, as they pertain to Applications.[18] Community applicants have relied on the language of the AGB that experts selected would be appropriately qualified with some credible level of knowledge and expertise on the communities reflected in the Applications determined. In many cases, the ICC has selected Panelists with no clearly appropriate qualifications or credible experience with respect to communities reflected in the Applications determined, which is a clear violation of the AGB, Section 3.4.4 which states that the "panel will consist of appropriately qualified experts." As such, many Objectors were materially harmed by Determinations since Panelists lacked fundamental knowledge of community functions and such precedents might likely harm them in CPE Evaluation.

[17] http://www.icann.org/en/news/public-comment/spec13-06dec13-en.htm
[18] http://newgtlds.icann.org/en/applicants/cpe/guidelines-27sep13-en.pdf, Pg.22

8. Detail of Board or Staff Action – Required Information

Provide the Required Detailed Explanation here:

On June 19th 2013, a letter was sent to ICANN and the Board which raised serious concerns that **"**the ICC has not identified expert Panelists that have expertise in music - the relevant subject matter of interest for the communities."

On June 24th, 2013 ICANN responded stating that "for the matter of the expertise of the panel members…Section 3.4.4 of the Applicant Guidebook" states:

> 3.4.4 Selection of Expert Panels - A panel will consist of appropriately qualified experts appointed to each proceeding by the designated DRSP. Experts must be independent of the parties to a dispute resolution proceeding. Each DRSP will follow its adopted procedures for requiring such independence; including procedures for challenging and replacing an expert for lack of independence…There will be one expert in proceedings involving a community objection.

ICANN further stated in their response that "ICANN has confidence that the ICC has followed the requirements as expressed by the AGB and has appointed experienced jurists with appropriate qualifications in mediation/arbitration to preside over objection proceedings." However, ICANN's response that the "appropriate qualifications" of an expert is in "mediation/arbitration" is not mentioned in the AGB. The definition of "expert" is "a person who has a comprehensive and authoritative knowledge of or skill in a particular area.[19]" Objectors reasonably relied on the fact that experts would be "appropriately qualified experts" pertaining to the Applications determined and have "comprehensive and authoritative knowledge" in that "particular area."

ICANN's correspondence opens up serious issues of lack of clarity, accountability and transparency in regards to the Community Objection process since the AGB clearly states the word "expert.", not the words "mediator" or "arbitrator" which would have been the appropriate words if ICANN's correspondence statements were applicable. This opens up new questions about the fairness of the process and the high probability of confusion based on the fact that ICANN did refer to the Panelists as "experts" not "arbitrators" or "mediators." This is aligned and consistent with the language used in another community-related

[19] Oxford Dictionary, http://www.oxforddictionaries.com/us/definition/american_english/expert

evaluation process where experts are used – the Community Priority Evaluation. Specifically, CPE Guidelines clearly state that "evaluators are selected based on their knowledge of specific countries, regions and/or industries, as they pertain to Applications"[20] which is consistent with the definition of "expert" not an arbitrator or mediator. There is no mention in the AGB that the expert's "appropriate qualifications" would be in "mediation/arbitration" because such qualifications would be inappropriate since they would directly harm Objectors given that Objectors would have the impossible burden of educating unqualified mediators/arbitrators on community specifics, how the community functions and other complexities requiring significantly more words than the maximum permitted in filing.

On July 30th an Additional Submission in light of GAC Advice/NGPC material change Resolutions and clarifications with respect to Amazon misleading Response statements about Objector's standing and material harm was submitted to Panelist:

> Per Ms. Košak's, message of July 30, 2013, we have been directed to confer directly with you. As you may be aware, yesterday we submitted Objector's Request for Leave to File an Additional Submission and Reply to Applicant's Response. Per the attached filing, this submission is made in accordance with Art 17 of the Attachment to Module 3 of the Applicant Guidebook.

On August 20th, the Panelist completely ignored material changes to the Program by GAC Advice, NGPC Resolutions and Applicant misleading statements and rejected the Additional Submission referring to its content as "not exceptional" despite the material changes' influential impact on all new gTLDs and rule changes exceptionally affecting all Applicants:

> Having examined the file... the Expert is of the opinion that it contains all the necessary elements required to reach a Determination on this dispute. Accordingly the Expert considers that there is no need to invite additional submissions as envisaged under Article 17 (a) of the Procedural Rules governing these proceedings. The Expert further notes the Applicant's comment to the effect that under Article 18 of the Procedural Rules production of documents is limited to exceptional cases. No such exceptional case exists at this time. On the basis of these considerations the Request is denied and its contents are not to be included in the file of this case.

In regard to GAC Advice, ICANN solicited responses from applicants for the strings identified by the GAC regarding whether they planned to operate the applied-for TLDs as exclusive access registries (defined as a registry restricted to a single person or entity and/or

[20] http://newgtlds.icann.org/en/applicants/cpe/guidelines-27sep13-en.pdf, Pg.22

that person's or entity's Affiliates" (as defined in Section 2.9c of the Registry Agreement). The responses were submitted to the New gTLD Program Committee (NGPC) of the ICANN Board. On 28 September 2013, the NGPC adopted a Resolution on GAC Category 2 Advice[21] allowing applicants not planning to operate as exclusive access registries, and that are prepared to enter the Registry Agreement as approved, to move forward to contracting.

On October 8th, .MUSIC (DotMusic) sent written correspondence to ICANN[22] in relation to Applicant Responses:

> We write as a follow-up to our most recent Letter to ICANN (October 8th)[23] to formally record and publish our concerns about new material changes arising from ICANN NGPC Resolutions and their impact on the current Community Objection process. Specifically, we would like to highlight the effect of potentially prejudicial "exceptions" through the acceptance of certain GAC advice and ICANN NPGC resolutions.

On October 10th, 2013 .MUSIC followed up its email after the release of GAC Category 2 Advice Form Responses:

> … it has come to our attention that two of the Applicants we have mentioned in our Letter (who are subject to community objections) have materially changed their opinion and clearly stated that their generic string application(s) for music-themed TLDs will no longer be operated as "exclusive" TLDs, a clear statement of admittance that their original applications' "exclusive" access music-themed TLDs create a strong likelihood of harm.
>
> This is exactly the kind of issues on material changes our Letter has been trying to illustrate in light of ongoing Community Objections on the subject matter which now have no other predictable and consistent recourse but to be upheld given the transparent admittance by these Applicants: Amazon,[24] Far Further/ .music LLC.[25] We kindly request these statements by these two Applicants and our Letter be forwarded to the ICC Panelists since they are crucially pertinent to the cases at hand. We also kindly request some clarification statements from both ICANN and the ICC how such material changes will be addressed and handled since these Applicants' community objection responses were inconsistent with these GAC Category 2 Advice statements they have just made. It is clearly evident that (i) their original application submission was not done in error and such material changes and GAC Category 2 Advice statements: (i) affect third-parties materially, especially objectors and applicants in contention set, (ii) create

[21] http://www.icann.org/en/groups/board/documents/resolutions-new-gtld-28sep13-en.htm#2.a
[22] http://www.icann.org/en/news/correspondence/roussos-to-crocker-et-al-08oct13-en.pdf
[23] http://www.icann.org/en/news/correspondence/roussos-to-crocker-et-al-12jul13-en.pdf on the 12th, July 2013 with ICANN response at http://www.icann.org/en/news/correspondence/willett-to-roussos-14aug13-en.pdf on 14th August, 2013
[24] http://newgtlds.icann.org/sites/default/files/applicants/09oct13/gac-advice-response-1-1316-18029-en.pdf
[25] http://newgtlds.icann.org/sites/default/files/applicants/09oct13/gac-advice-response-1-959-51046-en.pdf

> unfairness to both objectors and applicants in contention set, (iii) are material, and (iv), if allowed, create a precedent with unintended consequences to the new gTLD Program.

ICANN responded on October 22nd, 2013.[26] On October 10, 2013 another email was sent to the Expert and the ICC pertaining to Amazon's GAC 2 Response material change and position change in relation to their exclusive access applications for music-themed .music, .song and .tunes alerting GAC of their intentions to change their registries from exclusive to non-exclusive:

> As you may not yet be aware, on October 9, 2013 (yesterday), ICANN published a submission by the Objected-to Applicant that materially affects the instant proceedings. Accordingly, Objector respectfully submits that these statements, and proposed sweeping changes to the Applicant's Applications be considered in connection with the instant matter.
> As set forth below, to avoid further conflict with the Beijing Communiqué -- addressing concerns about Category 2 closed generic strings (and the same arguments asserted by Objector and under consideration in the instant proceedings) -- Applicant advised ICANN that it will materially change its position from running the .music, .tunes and .song TLDs as closed exclusive registries to open registries.
>
> Accordingly, the Objector respectfully submits that the instant proceedings must now include an evaluation and consideration of the following ICANN publications dated October 9th, 2013 whereby Applicant states that it will change its Applications from "closed" and "exclusive" to "open."
>
> Through these submissions the Applicant is attempting to circumvent this Objection and other criticism levied against it by "agreeing" to open its exclusive music-themed Registries. See New gTLD GAC Advice: Category 2 Safeguards and Applicant Responses Published October 9, 2013[27] and Applicant's Response to GAC Advice Category 2: Exclusive Access.[28]
>
> These newly-published statements by the Objected-to Applicant (published last night by ICANN) are contrary and inconsistent with the Applicant's Responses to the instant Community Objections. The foregoing submissions establish that the Applicant's originally-exclusionary polices in the objected-to Application(s) are not in the global public interest and would create a certainty of material harm to the legitimate interests of the music community and the global public interest.
>
> Amazon has materially changed its stance with a new statement that their generic string application(s) for music-themed TLDs will no longer be operated as "exclusive" registries even though their current application(s) squarely state that "the TLD(s) will be operated as an exclusive registry." It is evident that Amazon's original position in relation to "exclusive" registry access has changed. Amazon's

[26] http://www.icann.org/en/news/correspondence/willett-to-roussos-22oct13-en.pdf
[27] http://newgtlds.icann.org/en/applicants/gac-advice/cat2-safeguards
[28] http://newgtlds.icann.org/sites/default/files/applicants/09oct13/gac-advice-response-1-1316-18029-en.pdf

proposed reverse in course is not yet approved and provides new evidence that Objector's concerns - which were raised prior to any public discussion about the harm of closed generics - should be upheld.

On the date that the instant Objections were filed, Applicant's music-themed applications (.music, .song and .tunes) created a certainty of material harm and were against the global public interest. The Applicant's proposed changes to its Applications are not yet approved and final by ICANN and thus the material harm still exists. Therefore, the only remedy is for this Panel to move to protect the community and public interest.

Objector also notes that ICANN's New gTLD Program Committee's (NGPC) Scorecard Resolution No. 10 dated September 28th, 2013[29] pertaining to the "Registry Agreement as approved by the NGPC, prohibits exclusive registry access for generic strings (emphasis added)." Here too, the NGPC resolution "is consistent with the GAC advice." The NGPC has directed ICANN "staff to move forward with the contracting process for applicants for strings identified in the Category 2 Safeguard Advice that are prepared to enter into the Registry Agreement as approved." Essentially, the NGPC and the objected-to Applicant have agreed with Objector's concerns that closed, exclusive registries for .music, .song and .tunes are improper and harmful.
If an expert determination has already been made that is contrary to upholding the Community Objection against the Applicant, we respectfully request the case be re-opened to address these new contradictory statements by the Applicant and to render a determination that: (i) is consistent with the Applicant's newly published conflicting statements; and (ii) is aligned with GAC advice and ICANN NGPC Resolutions on the issue of exclusive registry access for generic strings.
Applicant is free to respond to these points and defend its material changes to open these strings in the midst of this Objection.

For the instant Community Objections to have meaning, and this process to maintain integrity, the matter must be re-opened and the issue be submitted for re-evaluation by the Expert.

On October 11, 2013, the Community Objection panelist in relation to Amazon's closed .music, .tunes and .song applications, Francisco Orrego Vicuña, responded:

I am in receipt of the parties' respective communications dated 10th and 11th October, 2013 in respect of the submission of new information in these cases. The Expert must inform the parties that no such new information can be considered at this stage in the context of the decisions on the cases noted…. under Article 21 of the Dispute Resolution Procedure the Expert is directed to submit its Determination within 45 days of the constitution of the panel. This date has passed…The Objector's request in his communication of 10th October is accordingly not accepted.

[29] http://www.icann.org/en/groups/board/documents/resolutions-new-gtld-annex-1-28sep13-en.pdf

On November 26th, 2013 the ICC replied to our correspondence and informed in an email that such new information can be considered by the Expert:

> …the Centre has also taken note of the exchange of e-mails between the parties and the Expert with regard to the request for re-opening the case following the Applicant's changes in its Applications. The Centre also notes the Objector's request that the ICC "*review this issue, allow discussion and provide clarification on these points*". The Centre would like to draw your attention to the fact, that the procedure for changing Applications, including the obligation of the Applicant to provide the explanations thereof, is governed by ICANN's rules… please be informed that the decision to re-open the case, should the need arise, and to take into account new or amended documents, is taken by the Expert (emphasis added) based on the information available and nature of the cases in question.

On November 26th, 2013 a response was sent to the ICC and Panelist:

> After carefully reviewing the public Expert Determinations,[30] it is apparently clear that Experts have appropriately used the Applicant Guidebook as a strong reference for their Determinations and rules which makes this issue relevant and procedural in nature. As you have indicated, the procedure for changing Applications is governed by ICANN rules… The Centre also clearly noted that… "the decision to re-open the case, should the need arise, and to take into account new or amended documents, is taken by the Expert based on the information available and the nature of the cases in question.
>
> The rules that the Expert must abide to are governed by ICANN rules and procedures, most notably the language contained in the Applicant Guidebook (AGB). There are specific provisions in regards to Material Changes found in the AGB[31] to which all Applicants – including both Amazon (.music 1-1316-18029, .song 1-1317-53837, .tunes 1-1317-30761) and .music LLC/Far Further (.music 1-959-51046) must abide to, especially if their position is one of "exclusive access." However, they have publicly responded to GAC with a position which is 180 degrees different to their Responses to the ICC and different to their Application. This is misleading, inconsistent and legitimate grounds for concern with respect to procedures. If both Applicants' Responses and "original" Applications were so strong, they did have the option to defend their position with respect to GAC advice - as they did in their Objection Responses - but have now conveniently chosen a different direction, which is misleading and creates a harmful precedent in the ICANN process governing dispute resolution procedures.
>
> It is reasonable to assume that in any proceeding – whether it is one conducted in a court of law or under an ICANN's dispute resolution procedure – that any inconsistencies or changes in position not reflected in the original testimony – the original Application (without any PICs or GAC Advice Category 1 or 2 material

[30] http://www.iccwbo.org/products-and-services/arbitration-and-adr/expertise/icann-new-gtld-dispute-resolution/expert-determination/
[31] http://newgtlds.icann.org/en/applicants/customer-service/change-requests

changes) or their Responses to Objections - should be investigated by the Expert so that the procedures followed by the Expert are compliant with the Applicant Guidebook and no harmful precedent, unintended consequences or loopholes are created.

The ICANN Guidebook's section on "Material Changes" is clear that any information that is deemed "false or misleading may result in denial of the application" (AGB). We strongly believe that many – if not all - music-themed Applicants have provided misleading information in their Responses to the Community Objections because such Responses are not made public by the Centre (emphasis added). As such, there is no Applicant accountability towards the ICANN dispute resolution process or transparency with the Centre since the Applicants' Responses are not made public. We are deeply concerned with misleading music-themed gTLD Applicant Community Objection Responses especially those given to Experts that GAC Advice was "irrelevant." Such statements would not be seen under a positive light by both GAC or the ICANN NGPC if they were made public to them.

It is clear that if an Application is materially changed from "exclusive" to "non-exclusive" (by incorporating Category 2 safeguards) or incorporating Category 1 enhanced safeguards, it will affect its business model, its financial statements and its Letter of Credit. Under the ICANN AGB rules such "changes" will likely "involve additional fees or evaluation in a subsequent application round" (AGB) because the entire premise of the Applicant's Application has changed materially.

Last Thursday at the ICANN Public Forum in Buenos Aires/Argentina, we publicly informed the ICANN Board of these types of procedural loophole concerns which objected-to Applicants can use to circumvent the dispute resolution process. We have also met with the ICANN Ombudsman to express these same concerns and he recommended to reach out to the ICC and the Expert Panelist. The fact that the Centre agrees that "ICANN's new gTLD dispute resolution procedure does not provide for any specific provision in this regard" is clear evidence of procedural loopholes that Objected-to Applicants could use to their benefit to circumvent the Community Objections.

Our objective is that Objections are treated in a transparent and accountable manner, consistent with the Applicant Guidebook and rules contained in the AGB in regards to Material Changes or with respect to a change of position that was not in the original Application. We hope that the Experts acknowledge the issues at hand and the harmful precedent as illustrated in the Material Changes section of the AGB… music-themed gTLD Objectors' arguments, whether on the issue of "exclusive access" or "enhanced safeguards," were based on the Applicant's stated positions found in their Applications… Ultimately, the Expert should rule on the Applicant's stated Policies as found in their Applications taking into consideration any relevant new statements by the Applicant as well as new, pertinent ICANN NGPC Resolutions with respect to "exclusive access" or lack of "enhanced safeguards." Otherwise, the process has no meaning, and as long as a party can "shift" position to avoid scrutiny, there is no accountability.

> Allowing inconsistent statements to be a justification for avoiding an adverse verdict would create a scenario that obviates the need for the Panel in the first place. We agree with the ICANN Resolutions and they provide additional evidence from ICANN - who, as the ICC agrees, writes the Rules - on the obvious harm created by music-themed Applications that do not have "adequate safeguards" or have "exclusive access." We hope that the Expert Determinations are consistent and do not allow process loopholes for Objected-to Applicants to circumvent the process and the new ICANN NGPC resolutions which have vindicated the concerns presented in the music-themed Community Objections.

On December 3rd, 2013 the ICC responded to our correspondence:

> The Centre carefully considered your comments regarding the above-mentioned case and the provisions of the Procedure and the Rules in this regard. Further, we have communicated your concerns to ICANN. However, at this point the Centre can only proceed pursuant to the current version of the Procedure which does not provide for the possibility of an amendment of the Objection in the course of the proceedings, unless permitted by the Expert (Emphasis Added). Accordingly, it is in his discretion to decide whether to take into account additional submissions...

There is also a lack of clarity with regard to the rules and procedures followed by the ICC and the panelist which are contradictory. On one hand the ICC states that Additional Submissions or amendments due to material changes at any stage of the proceedings can be "permitted by the Expert" and that "it is in his discretion to decide whether to take into account additional submissions", while on the other hand the Expert denies having this power claiming that "no such new information can be considered at this stage in the context of the decisions on the cases noted" because "under Article 21 of the Dispute Resolution Procedure the Expert is directed to submit its Determination within 45 days of the constitution of the panel."

It is noted that the ICANN Board and the NGPC responded to the GAC Advice and called for public comment and input regarding "closed generic" Category 2 Applications and took action to materially change how such gTLDs are to be operated and allowed Applicants to intentionally materially change their Applications, in some cases from an exclusive access registry to an open access registry – allowing substantial amendments to Applications during proceedings. During this process ICANN failed to respond to Objector's stated concerns about the effect of GAC Advice on the proceedings and failed to advise the ICC and panel about the decisions made by ICANN. Moreover, at any point ICANN could have suspended

the Community Objection proceedings to allow for a reasoned review and consideration of the impact of such material changes on the wider gTLD process and Community Objections.

The Affected Parties believe that there was inaction by ICANN:

1) in failing to adequately train, advise, and instruct the ICC allowing the ICC to appoint an expert who was unqualified to address the specific issues related to music community presented by the Objector. The panel's unfamiliarity with the music community, its cultural composition, its strict delineation and a host of intellectual property issues it faces on the DNS (such as rampant piracy_ as well as the unique impact of the gTLD program on worldwide distribution of music, resulted in a fundamentally flawed decision that is a reversible error (emphasis added);

2) by refusing to present to the ICC and the panelist, GAC-related issues and new NGPC Resolutions: Responses to GAC Advice, Board Resolutions, Changes in Applicant positions through the GAC Advice Category 2: Exclusive Access Response Form for Applicants, and revisions to Registry Agreement that addressed GAC Advice allowed the Objection to proceed without consideration of the effect and importance of these exceptional developments that occurred after the Objections were filed;

3) by allowing a process to facilitate modifications and material changes to Applications are facilitated in response to GAC Advise on Category Exclusive Access Applications permitted Applicant's to fundamentally change positions in the middle of the proceedings without ramifications to the material detriment of Objector;

4) in creating a process by which exceptional modifications and material changes to Applications in response to GAC Advise on Category Exclusive Access Applications can be facilitated. Failing to address the effect of such actions to on-going Objections violated Article 4 of the Articles of Incorporation and Article 1, Section 2, 7, 8, and 9 of the ICANN Bylaws resulting in a breach of process and calls into question the legitimacy of the program; and

5) by failing to offer an appropriate appeal mechanism to address clear procedural issues and AGB violations pertaining to Objections especially in cases of unqualified panels and factually incorrect and inconsistent statements.

6) by harming applicants in a contention set as well as Community and Legal Rights Objectors against Amazon for the same strings that relied on the AGB's language. Amazon's position change in regards to exclusive-access, affects both Community Objections and Legal Rights Objections since they vindicate Objectors' arguments on the material harm test.

7) in failing to ensure there were no conflicts of interest and bias in panels relating to the new gTLD Objection process as whole. The Applicant's general counsel Doug Isenberg representing Amazon in these new gTLD Community Objections was also a Panelist determining a decision against another Objector (Food Network) in a new gTLD Legal Rights Objection proceeding. DotMusic has been involved in both Community Objections and Legal Rights Objections against Applicant for the same objected-to music-themed strings and such panel selection conflicts violate the AGB and introduces unintended precedents in that other panels may rely on for their determination. This compromises the credibility of the new gTLD program and sheds light on how Objections were mishandled by ICANN without any accountability on the selection of panels even if there was a clear conflict of interest.

9. What are you asking ICANN to do now?

The Affected Parties respectfully request that ICANN:

1) Reimburse or order the ICC to reimburse the Objector for all of its expenses, including but not limited to attorney fees, administrative expenses and Expert fees associated with cases: EXP_461_ICANN_78 (c EXP_479_ICANN_96 EXP_480_ICANN_97); and

2) Allow for new Community Objections to be filed for these Applications with the appointment of an appropriate Expert (noted as an expert in music/intellectual property/competition regulation);

3) Determine that Applicants that have made public statements intending to substantially amend their Applications by responding to GAC Advice be deemed material and inconsistent with their position in Community Objection Responses and rule in favor of Objectors given that it is admission of their harmful policies; or

4) Allow for a Reconsideration of the Decisions by an appropriate and qualified expert and with instruction regarding the GAC Advice and changes made by Applicants

10. Please state specifically the grounds under which you have the standing and the right to assert this Request for Reconsideration, and the grounds or justifications that support your request.

DotMusic Limited (.MUSIC) is a new gTLD Applicant for the .music music-themed community application. The new gTLD Applicant and Objector(s)/Related-Objector Entities are entitled to a fair and appropriate evaluation of the AGB policies and procedures. Moreover, DotMusic as a competing applicant is adversely affected by ICANNs granting of modifications and changes to Applications in response to GAC Advice on Category 2 Exclusive Access Applications publicly stating Applicant's intention to fundamentally amend Applications and change positions without consideration on how such action affected other Applicants or the Community Objection process.

Furthermore, such panel decisions and false statements not based on facts pertaining to Objector's standing as a clearly delineated community (See Annex 3) or the music community's dependence on the DNS for activities (See Annex 2) can adversely affect the Community Priority Evaluation (and DotMusic as a community applicant) since EIU Evaluators could use the expert's factually incorrect opinion as precedent and fail Community Applicants in general (emphasis). DotMusic has spent over 8 years, significant resources and millions of dollars building the .music brand and receiving support from a significant portion of the community to pass CPE. If CPE fails, DotMusic will be subject to expensive auctions which were designed to favor deep pocketed standard Applicants – such as Amazon and Google – not community applicants.

The Objector and Related Objector Entities were entitled to a fair and appropriate management of the Objection proceedings in accordance with the AGB. By providing inadequate training and guidance to the ICC, ICANN allowed the ICC to appoint an unqualified expert that resulted in fundamentally flawed proceedings, factually incorrect statements and a harmful determination which creates a harmful precedent.

Breach of Fundamental Fairness

Basic principles of due process to the proceeding were violated and lacked accountability by ICANN, the ICC and the Panel. ICANN failed to consider concerns about the selection of the panel and the ICC failed to follow the procedures the AGB set in relation to selecting an

appropriately qualified expert in the subject-matter reflecting the Applications despite the excessive costs and resources attributed to filing. The panel also selected not to hear legitimate concerns and striking evidence by the Objector which were crucially relevant even contradicting the ICC's clear statements that it was up to panel's discretion to do so.

Failure to Consider Evidence

The Panel failed to consider relevant evidence relating to: (i) The Applicant deciding not to defend their exclusive access position and making a complete position change in their GAC Category 2 Response public statements changing from exclusive-access to non-exclusive, proving that their current Application creates a likelihood of material harm leading to a ruling favoring Objector; (ii) The clear standing of Objector as a clearly, delineated community; (iii) The significant size and global breadth of the Objector Members; (iv) How the music community is dependent on DNS/Internet for core activities.

Violation of ICANN Articles of Incorporation

Article 4 calls for ICANN to operate for the benefit of the Internet community as a whole, carrying out its activities in conformity with relevant principles of international law and applicable international conventions and local law, and to the extent appropriate and consistent with its Articles and Bylaws, through open and transparent processes that enable *competition and open entry in Internet related markets.*

ICANN should have properly communicated and delegated functions to the ICC and failed to do so in violation of ByLaws Art. 1, Section 2, 3 *To the extent feasible and appropriate, delegating coordination functions to or recognizing the policy role of other responsible entities that reflect the interests of affected parties*.

ICANN or the NGPC should have properly communicated to the ICC and the Panelists the existence and effect of GAC Advice, PICs, NGPC Resolutions and Registry Agreement revisions on pending Objections. ICANN or the NGPC should have also considered the effect of allowing such substantial amendments to Applications and material changes to the gTLD Program (ByLaws Art. 1, Section 2, 7 *Employing open and transparent policy development mechanisms that (i) promote well-informed decisions based on expert advice, and (ii) ensure that those entities most affected can assist in the policy development*

process; ByLaws Art. 1, Section 2, 8 *Making decisions by applying documented policies neutrally and objectively, with integrity and fairness*.

Between April, 2013 and December 9, 2013 (the date of the Decision), ICANN could have acted to protect Applicants and Objector from material harm by properly addressing material flaws with the ICC Process and/or informing the ICC and Panelists regarding the GAC Advice and related issues (ByLaws Art. 1, Section 2, 9 *Acting with a speed that is responsive to the needs of the Internet while, as part of the decision-making process, obtaining informed input from those entities most affected*; ByLaws Art. 1, Section 2, 10 *Remaining accountable to the Internet community through mechanisms that enhance ICANN's effectiveness*; ByLaws Art. 1, Section 2, 11 *While remaining rooted in the private sector, recognizing that governments and public authorities are responsible for public policy and duly taking into account governments' or public authorities' recommendations*; and ByLaws Art. 3, Section 1 *ICANN and its constituent bodies shall operate to the maximum extent feasible in an open and transparent manner and consistent with procedures designed to ensure fairness*.

11. Are you bringing this Reconsideration Request on behalf of multiple persons or entities?

X Yes

11a. If yes, Is the causal connection between the circumstances of the Reconsideration Request and the harm the same for all of the complaining parties?

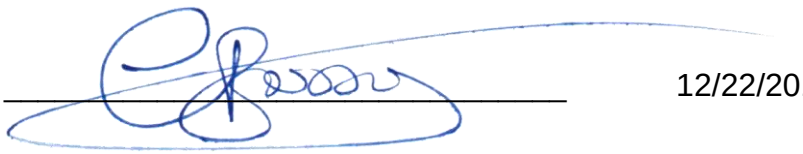
Yes, because the music community (i) has a shared, common interest - the legal distribution and promotion of music, (ii) is dependent on the DNS (where rampant piracy occurs) for core activities, and since (iii) Determinations of such significance pertaining to competition and exclusive access can create material detriment to the legitimate interests of a significant portion of the music community that is represented by the Affected parties. Failure of the panelist to understand that the music community is reliant on the DNS exhibits why this particular case requires someone familiar with music/intellectual property matters.

Do you have any documents you want to provide to ICANN?

Yes, please see Annex. Attached are the (i) 3 Expert Determinations for .music, .song, and .tunes (See Annex 1), (ii) Proof of evidence that the music community is reliant on the DNS/Internet for core activities (See Annex 2), and (iii) Proof of evidence that the music community is clearly and strictly delineated (See Annex 3), which was mentioned in the Additional Submission.

Terms and Conditions for Submission of Reconsideration Requests

The Board Governance Committee has the ability to consolidate the consideration of Reconsideration Requests if the issues stated within are sufficiently similar. The Board Governance Committee may dismiss Reconsideration Requests that are querulous or vexatious. Hearings are not required in the Reconsideration Process, however Requestors may request a hearing. The BGC retains the absolute discretion to determine whether a hearing is appropriate, and to call people before it for a hearing. The BGC may take a decision on reconsideration of requests relating to staff action/inaction without reference to the full ICANN Board. Whether recommendations will issue to the ICANN Board is within the discretion of the BGC. The ICANN Board of Director's decision on the BGC's reconsideration recommendation is final and not subject to a reconsideration request.



12/22/2013

Constantinos Roussos

Date

DotMusic (.MUSIC)

Reconsideration Request

Union of Orthodox Jewish Congregations of America, *et al.*

Annex C

Recommendation of the Board Governance Committee,
Reconsideration Request 13-20 (21 Jan. 2014)

DETERMINATION OF THE BOARD GOVERNANCE COMMITTEE (BGC)

RECONSIDERATION REQUEST 13-20

21 JANUARY 2014

The Requester seeks reconsideration of ICANN's alleged failure: (1) to properly prepare the ICC[1] to decide community objections and to ensure compliance with the established procedures concerning sensitive strings; and (ii) to provide a mechanism to appeal expert determinations based on grounds outside the Applicant Guidebook ("Guidebook").

I. Brief Summary.

The Requester applied for .BANK. The Objector IBF filed a Community Objection against Requester's application, and won. The Requester claims that ICANN staff failed to assure the preparedness of the ICC and the ICC panelists to apply the established polices in determining community objections concerning sensitive strings, such as .BANK. The Requester further claims that ICANN staff failed to provide an appeal mechanism if the decision was based on grounds outside the Guidebook.

With respect to the claim that the ICC or the Panel were not adequately trained, this claim is not supported and should be rejected. The Requester does not cite any established policy or process that was allegedly violated by ICANN's purported inaction or that required ICANN to take action beyond the action that ICANN took. Moreover, there is no support for the Requester's claim that the Panel applied the wrong standard of review.

With respect to the second claim, the Requester has not identified any established policy or process that required ICANN to implement an appeal mechanism (upon request or otherwise).

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[1] International Centre for Expertise of the International Chamber of Commerce.

The Requester's belief that the dispute resolution procedures should have included certain quality controls does not constitute a policy or process violation that supports reconsideration. And, as noted many times before, the procedures were developed over years of public input and discussion.

Therefore, the BGC concludes that Request 13-20 be denied.

II. Facts.

A. Background Facts.

DotSecure Inc. ("Requester") applied for .BANK.

On 13 March 2013, the International Banking Federation ("IBF") objected to the Requester's application asserting that there is "substantial opposition to the gTLD application from a significant portion of the community to which the gTLD string may be explicitly or implicitly targeted." (Guidebook, § 3.2.1; New gTLD Dispute Resolution Procedure ("Procedure"), Art. 2(e).)

On 14 May 2013, the Requester responded to IBF's Objection ("Response").

On 12 June 2013, the ICC appointed Mark Kantor as the Expert ("Expert" or "Panel").

On 3 July 2013, IBF filed a reply to the Response ("IBF's Reply").

On 9 July 2013, the Requester responded to IBF's Reply.

On 26 November 2013, the Panel rendered an Expert Determination in favor of the IBF, thereby finding IBF the prevailing party. Based on the submissions and evidence, the Panel determined that the Requester's application for .BANK "would create a likelihood of material detriment to the rights and legitimate interests of a significant portion of the global banking community, the community to which [the Requester] expressly and implicitly targets string '.bank.'" (Determination, Pg. 35, ¶ 185.)

On 28 November 2013, the ICC notified the Requester of its Decision.

On 12 December 2013, the Requester filed Request 13-20.[2]

B. The Requester's Claims.

The Requester seeks reconsideration on the following grounds:

First, the Requester claims that ICANN staff failed to assure the preparedness of the ICC and the ICC panelists to apply the established procedures in determining community objections. (Request, Pg. 9, ¶ 8.3.) The Requester contends that the Panel's purported application of the wrong standard for evaluating IBF's Objection and ICANN staff's alleged failure to provide the ICC with status reports on changes to the Guidebook evidence the ICC's improper training and staff's failure to ensure compliance. (Request, Pg. 2, ¶ 3.3 and Pgs. 5-6, ¶¶ 3.10-3.12.)

Second, the Requester claims that ICANN staff failed to provide an appeal mechanism if the decision was based on grounds outside the Guidebook. (Request, Pg. 9, ¶ 8.3.)

C. Relief Requested.

The Requester asks that ICANN reject the Expert Determination in favor of IBF. The Requester also asks that ICANN cancel its appointment of the ICC to determine either all community objections, or at least community objections involving sensitive strings such as .BANK, and void all such expert determinations rendered by the ICC, including the one at issue here. The Requester further asks that the ICC refund all fees collected in connection with community objections that are overruled as a result of this Request, and provide "another, fair, open, efficient and expeditious method of providing binding resolution of Community Objections involving sensitive strings," or alternatively, a procedure for applicants to review

[2] In addition to the three annexes submitted in support of its Request (all of which are posted), the Requester included a link to a dropbox with additional materials. Those materials include IBF's Objection and supporting documentation. The Requester informed ICANN that it has not obtained IBF's permission to publicly disclose these materials. Pursuant to Article IV, Section 2.14, the BGC cannot consider any materials that are not in the public record when evaluating a reconsideration request. Requester has since withdrawn all materials submitted without the other parties' permission.

determinations. Finally, the Requester asks that ICANN provide an appeal mechanism for applicants to appeal an ICC determination "on legitimate grounds if the decision rendered against them was based on grounds outside the [Guidebook]." (Request, Pgs. 10-11, ¶ 9.1.)

III. Issues.

In view of the claims set forth in Request 13-20, the issues for reconsideration are as follows:

A. Whether ICANN staff's alleged failure to: (i) properly prepare the ICC and the Panel; and (ii) to ensure compliance with the established procedures concerning sensitive strings supports reconsideration; and

B. Whether ICANN staff's alleged failure to provide an appeal mechanism in the dispute resolution process supports reconsideration.

IV. The Relevant Standards for Evaluating Reconsideration Requests.

ICANN's Bylaws provide for reconsideration of a Board or staff action or inaction in accordance with specified criteria.[3] (Bylaws, Art. IV, § 2.) Dismissal of a request for reconsideration of staff action or inaction is appropriate if the BGC[4] concludes, or if the Board or the NGPC[5] agrees to the extent that the BGC deems that further consideration is necessary, that the requesting party does not have standing because the party failed to satisfy the reconsideration criteria set forth in the Bylaws.

V. Analysis and Rationale.

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[3] Article IV, Section 2.2 of ICANN's Bylaws states in relevant part that any entity may submit a request for reconsideration of an ICANN action or inaction to the extent that it has been adversely affected by:

(a) one or more staff actions or inactions that contradict established ICANN policy(ies); or

(b) one or more actions or inactions of the ICANN Board that have been taken or refused to be taken without consideration of material information, except where the party submitting the request could have submitted, but did not submit, the information for the Board's consideration at the time of action or refusal to act; or

(c) one or more actions or inactions of the ICANN Board that are taken as a result of the Board's reliance on false or inaccurate material information.

[4] Board Governance Committee.

[5] New gTLD Program Committee.

A. The Alleged Failure of ICANN To Properly Prepare The ICC And The Panel, And To Ensure Compliance With The Established Procedures Concerning Sensitive Strings Does Not Support Reconsideration.

The Requester claims that by providing "inadequate or no training" to the ICC, ICANN has improperly prepared the ICC to make decisions on community objections involving sensitive strings. (Request, Pg. 11, ¶ 10.2; Pgs. 3-4, ¶ 3.4; Pgs. 4-5, ¶ 3.7.)[6] In asserting this claim, the Requester also points to correspondence from the Requester's parent company, Radix Registry ("Radix"), and other applicants, to ICANN about the ICC's purported inadequate training and the concern that ICC expert panels are "2 degrees removed from the ICANN staff." (Request, Pgs. 6-7, ¶ 3.13; Annex 3 to Request.)

Notably, the Requester is challenging an alleged inaction – *i.e.,* ICANN's purported failure to "assur[e] the preparedness of the ICC and the ICC panelists to properly apply [the] policies in determination of Community Objections concerning sensitive strings." (Request, Pg. 9, ¶ 8.3.) The Requester, however, does not cite any established policy or process that was allegedly violated by ICANN or that required ICANN to take action beyond the action that ICANN took – "ICANN selected DRSPs on the basis of their relevant experience and expertise, as well as their willingness and ability to administer dispute proceedings in the new gTLD Program."[7] (Guidebook, Section 3.2.3.) The Requester's claim that the ICC or the Panel were not adequately trained on the procedures set forth in the Applicant Guidebook is simply not supported and should be rejected.

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[6] By way of example, the Requester claims that the Panel found "substantial opposition" to the Requester's application for .BANK without considering the "truth or validity" of the submissions filed in opposition. The Requester does not contend here that the Panel applied the wrong standard in assessing the amount of opposition filed and the substantiality of the opponents, but instead, asserts that ICANN should have trained the ICC to ensure that only opposition based on accurate statements is included in the calculus of the substantiality of the opposition. (Request, Pg. 4, ¶ 3.5.)

[7] "DRSPs" refers to dispute resolution service providers.

The current Guidebook is posted on ICANN's new gTLD microsite.[8] The standards for evaluating the merits of a community objection are set out in the Guidebook, and by filing an application for a new gTLD, each applicant agrees to accept the applicability of the gTLD dispute resolution process. (Guidebook, Section 3.5.4 & Section 3.3.2; Procedure, Art. 1(d).) Applicants are evaluated against transparent and predictable criteria, and the procedures are designed to ensure fairness.

In its correspondence to ICANN, Radix acknowledged that the Guidebook "does a remarkable job of providing clear guidance to the Applicants, Objectors and Panels on the criteria that need to be met in order for an Objection to prevail" and that the definitions in the Guidebook are "unambiguous" and "were available well in advance of the application deadline." (Annex 3 to Request: 22 July 2013 Correspondence from Radix to ICANN.) Radix further conceded that ICANN "spent significant amounts of time working with the personnel at the DRSPs, particularly the [ICC], to make them thorough with the [Guidebook]," but asserted that the "requisite knowledge and understanding of the [Guidebook] has not percolated down to the actual Expert Panels appointed by the ICC." (*Id*.) In its correspondence, Radix claimed that the expert panels have not "adhered" to the admittedly clear standards set out in the Guidebook in making their determinations. (*Id.*) Radix therefore claimed that expert panels allegedly applying the wrong standard is evidence of ICANN's purported failure to train the expert panels.

ICANN has previously determined that the reconsideration process can properly be invoked for challenges to expert determinations rendered by DRSPs, such as the ICC, where it can be stated that the Panel failed to follow the established policies or processes in reaching the

[8] *See* http://newgtlds.icann.org/en/applicants/agb.

expert determination.[9] Thus, to the extent an expert panel applied an incorrect standard in evaluating and determining a community objection (as Radix suggests), the reconsideration process is a proper mechanism for challenging such a decision. But a blanket claim by the Requester that ICANN failed to properly prepare the ICC and/or the Panel based on broad allegations that expert panels are applying the wrong standard does not support reconsideration for the reasons stated above.

1. The Requester Has Failed to Demonstrate that the Panel Applied the Wrong Standard In Contravention of Established Policy or Procedure.

The Requester claims that the Panel's purported failure to apply the correct standard in evaluating IBF's Objection evidences the Panel's improper training and ICANN's failure to ensure compliance with the established procedures concerning sensitive strings. (Request, Pgs. 3-5, ¶¶ 3.3-3.9.) Specifically, the Requester contends that although early advice from the GAC[10] and others providing that sensitive strings (such as .BANK) should be operated only by members of the relevant community to which such strings are targeted was not adopted by ICANN, the Panel determined that the Requester's application for .BANK will cause material detriment to the global banking community simply because the Requester is not a member of the alleged global banking community. (Request, Pg. 3, ¶ 3.3). The Requester's conclusions in this respect are not supported.

To prevail on a community objection, the objector must establish, among other things, that the "application creates a likelihood of material detriment to the rights or legitimate interests

[9] *See* BGC Recommendation on Reconsideration Request 13-5 at http://www.icann.org/en/groups/board/governance/reconsideration/recommendation-booking-01aug13-en.doc.

[10] Governmental Advisory Committee.

of a significant portion of the community to which the string may be explicitly or implicitly targeted." (Guidebook, Section 3.5.4.) The Guidebook includes a list of factors that could be used by a panel in making this determination. The factors include but are not limited to the following:

- Nature and extent of damage to the reputation of the community represented by the objector that would result from the applicant's operation of the applied-for gTLD string;
- Evidence that the applicant is not acting or does not intend to act in accordance with the interests of the community or of users more widely, including evidence that the applicant has not proposed or does not intend to institute effective security protection for user interests;
- Interference with the core activities of the community that would result from the applicant's operation of the applied-for gTLD string;
- Dependence of the community represented by the objector on the DNS for its core activities;
- Nature and extent of concrete or economic damage to the community represented by the objector that would result from the applicant's operation of the applied-for gTLD string; and
- Level of certainty that alleged detrimental outcomes would occur.

(Guidebook, Section 3.5.4.)

Here, the Panel correctly referenced the above standard in the Determination. (Determination, Pg. 30, ¶¶ 149 &151). The Panel also noted the Requester's position regarding the early GAC advice relating to sensitive strings, principally the Requester's contention that IBF's Objection misconstrues the role of the GAC and fails to note the responses by ICANN to the GAC's comments. (Determination, Pg. 31, ¶ 157.) The Panel concluded that IBF accurately characterized the GAC's concerns regarding sensitive strings and that ICANN's responses to the GAC's comments did not reject the GAC's concerns, but instead, directed interested parties to utilize the dispute resolution process to address such concerns. (*Id.*)

The Panel further concluded that, even though the Requester may not have broken any rules or requirements in applying for .BANK while not being a member of the global banking community, there are a number of reasons why the Requester's:

> [A]dmitted lack of an existing relationship with the banking industry is sufficient by itself to create a likelihood of material detriment to the rights or legitimate interests of a significant portion of the global banking community and users of banking services worldwide.

(Determination, Pg. 31, ¶ 159.) In a detailed analysis, the Panel addressed, among other things, how the Requester's lack of experience and lack of existing relationships in this highly complex regulatory environment is:

> [H]ighly likely to result in inadvertent non-compliance with bank regulatory measures, in delays in obtaining regulatory consents, in difficulties resolving overlapping requirements imposed by a multiplicity of regulators and policymakers, and in significant concerns on the part of regulatory authorities over the possibility of fraud, consumer abuse, tax evasion and money laundering, other financial crimes and improper avoidance of regulatory measures by means of the Internet.

(Determination, Pg. 32, ¶ 163.) The Panel noted that such concerns were highlighted by bank regulatory authorities in their comments to ICANN with respect to sensitive financial services strings such as .BANK. (*Id.*) The Panel also expressed its views that the prospects for delay, non-compliance and confusion are likely to directly and adversely affect the reputation and the core activities of the global banking community, and that the Requester's admitted lack of relationships and familiarity with banking "raises the level of certainty with respect to the likelihood of these injuries materializing to a high level, far too high to sustain the Application." (Determination, Pg. 32, ¶¶ 164-166.) Thus, contrary to the Requester's assertion, the Panel did not determine that the Requester's application for .BANK was likely to cause material detriment to the global banking community simply because the Requester is not a member of the global banking community. Rather, the Panel determined that the Requester's lack of existing

relationships and familiarly with the global banking community was highly likely to create a number of material detriments to the targeted community. There is therefore no support for the Requester's claim that the Panel's purported lack of training resulted in the Panel applying the wrong standard in evaluating IBF's Objection.

2. ICANN's Purported Failure to Provide the ICC with Status Reports Does not Demonstrate a Policy or Process Violation.

The Requester claims that ICANN's alleged failure to provide the ICC with status reports on changes to the Guidebook further evidences the ICC's improper training and ICANN's failure to ensure compliance with the established procedures concerning sensitive strings. (Request, Pgs. 5-6, ¶¶ 3.10-3.12.) Specifically, the Requester contends that the GAC issued advice relating to sensitive strings (identifying .BANK, among others), that ICANN has since indicated to the GAC its intent to accept that advice by revising the draft New gTLD Registry Agreement, and that ICANN has made no attempts to update the ICC regarding these changes. (Request, Pg. 6, ¶ 3.11.)

As an initial matter, the Guidebook provides that the "receipt of GAC advice will not toll the processing of any application (i.e., an application will not be suspended but will continue through the stages of the application process)." (Guidebook, Section 3.1.) Thus, ICANN's receipt of GAC advice relating to sensitive strings will not have an impact on the processing of any objections involving sensitive strings, including IBF's Objection to the Requester's application for .BANK.

The Requester suggests that the referenced GAC advice includes changes to the Guidebook and the objection procedures therein. The Requester's suggestion here is misplaced. The GAC's advice relating to sensitive strings has no bearing on the current objection procedures outlined in the Guidebook. The GAC's advice relates to certain safeguards in the contracting

process for new gTLD applicants, which includes proposed changes to the New gTLD Registry Agreement. To date, the NGPC has only approved the proposal for how to implement the GAC's advice; nothing has been approved/finalized. (http://www.icann.org/en/groups/board/documents/resolutions-new-gtld-25jun13-en.htm#2.b, *see also* Annex I: NGPC Proposal for Implementation of GAC Safeguards Applicable to All New gTLDs available at http://www.icann.org/en/groups/board/documents/resolutions-new-gtld-annex-i-agenda-2b-25jun13-en.pdf.) Accordingly, there is no support for the Requester's claim that ICANN's alleged failure to provide the ICC with status reports is evidence of the ICC's improper training or ICANN's failure to ensure compliance with the established procedures concerning sensitive strings.

B. The Alleged Failure To Provide An Appeal Mechanism In The Dispute Resolution Process Does Not Support Reconsideration.

The Requester claims it has (through its parent company, Radix) requested that ICANN provide an appeal mechanism to enable applicants to defend their rights under the Guidebook against exactly the type of outcome the Requester obtained by the Panel here – a decision rendered against them based on grounds allegedly outside the Guidebook. The Requester contends that ICANN's failure to provide such a mechanism is an inaction that should be reconsidered. (Request, Pg. 7, ¶ 3.14 and Pg. 9, ¶ 8.3.)

The Guidebook, and its many versions and revisions, is based on years of open and frank discussion, debate and deliberation with the Internet community. The standards for evaluating the merits of a community objection have been debated and have been well known for years. The Guidebook provides that "applicant[s] may utilize any accountability mechanism set forth in ICANN's Bylaws for purposes of challenging any final decision made by ICANN with respect to that application." (Guidebook, Module 6, ¶ 6.) These mechanisms include the Reconsideration

Process, the Independent Review Process, and the Ombudsman. (Bylaws, Art. IV & V.) The Requester has not identified any established policy or process that required ICANN to implement any additional appeal mechanism (upon request or otherwise) than those mechanisms already provided for under the Guidebook and in ICANN's Bylaws. The Requester's belief that the dispute resolution procedures should have included certain quality controls does not constitute a policy or process violation that supports reconsideration.

VI. Decision

Based on the foregoing, the BGC concludes that the Requester has not stated proper grounds for reconsideration, and therefore denies Requester's Reconsideration Request (Request 13-20). There is no indication that ICANN violated any policy or process in accepting the determination sustaining IBF's Objection to the Requester's application for .BANK. If the Requester believes that it has somehow been treated unfairly in the process, the Requester is free to ask the Ombudsman to review this matter.

In accordance with Article IV, Section 2.15 of the Bylaws, the BGC's determination on Request 13-20 shall be final and does not require Board consideration. The Bylaws provides that the BGC is authorized to make a final determination on all Reconsideration Requests brought regarding staff action or inaction. (Bylaws, Art. IV, § 2.15.) The BGC has the discretion, but is not required, to recommend the matter to the Board for consideration and action, as the BGC deems necessary. (*See id.*) As discussed above, Request 13-20 seeks reconsideration of action or inaction taken by staff. After consideration of this particular Reconsideration Request, the BGC concludes that its determination on this matter is sufficient and that no further consideration by the Board is warranted.

In terms of timing of the BGC's Determination, we note that Section 2.16 of Article IV of the Bylaws provides that the BGC shall make a final determination or recommendation with

respect to a Reconsideration Request within thirty days following receipt of the request, unless impractical. *See* Article IV, Section 2.16 of the Bylaws. To satisfy the thirty-day deadline, the BGC would have to have acted by 11 January 2014. Due to the volume of Reconsideration Requests received within recent weeks and the intervening holiday schedule, the first practical opportunity for the BGC to take action on this Request was on 21 January 2014; it was impractical for the BGC to consider the Request sooner. Upon making that determination, staff notified the requestor of the BGC's anticipated timing for the review of Request 13-20.

Reconsideration Request

Union of Orthodox Jewish Congregations of America, *et al.*

Annex D

Recommendation of the Board Governance Committee,
Reconsideration Request 13-9 (10 Oct. 13)

RECOMMENDATION OF THE BOARD GOVERNANCE COMMITTEE (BGC)

RECONSIDERATION REQUEST 13-9

10 OCTOBER 2013

On 4 September 2013, Amazon EU S.a.r.l. ("Amazon") submitted a reconsideration request ("Request"). The Request asked the Board to reconsider the 21 August 2013 Expert Determination from a dispute resolution Panel established by the International Centre for Dispute Resolution ("ICDR") sustaining Commercial Connect LLC's ("Commercial Connect") objection to Amazon's new gTLD application for the Japanese translation of "online shopping" ("Amazon's Applied-for String") as being confusingly similar to Commercial Connect's application for .SHOP ("Commercial Connect's Applied-for String").

I. Relevant Bylaws

Article IV, Section 2.2 of ICANN's Bylaws states in relevant part that any entity may submit a request for reconsideration or review of an ICANN action or inaction to the extent that it has been adversely affected by:

> (a) one or more staff actions or inactions that contradict established ICANN policy(ies); or
>
> (b) one or more actions or inactions of the ICANN Board that have been taken or refused to be taken without consideration of material information, except where the party submitting the request could have submitted, but did not submit, the information for the Board's consideration at the time of action or refusal to act; or
>
> (c) one or more actions or inactions of the ICANN Board that are taken as a result of the Board's reliance on false or inaccurate material information.

Dismissal of a request for reconsideration is appropriate if the Board Governance Committee ("BGC") recommends, and in this case the New gTLD Program Committee ("NGPC") agrees, that the requesting party does not have standing because the party failed to

satisfy the criteria set forth in the Bylaws. These standing requirements are intended to protect the reconsideration process from abuse and to ensure that it is not used as a mechanism simply to challenge an action with which someone disagrees. The reconsideration process is for situations where the staff acted in contravention of established policies (when the Request is based on staff action or inaction).

The Request was received on 4 September 2013, which makes it timely under the Bylaws. Bylaws, Art. IV, § 2.5.

II. Background

A. The New gTLD Objection Procedure

The New gTLD Program includes an objection procedure pursuant to which objections to applications for new gTLDs are submitted to an independent dispute resolution service provider ("DRSP"). The objection procedures are set out in Module 3 of the Applicant Guidebook ("Guidebook") (http://newgtlds.icann.org/en/applicants/agb/objection-procedures-04jun12-en.pdf) and the New gTLD Dispute Resolution Procedure (the "Procedure") attached thereto.

As detailed in the Request, Commercial Connect filed a string confusion objection with the ICDR asserting that an "applied-for string is confusingly similar to an existing TLD or to another applied-for gTLD string in the same round of applications." (Guidebook, Section 3.3.2.1; Procedure, Art. 2(e).)[1]

To initiate a dispute resolution proceeding, an objection must comply with the procedures set out in Articles 5-8 of the Procedure. This includes the requirement that objections be filed with the appropriate DRSP with copies to the gTLD applicant against which the objection is

[1] Where a new gTLD applicant successfully asserts string confusion with another applicant, the two strings are placed in a "contention set" to be resolved per the String Contention Procedures in Module 4 of the Applicant Guidebook. (Guidebook, Section 3.2.2.1.)

being raised. (Procedure, Art. 7 (b).) Before an objection is registered for processing, the DRSP conducts an administrative review to verify compliance with Articles 5-8 of the Procedure and the applicable DRSP Rules, and informs the objector, the applicant and ICANN of the result of its administrative review. (Procedure, Art. 9(a).)

A Panel of appropriately qualified expert(s) appointed by the designated DRSP will consider an objection that has been registered for processing and for which a response has been submitted. (Guidebook, Section 3.4.4.) Each Panel will determine whether the objector has standing to object and will use appropriate general principles/standards to evaluate the merits of each objection. The Panel must apply the standards that have been defined in Section 3.5 of the Applicant Guidebook for each type of objection. (Guidebook, Section 3.5; Procedure, Art. 20.)

The Panel's final determination will include a summary of the dispute and findings, identify the prevailing party, and provide the reasoning upon which the expert determination is based. (Guidebook, Section 3.4.6; Procedure, Art. 21.) The findings of the Panel will be considered an expert determination and advice that ICANN will accept within the dispute resolution process. (Guidebook, Section 3.4.6.)

B. Commercial Connect's Objection to Amazon's Applied-for String

Amazon is an applicant for the Japanese translation of "online shopping." Commercial Connect objected to Amazon's Applied-for String, asserting that it was confusingly similar to Commercial Connect's Applied-for String ("Commercial Connect's Objection"); Amazon filed a response. The ICDR's appointed Panelist (the "Panel") rendered an "Expert Determination" on 21 August 2013. The Panel determined that Commercial Connect had standing to object as an applicant for .SHOP, and rejected claims by Amazon that Commercial Connect did not properly serve its objection on Amazon. (Expert Determination, Pg. 3.) Based on the evidence and the parties' submissions, the Panel sustained Commercial Connect's Objection on the grounds that

Commercial Connect's Applied-for String is confusingly similar to Amazon's Applied-for String (Expert Determination, Pgs. 4-5.)

Although Commercial Connect's Objection was determined by a third-party DRSP, ICANN has determined that the Reconsideration process can properly be invoked for challenges of the third-party DRSP's decisions where it can be stated that either the DRSP failed to follow the established policies or processes in reaching the decision, or that ICANN staff failed to follow its policies or processes in accepting that decision. See BGC Recommendation on Reconsideration Request 13-5 at http://www.icann.org/en/groups/board/governance/reconsideration/recommendation-booking-01aug13- en.doc.

III. Analysis of Amazon's Request for Reconsideration

Amazon seeks reconsideration of the Panel's decision sustaining Commercial Connect's Objection. More specifically, Amazon requests that ICANN disregard the Panel's Expert Determination, and either instruct a new Panel to review Commercial Connect's string confusion objection with the standards set forth in the Applicant Guidebook or make the necessary accommodations to allow for a "non-discriminatory application of ICANN standards, policies and procedures." (Request, Section 9.)

A. The ICDR and the Panel's Acceptance of Commercial Connect's Objection Does Not Demonstrate A Process Violation

In its Request, Amazon contends that the ICDR and the Panel failed to follow the established process for registering and/or accepting Commercial Connect's Objection. Specifically, Amazon claims that Commercial Connect failed to provide Amazon with a copy of the objection as required by Article 7(b) of the Procedure, and that this failure is a deficiency that cannot be rectified under the Procedure. (Request, Pgs. 8-10; Annex 4 to Request (19 April 2013

Letter from Amazon to the ICDR).) Pursuant to Article 9(d) of the Procedure, which provides for dismissal of objections that do not comply with Articles 5-8 of the Procedure and where deficiencies have not been cured in the specified timeframe, Amazon contends that the ICDR should have dismissed Commercial Connect's Objection and closed the proceedings. (Request, Pg. 10; Annex 4 to Request (19 April 2013 Letter from Amazon to the ICDR); Annex 5 to Request (24 April 2013 Letter from Amazon to the ICDR).)

The Procedure makes clear that the ICDR was required to perform an administrative review of Commercial Connect's Objection, and to inform the objector, applicant, and ICANN of the results of its administrative review. (Procedure, Art. 9(a).) The available record shows that the ICDR complied with its obligations in this regard.

Amazon claims it received an email from the ICDR acknowledging receipt of Commercial Connect's Objection on 18 March 2013 – though, according to Amazon, that email did not specifically identify the string that was the subject of Commercial Connect's Objection. (Request, Pg. 9.) Soon thereafter, on 4 April 2013, Amazon states that it also received an email from the ICDR requesting that Commercial Connect provide "proof or statement" that copies of the objection were sent to Amazon. (Request, Pg. 9.)

Contrary to Amazon's assertions, failure to provide an applicant with a copy of the objection as required by Article 7(b) is a deficiency that can be cured under the Procedure. Article 9(c) provides that if the DRSP finds that the objection does not comply with Articles 5-8 of the Procedure, the DRSP "shall have the discretion to request that any administrative deficiencies in the Objection be corrected within 5 days." (Procedure, Art. 9(c).) Accordingly, the ICDR's 4 April 2013 email, requesting Commercial Connect to cure the stated deficiency,

was consistent with the process established in the Procedure for the administrative review of objections.

According to the Request, subsequent to the ICDR's 4 April 2013 correspondence to Commercial Connect requesting it to provide proof of service of the objection on Amazon, Amazon claims it received the following documents from Commercial Connect:

> (i) A copy of Commercial Connect's application for .SHOP;
>
> (ii) A "online filing demand for arbitration/mediation form" that refers to Amazon's Applied-for String;
>
> (iii) A "dispute resolution objection" with blank unfilled spaces where the string applicant and relevant string would otherwise appear;
>
> (iv) a copy of Commercial Connect's 11 October 2000 applications for .MALL, .SHOP, and .SVC; and
>
> (v) A copy of a 5 April 2013 correspondence to the ICDR in which Commercial Connect certifies that copies of the complaint and attachments were sent via email to all respondents and to ICANN.

(Request, Pgs. 9-10.) From the above, although particular entries may have been left blank, it appears that Amazon did in fact receive a copy of the objection. Based on the 5 April 2013 correspondence from Commercial Connect certifying that copies were provided to Amazon, ICDR concluded that Commercial Connect corrected the deficiency within one day of being notified, well within the five-day period allowed under the Procedure.

In its 11 April 2013 correspondence to the parties, the ICDR indicates that Commercial Connect's Objection would be registered for processing. The ICDR states that it conducted a further administrative review and noted that Commercial Connect's Objection, "after rectifying deficiencies previously set forth, now complies with Articles 5-8" of the Procedure. (Request, Pg. 8; Annex 3 to the Request (11 April 2013 Letter from the ICDR).) The ICDR thereafter sent a letter on 17 April 2013 providing Amazon with notification of its thirty-day period to file a

response to Commercial Connect's Objection. (See Annex 5 to Request (24 April 2013 Letter from Amazon to the ICDR.) Based on the above, Amazon lacks support for the claim that it did not receive notification that an objection had been filed against it and that Amazon was required to respond in order to avoid default.

Moreover, notwithstanding Amazon's own acknowledgment that it received a copy of the "dispute resolution objection" (albeit with certain entries left blank), the ICDR invited Amazon to raise the alleged procedural defects in Amazon's response to Commercial Connect's Objection. (Annex 6 to Request (3 May 2013 Email from ICDR to Amazon).) The Panel, having received and considered Amazon's claims of procedural deficiencies, rejected Amazon's claims indicating there was no actual prejudice to Amazon. The Panel noted:

> [I]t appears that Applicant received actual notice of the Objection, and has been accorded a full and fair opportunity to be heard on its application. Applicant also has not shown that it was prejudiced by any alleged defects in the filing of the Objection. (Expert Determination, Pg. 3.)

In view of the above, the ICDR's acceptance of Commercial Connect's Objection for decision does not demonstrate a policy or process violation, and Amazon has not demonstrated otherwise.

B. Amazon's Claim That The Panel Applied The Wrong Standard Is Unsupported And Is Not A Basis For Reconsideration.

A separate ground of Amazon's Request is its contention that the Panel applied the wrong standard in evaluating Commercial Connect's Objection. Specifically, Amazon claims that the Panel applied a standard that considered "the use of essentially the same word in two different languages [as] sufficient to cause string confusion among the average, reasonable Internet user," and claims that such a standard would eliminate the need to evaluate translations of words on a case-by-case basis. (Response, Pg. 13.) Amazon further asserts that even if translations of essentially the same word were sufficient to cause string confusion, an English translation of

Amazon's Applied-for String is not the same as Commercial Connect's Applied-for String, and they have different meanings. (Request, Pg. 13.) Amazon relies on another ICDR Panel's determination, finding that Top Level Domain Holdings Limited's ("TLDH") application for the Chinese translation of "shop" ("TLDH's Applied-for String) is not confusingly similar to Commercial Connect's application for .SHOP,[2] as evidence that the Panel applied the wrong standard. (Request, Pg. 14; Annex 2 to Request.) Amazon concludes that "in the impossible event" that ICANN accepts the Panel's determination, the acceptance would "create inequitable and disparate treatment without justified cause" in violation of Article II, Section 3, of ICANN's Bylaws. (Request, Pg. 7)

In the context of the New gTLD Program, the Reconsideration process does not call for the BGC to perform a substantive review of DRSP Panel decisions; Reconsideration is for the consideration of process- or policy-related complaints. The Reconsideration process will not be used in this instance to evaluate the Panel's substantive conclusion that Commercial Connect's Applied-for String and Amazon's Applied-for String are confusingly similar. Rather, any review will be limited to whether the Panel violated any established policy or process, which Amazon claims was done by the Panel not applying the correct standard in reaching its determination.

The Panel referenced and correctly stated the applicable standard more than once in its evaluation of Commercial Connect's objection.[3] (Expert Determination,

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[2] *Commercial Connect, LLC v. Top Level Domain Holdings Ltd.,* Case No. 50 504 T 00258 13, *available at* http://images.go.adr.org/Web/AmericanArbitrationAssociation/%7B772b1de3-e337-4643-b310-f87daa172a2e%7D_50_504_T_00258_13_determination.pdf (hereinafter "TLDH Expert Determination".)

[3] In what appears to be a typographical error, at one point, the Panel incorrectly cites to Section 3.4.1 of the Applicant Guidebook instead of Section 3.5.1, but the Panel nonetheless correctly quotes from the applicable standard.

Pgs. 2, 4.) The relevant standard for evaluating a string confusion objection is set out in Section 3.5.1 of the Applicant Guidebook:

> A DRSP Panel hearing a string confusion objection will consider whether the applied-for gTLD string is likely to result in string confusion. String confusion exists where a string so nearly resembles another that it likely to deceive or cause confusion. For a likelihood of confusion to exist, it must be probable, not merely possible that confusion will arise in the mind of the average, reasonable Internet user. Mere association, in the sense that the string brings another string to mind, is insufficient to find a likelihood of confusion.

The Applicant Guidebook also makes clear that a string confusion objection is not limited to visual similarity, but rather, may be based on any type of similarity, including aural similarity or similarity in meaning. (Guidebook, Section 2.2.1.1.3.)

Based on the parties' contentions, it appears that the Panel concentrated on the meanings of the two strings. The Panel determined that there were three distinct, but related issues that needed to be examined in assessing Commercial Connect's Objection:

> (i) Whether the root of the word in a string should be accorded protection from usage of variations of the root word, including participles (*e.g.,* several variations for the root word "shop" in the English language)?
>
> (ii) Whether the addition of the word "online" before the word "shopping" makes the two strings distinct as to avoid string confusion?
>
> (iii) Whether the use of Japanese characters and languages for the same word avoids the possibility of confusion?

(Expert Determination, Pg. 4.)

In evaluating these three issues, the Panel found that the concurrent use of "shopping", the participle of the root word "shop," in a string will result in probable confusion by the average, reasonable Internet user, because the two strings have virtually the same sound, meaning, look

and feel.[4] (Expert Determination, Pgs. 4-5.) The Panel likewise found that the addition of the word "online" before "shopping" does not add sufficient uniqueness to the string because the meaning of the strings arises from the use of the root word "shop" and not the modifier "online." (Expert Determination, Pg. 5.) The Panel was also not persuaded that simply using a foreign language or foreign characters avoided the possibility of confusion. The Panel determined that many Internet users speak more than one language, including English, and that the use of essentially the same word in two different languages is sufficient to cause string confusion among the average, reasonable Internet user. (Expert Determination, Pg. 5.)

The Panel's focus on the meanings of the strings is consistent with the standard for evaluating string confusion objections. A likelihood of confusion can be established with any type of similarity, including similarity of meaning. (Guidebook, Section 2.2.1.1.3.) To challenge this proposition, Amazon relies on the analysis of the public comment to version 2 of the Applicant Guidebook. (Request, Pg. 11.) Amazon asserts that the public comment makes clear that the standard for establishing string confusion is a "high standard, not intended to hobble competition." (Request, Pg. 11.) In response to these public comments, which included the suggestion that string confusion objections not be allowed for cases of similar meaning, ICANN specifically addressed and clarified the proper scope of objections:

> The new gTLD implementation follows the GNSO recommendation that implies that string confusion should be tested in all ways: visual, meaning and aural confusion. After all, if harm to consumers would result due to the introduction of

[4] Amazon claims that the word "shopping" is not used and does not appear in either of the strings at issue, and therefore, the Panel improperly compared Amazon's Applied-for String with the "shopping" string. (Request, Pg. 14-15.) Amazon's argument lacks credibility in that Amazon's proposed string is the Japanese translation for "online shopping"; thus, "shopping" is contained within the challenged string. Further, the Panel is permitted under the Procedure to "refer to and base is findings upon the statements and documents submitted and any rules or principles that it determines to be applicable." (Procedure, Art. 20(b).)

> two TLDs into the root zone because they sounded but did not look alike, then both TLDs should not be delegated.

(New gTLD Draft Applicant Guidebook-Version 2: Analysis of Public Comment, Pg. 149 *available at* https://archive.icann.org/.../agv2-analysis-public-comments-31may09-en.pdf.) Any claim by Amazon that the Panel must limit itself to a standard of aural or visual similarity is not supported by available documentation, and does not support a finding that the Panel violated any established policy or procedure.

Moreover, the Panel did not automatically conclude that there was a likelihood of confusion between Commercial Connect's Applied-for String and Amazon's Applied-for String as Amazon contends. To the contrary, it appears that the Panel conducted a detailed and comprehensive analysis of the issues before reaching its determination.

Amazon further relies on another ICDR Panel's determination, finding that TLDH's Applied-for String is not confusingly similar to Commercial Connect's Applied-for String, as evidence that the Panel applied the wrong standard.[5] (Request, Pg. 14.) The fact that these two ICDR Panels evaluated potentially similar objections yet came to different conclusions does not mean that one Panel applied the wrong standard. On a procedural level, each expert Panel generally rests its determination on the materials presented to it by the parties to that particular objection, and the objector bears the burden of proof. Two Panels confronting nearly identical issues could rightfully reach different determinations, based on the strength of the materials

[5] On 5 September 2013, Commercial Connect separately sought reconsideration of ICANN staff's acceptance of the TLDH Expert Determination. (Request 13-10, available at http://www.icann.org/en/groups/board/governance/reconsideration/request-commercial-connect-.) Request 13-10 is based primarily on a claim that the Panel dismissing Commercial Connect's objection to TLDH's Applied-for String and the Panel sustaining Commercial Connect's objection to Amazon's Applied-for String inconsistently applied the standard for evaluating string confusion objections. For the same reasons as stated herein, Commercial Connect's claims are unsupported and do not support Reconsideration.

presented. While Commercial Connect was the objector in both proceedings cited by Amazon, the objections were rebutted by different applicants. Thus, the Panels reached different determinations at least in part because the materials submitted by each applicant (Amazon and TLDH) in defense of its proposed string were different.

For instance, in dismissing Commercial Connect's objection to TLDH's Applied-for String, the Panel determined that Commercial Connect failed to meet its burden of proof that the two strings (Commercial Connect's Applied-for String and TLDH's Applied-for String) would cause probable confusion in the mind of the average, reasonable Internet user. (TLDH Expert Determination, Pg. 7.) The Panel, on the other hand, in sustaining Commercial Connect's objection, found that Amazon's arguments:

> [d]o not appear to be consistent with the applicable standard of review, the apparent purpose or goal of implementing gTLDs, or the purpose or goal in allowing a string confusion objection.

(Amazon Expert Determination, Pg. 5.) Overall, the Panel found that Amazon's arguments were "not persuasive." (Expert Determination, Pg. 5.)

Moreover, according to the TLDH Expert Determination, TLDH asserted that Commercial Connect's Applied-for String and TLDH's Applied-for String are aimed at distinct markets. TLDH claimed that Commercial Connect's Applied-for String will be marketed to "the global ecosystem of e-commerce" with a "strict verification process where Commercial Connect researches the identity of that applicant and [the] business." (TLDH Expert Determination, Pg. 5.) In contrast, TLDH's Applied-for String is directed to "Chinese-language vendors" and requires no such pre-verification. TLDH noted that these markets may overlap to some extent, but one is "global and restricted," while the other is "language-specific and open." (TLDH Expert Determination, Pg. 5.)

The Panel, dismissing Commercial Connect's objection to TLDH's Applied-for String, found that the similarity in meaning between the two strings is apparent only to individuals who read and understand both Chinese and English. Relying on the intended markets for the strings, the Panel determined:

> While there is some potential for overlap between these two markets, they are largely distinct. Therefore, there is little likelihood that a bilingual user would be deceived or confused.

(TLDH Expert Determination, Pg. 7.) The Panel therefore dismissed Commercial Connect's objection not because it concluded that translations of essentially the same word are insufficient to cause string confusion – as Amazon suggests – but because TLDH presented convincing evidence that there was little likelihood of confusion between Commercial Connect's Applied-for String and TLDH's Applied-for String.

Further, the standard guiding the Panels involves some degree of subjectivity. While Amazon may disagree with the Panel's finding, Reconsideration is not available as a mechanism to re-try the substantive determination of the Panel. Amazon's claims that the Panel applied the wrong standard are unsupported and therefore, do not support Reconsideration.

IV. Recommendation and Conclusion

Based on the foregoing, the BGC concludes that Amazon has not stated proper grounds for reconsideration, and we therefore recommend that Amazon's Request be denied without further consideration.

As there is no indication that either the ICDR or the Panel violated any policy or process in accepting and sustaining Commercial Connect's Objection, this Request should not proceed. If Amazon thinks that it has somehow been treated unfairly in the process, and the Board (through the NGPC) adopts this Recommendation, Amazon is free to ask the Ombudsman to review this matter.

Though there are no grounds for reconsideration presented in this matter, following additional discussion of the matter the BGC recommended that staff provide a report to the NGPC, for delivery in 30 days, setting out options for dealing with the situation raised within this Request, namely the differing outcomes of the String Confusion Objection Dispute Resolution process in similar disputes involving Amazon's Applied-for String and TLDH's Applied-for String. In addition, the BGC suggested that the strings not proceed to contracting prior to staff's report being produced and considered by the NGPC.

Reconsideration Request

Union of Orthodox Jewish Congregations of America, *et al.*

Annex E

Kosher Marketing Assets LLC,
gTLD Application No. 1-1013-67544, KOSHER

New gTLD Application Submitted to ICANN by: Kosher Marketing Assets LLC

String: KOSHER

Originally Posted: 13 June 2012

Application ID: 1-1013-67544

Applicant Information

1. Full legal name

Kosher Marketing Assets LLC

2. Address of the principal place of business

Contact Information Redacted

3. Phone number

Contact Information Redacted

4. Fax number

Contact Information Redacted

5. If applicable, website or URL

Primary Contact

6(a). Name

John Kane

6(b). Title

Vice President, Corporate Services

6(c). Address

6(d). Phone Number

Contact Information Redacted

6(e). Fax Number

6(f). Email Address

Contact Information Redacted

Secondary Contact

7(a). Name

Alex Howerton

7(b). Title

Account Manager

7(c). Address

7(d). Phone Number

Contact Information Redacted

7(e). Fax Number

7(f). Email Address

Contact Information Redacted

Proof of Legal Establishment

8(a). Legal form of the Applicant

Limited Liability Company

8(b). State the specific national or other jursidiction that defines the type of entity identified in 8(a).

New York State

8(c). Attach evidence of the applicant's establishment.

Attachments are not displayed on this form.

9(a). If applying company is publicly traded, provide the exchange and symbol.

9(b). If the applying entity is a subsidiary, provide the parent company.

9(c). If the applying entity is a joint venture, list all joint venture partners.

Applicant Background

11(a). Name(s) and position(s) of all directors

11(b). Name(s) and position(s) of all officers and partners

Jesse Delaney Hornbacher	Manager

11(c). Name(s) and position(s) of all shareholders holding at least 15% of shares

Committee For the Advancement of Torah	Not Applicable

11(d). For an applying entity that does not have directors, officers, partners, or shareholders: Name(s) and position(s) of all individuals having legal or executive responsibility

Applied-for gTLD string

13. Provide the applied-for gTLD string. If an IDN, provide the U-label.

KOSHER

14(a). If an IDN, provide the A-label (beginning with "xn--").

14(b). If an IDN, provide the meaning or restatement of the string in English, that is, a description of the literal meaning of the string in the opinion of the applicant.

14(c). If an IDN, provide the language of the label (in English).

14(c). If an IDN, provide the language of the label (as referenced by ISO-639-1).

14(d). If an IDN, provide the script of the label (in English).

14(d). If an IDN, provide the script of the label (as referenced by ISO 15924).

14(e). If an IDN, list all code points contained in the U-label according to Unicode form.

15(a). If an IDN, Attach IDN Tables for the proposed registry.

Attachments are not displayed on this form.

15(b). Describe the process used for development of the IDN tables submitted, including consultations and sources used.

15(c). List any variant strings to the applied-for gTLD string according to the relevant IDN tables.

16. Describe the applicant's efforts to ensure that there are no known operational or rendering problems concerning the applied-for gTLD string. If such issues are known, describe steps that will be taken to mitigate these issues in software and other applications.

Kosher Marketing Assets, supported by Afilias, the back-end provider of registry services, anticipates the introduction of this TLD without operational or rendering problems. Based on a decade of experience launching and operating new TLDs, Afilias, the back-end provider of registry services for this TLD, is confident the launch and operation of this TLD presents no known challenges. The rationale for this opinion includes:
• The string is not complex and is represented in standard ASCII characters and follows relevant technical, operational and policy standards;
• The string length is within lengths currently supported in the root and by ubiquitous Internet programs such as web browsers and mail applications;
• There are no new standards required for the introduction of this TLD;
• No onerous requirements are being made on registrars, registrants or Internet users, and;
• The existing secure, stable and reliable Afilias SRS, DNS, WHOIS and supporting systems and staff are amply provisioned and prepared to meet the needs of this TLD.

17. (OPTIONAL) Provide a representation of the label according to the International Phonetic Alphabet (http://www.langsci.ucl.ac.uk/ipa/).

Mission/Purpose

18(a). Describe the mission/purpose of your proposed gTLD.

The mission of the .KOSHER TLD is to promote Kosher food certification in general, and OK Kosher Certification and its clients in particular. All registrations in .KOSHER will be managed by Kosher Marketing Assets, LLC on behalf of OK Kosher Certification. Only those clients who pass rigorous certification will be granted use of domains under this TLD. Given existing data on certification and a conservative forecast for adoption of .KOSHER domains, we forecast having approximately 636 Domains Under Management (DUMs) by the third year of operation. Our financial responses in #45 though #50 go into detail on our funding, cost and revenue projections.

18(b). How do you expect that your proposed gTLD will benefit registrants, Internet users, and others?

i. General goals
The .KOSHER TLD and all domains under it will be used to provide reliable information about Kosher certification, as an industry and as concerns Kosher certified products.

Kosher Marketing Assets, LLC will promote awareness of the TLD through press releases and direct communications with customers of OK Kosher Certification. We anticipate that the companies and organizations who manage .KOSHER domains to drive the promotion and awareness of the TLD and its constituent domains, and customers marketing their brand on the resulting websites will enhance market awareness.

ii. How .KOSHER adds to the current space
Currently there is a plethora of websites representing many different aspects of the kosher certification process and resources. The .KOSHER TLD will specialize in Kosher Certification, providing an information resource which clearly expresses its specialty in an area where interested parties have heretofore struggled to find accurate and concise information. In short, .KOSHER will add content-specific, authenticated domains to the current namespace.

iii. User experience goals
.KOSHER TLD aspires to become the premiere reliable source of information on the Internet about everything to do with Kosher certification.

Domains under this TLD will only be made available to companies that have been personally visited, inspected, and are known to be using the domain to promote Kosher Certification. Kosher Marketing Assets, LLC will also create several informative websites explaining this and the details of Kosher certification, building confidence among end users about the accuracy and reliability of information available under the TLD. Thus, end-users will have confidence the information they view in a .KOSHER website or emails from the respective domain are about legitimate, verified Kosher products and establishments.

iv. Registry policies
All domains under this TLD will be managed by Kosher Marketing Assets LLC on behalf of OK Kosher Certification, so they will only be made available to companies that have been personally visited, inspected, and are known to intend to use a domain to promote Kosher Certification.

The mission and purpose of this TLD is to enhance and complement existing brand strategies of Kosher Marketing Assets and present the organization in a consistent manner. As such, Kosher Marketing Assets intends to limit registration of domains either for its exclusive use or for use by closely affiliated organizations in a manner that contributes to the purpose of this TLD. Kosher Marketing Assets also intends to govern the domain names registered to limit confusion and enhance user experience. To accomplish these objectives, Kosher Marketing Assets may be the sole registrant of domains in the TLD. However, due consideration has been made to all aspects of registry operations including the functions and policies defined below.

The roll-out of our TLD is anticipated to feature the following phases:
• Reservation of reserved names and premium names, which will be distributed through special mechanisms (detailed below).

• Sunrise — the required period for trademark owners to secure their domains before availability to the general public. This phase will feature applications for domain strings, verification of trademarks via Trademark Clearinghouse and a trademark verification agent, and a Trademark Claims Service.
• General Availability period — real-time registrations, made on a first-come first-served basis. Trademark Claims Service will be in use at least for the first 60 days after General Availability applications open.

The registration of domain names in the .KOSHER TLD will follow the standard practices, procedures and policies Afilias, the back-end provider of registry services, currently has in place. This includes the following:
• Domain registration policies (for example, grace periods, transfer policies, etc.) are defined in response #27.
• Abuse prevention tools and policies, for example, measures to promote WHOIS accuracy and efforts to reduce phishing and pharming, are discussed in detail in our response #28.
• Rights protection mechanisms and dispute resolution mechanism policies (for example, UDRP, URS) are detailed in #29.

Other detailed policies for this domain include policies for reserved names.

Reserved names

Registry reserved names

We will reserve the following classes of domain names, which will not be made generally available to registrants via the Sunrise or subsequent periods:
• All of the reserved names required in Specification 5 of the new gTLD Registry Agreement;
• The geographic names required in Specification 5 of the new gTLD Registry Agreement, and may be released to the extent that Registry Operator reaches agreement with the government and country-code manager;
• The registry operator's own name and variations thereof, and registry operations names (such as registry.tld, and www.tld), for internal use;
• Names related to ICANN and Internet standards bodies (iana.tld, ietf.tld, w3c.tld, etc.), and may be released to the extent that Registry Operator reaches agreement with ICANN.

The list of reserved names will be published publicly before the Sunrise period begins, so that registrars and potential registrants will know which names have been set aside.

v. Privacy and confidential information protection

As per the New gTLD Registry Agreement, we will make domain contact data (and other fields) freely and publicly available via a Web-based WHOIS server. This default set of fields includes the mandatory publication of registrant data. Our Registry-Registrar Agreement will require that registrants consent to this publication.

We shall notify each of our registrars regarding the purposes for which data about any identified or identifiable natural person ("Personal Data") submitted to the Registry Operator by such registrar is collected and used, and the intended recipients (or categories of recipients) of such Personal Data (the data in question is essentially the registrant and contact data required to be published in the WHOIS). We will require each registrar to obtain the consent of each registrant in the TLD for the collection and use of such Personal Data. The policies will be posted publicly on our TLD web site. As the registry operator, we shall not use or authorize the use of Personal Data in any way that is incompatible with the notice provided to registrars.

Our privacy and data use policies are as follows:
• As registry operator, we do not plan on selling bulk WHOIS data. We will not sell contact data in any way. We will not allow, enable, or otherwise support the transmission by e-mail, telephone, or facsimile of mass unsolicited, commercial advertising or solicitations.
• We may use registration data in the aggregate for marketing purposes.
• DNS query data will never be sold in a way that is personally identifiable.
• We may from time to time use the demographic data collected for statistical analysis, provided that this analysis will not disclose individual Personal Data and provided that such use is compatible with the notice provided to registrars regarding the purpose and procedures for such use.

As the registry operator we shall take significant steps to protect Personal Data collected from registrars from loss, misuse, unauthorized disclosure, alteration, or destruction. In our responses to Question 30 ("Security Policy") and Question 38 ("Escrow") we detail the security policies and procedures we will use to protect the registry system and the data contained therein from unauthorized access and loss.

Please see our response to Question 26 ("WHOIS") regarding "searchable WHOIS" and rate-limiting. That section contains details about how we will limit the mining of WHOIS data by spammers and other parties who abuse access to the WHOIS.

In order to acquire and maintain accreditation for our TLD, we will require registrars to adhere to certain information technology policies designed to help protect registrant data. These will include standards for access to the registry system and password management protocols. Our response to Question 30, "Security Policy" provides details of implementation.

We will allow the use of proxy and privacy services, which can protect the personal data of registrants from spammers and other parties that mine zone files and WHOIS data. We are aware that there are parties who may use privacy services to protect their free speech rights, or to avoid religious or political persecution.

18(c). What operating rules will you adopt to eliminate or minimize social costs?

Kosher Marketing Assets, supported by Afilias, the back-end provider of registry services, has adopted the above-mentioned and other policies to ensure fair and equitable access and cost structures to the Internet community, including:
• no new burdens placed on the Internet community to resolve name disputes
• utilization of standard registration practices and policies (as detailed in responses to questions 27, 28, 29)
• protection of trademarks at launch and on-going operations (as detailed in the response to question 29)
• fair and reasonable wholesale prices
• fair and equitable treatment of registrars

As per the ICANN Registry Agreement, we will use only ICANN-accredited registrars, and will provide non-discriminatory access to registry services to those registrars.

Pricing Policies and Commitments

There will be no charge for domain names at General Availability. Applicant reserves the right to reduce this pricing for promotional purposes in a manner available to all accredited registrars. Registry Operator reserves the right to work with ICANN to initiate an increase in the wholesale price of domains if required. Registry Operator will provide reasonable notice to the registrars of any approved price increase.

Community-based Designation

19. Is the application for a community-based TLD?

No

20(a). Provide the name and full description of the community that the applicant is committing to serve.

20(b). Explain the applicant's relationship to the community identified in 20(a).

20(c). Provide a description of the community-based purpose of the applied-for gTLD.

20(d). Explain the relationship between the applied-for gTLD string and the community identified in 20(a).

20(e). Provide a description of the applicant's intended registration policies in support of the community-based purpose of the applied-for gTLD.

20(f). Attach any written endorsements from institutions/groups representative of the community identified in 20(a).

Attachments are not displayed on this form.

Geographic Names

21(a). Is the application for a geographic name?

No

Protection of Geographic Names

22. Describe proposed measures for protection of geographic names at the second and other levels in the applied-for gTLD.

We will protect names with national or geographic significance by reserving the country and territory names at the second level and at all other levels within the TLD, as per the requirements in the New TLD Registry Agreement (Specification 5, paragraph 5).

We will employ a series of rules to translate the geographical names required to be reserved by Specification 5, paragraph 5 to a form consistent with the "host names" format used in domain names.

Considering the Governmental Advisory Committee (GAC) advice "Principles regarding new gTLDs", these domains will be blocked, at no cost to governments, public authorities, or IGOs, before the TLD is introduced (Sunrise), so that no parties may apply for them. We will publish a list of these names before Sunrise, so our registrars and their prospective applicants can be aware that these names are reserved.
We will define a procedure so that governments can request the above reserved domain(s) if they would like to take possession of them. This procedure will be based on existing methodology developed for the release of country names in the .INFO TLD. For example, we will require a written request from the country's GAC representative, or a written request from the country's relevant Ministry or Department. We will allow the designated beneficiary (the Registrant) to register the name, with an accredited Afilias Registrar, possibly using an authorization number transmitted directly to the designated beneficiary in the country concerned.

As defined by Specification 5, paragraph 5, such geographic domains may be released to the extent that Registry Operator reaches agreement with the applicable government(s). Registry operator will work with respective GAC representatives of the country's relevant Ministry of Department to obtain their

release of the names to the Registry Operator.

If internationalized domains names (IDNs) are introduced in the TLD in the future, we will also reserve the IDN versions of the country names in the relevant script (s) before IDNs become available to the public. If we find it advisable and practical, we will confer with relevant language authorities so that we can reserve the IDN domains properly along with their variants.

Regarding GAC advice regarding second-level domains not specified via Specification 5, paragraph 5: All domains awarded to registrants are subject to the Uniform Domain Name Dispute Resolution Policy (UDRP), and to any properly-situated court proceeding. We will ensure appropriate procedures to allow governments, public authorities or IGO's to challenge abuses of names with national or geographic significance at the second level. In its registry-registrar agreement, and flowing down to registrar-registrant agreements, the registry operator will institute a provision to suspend domains names in the event of a dispute. We may exercise that right in the case of a dispute over a geographic name.

Registry Services

23. Provide name and full description of all the Registry Services to be provided.

Throughout the technical portion (#23 - #44) of this application, answers are provided directly from Afilias, the back-end provider of registry services for this TLD. Kosher Marketing Assets chose Afilias as its back-end provider because Afilias has more experience successfully applying to ICANN and launching new TLDs than any other provider. Afilias is the ICANN-contracted registry operator of the .INFO and .MOBI TLDs, and Afilias is the back-end registry services provider for other ICANN TLDs including .ORG, .ASIA, .AERO, and .XXX.

The mission and purpose of this TLD is to enhance and complement existing brand strategies of Kosher Marketing Assets and present the organization in a consistent manner. As such, Kosher Marketing Assets intends to limit registration of domains either for its exclusive use or for use by closely affiliated organizations in a manner that contributes to the purpose of this TLD. Kosher Marketing Assets also intends to govern the domain names registered to limit confusion and enhance user experience. To accomplish these objectives, Kosher Marketing Assets may be the sole registrant of domains in the TLD. However, due consideration has been made to all aspects of registry operations including the functions and policies defined below.

Registry services for this TLD will be performed by Afilias in the same responsible manner used to support 16 top level domains today. Afilias supports more ICANN-contracted TLDs (6) than any other provider currently. Afilias' primary corporate mission is to deliver secure, stable and reliable registry services. This TLD will utilize an existing, proven team and platform for registry services with:

• A stable and secure, state-of-the-art, EPP-based SRS with ample storage capacity, data security provisions and scalability that is proven with registrars who account for over 95% of all gTLD domain name registration activity (over 375 registrars);

• A reliable, 100% available DNS service (zone file generation, publication and dissemination) tested to withstand severe DDoS attacks and dramatic growth in Internet use;
• A WHOIS service that is flexible and standards compliant, with search capabilities to address both registrar and end-user needs; includes consideration for evolving standards, such as RESTful, or draft-kucherawy-wierds;
• Experience introducing IDNs in the following languages: German (DE), Spanish (ES), Polish (PL), Swedish (SV), Danish (DA), Hungarian (HU), Icelandic (IS), Latvian (LV), Lithuanian (LT), Korean (KO), Simplified and Traditional Chinese (CN), Devanagari (HI-DEVA), Russian (RU), Belarusian (BE), Ukrainian (UK), Bosnian (BS), Serbian (SR), Macedonian (MK) and Bulgarian (BG) across the TLDs it serves;
• A registry platform that is both IPv6 and DNSSEC enabled;
• An experienced, respected team of professionals active in standards development of innovative services such as DNSSEC and IDN support;
• Methods to limit domain abuse, remove outdated and inaccurate data, and ensure the integrity of the SRS, and;
• Customer support and reporting capabilities to meet financial and administrative needs, e.g., 24x7 call center support, integration support, billing, and daily, weekly, and monthly reporting.

Afilias will support this TLD in accordance with the specific policies and procedures of Kosher Marketing Assets (the "registry operator"), leveraging a proven registry infrastructure that is fully operational, staffed with professionals, massively provisioned, and immediately ready to launch and maintain this TLD.

The below response includes a description of the registry services to be provided for this TLD, additional services provided to support registry operations, and an overview of Afilias' approach to registry management.

Registry services to be provided

To support this TLD, Kosher Marketing Assets and Afilias will offer the following registry services, all in accordance with relevant technical standards and policies:
• Receipt of data from registrars concerning registration for domain names and nameservers, and provision to registrars of status information relating to the EPP -based domain services for registration, queries, updates, transfers, renewals, and other domain management functions. Please see our responses to questions #24, #25, and #27 for full details, which we request be incorporated here by reference.
• Operation of the registry DNS servers: The Afilias DNS system, run and managed by Afilias, is a massively provisioned DNS infrastructure that utilizes among the most sophisticated DNS architecture, hardware, software and redundant design created. Afilias' industry-leading system works in a seamless way to incorporate nameservers from any number of other secondary DNS service vendors. Please see our response to question #35 for full details, which we request be incorporated here by reference.
• Dissemination of TLD zone files: Afilias' distinctive architecture allows for real-time updates and maximum stability for zone file generation, publication and dissemination. Please see our response to question #34 for full details, which we request be incorporated here by reference.
• Dissemination of contact or other information concerning domain registrations: A port 43 WHOIS service with basic and expanded search capabilities with requisite measures to prevent abuse. Please see our response to question #26 for full details, which we request be incorporated here by reference.
• Internationalized Domain Names (IDNs): Ability to support all protocol valid Unicode characters at every level of the TLD, including alphabetic, ideographic and right-to-left scripts, in conformance with the ICANN IDN Guidelines. Please see our response to question #44 for full details, which we request be

incorporated here by reference.
• DNS Security Extensions (DNSSEC): A fully DNSSEC-enabled registry, with a stable and efficient means of signing and managing zones. This includes the ability to safeguard keys and manage keys completely. Please see our response to question #43 for full details, which we request be incorporated here by reference.

Each service will meet or exceed the contract service level agreement. All registry services for this TLD will be provided in a standards-compliant manner.

Security
Afilias addresses security in every significant aspect – physical, data and network as well as process. Afilias' approach to security permeates every aspect of the registry services provided. A dedicated security function exists within the company to continually identify existing and potential threats, and to put in place comprehensive mitigation plans for each identified threat. In addition, a rapid security response plan exists to respond comprehensively to unknown or unidentified threats. The specific threats and Afilias mitigation plans are defined in our response to question #30(b); please see that response for complete information. In short, Afilias is committed to ensuring the confidentiality, integrity, and availability of all information.

New registry services

No new registry services are planned for the launch of this TLD.

Additional services to support registry operation

Numerous supporting services and functions facilitate effective management of the TLD. These support services are also supported by Afilias, including:
• Customer support: 24x7 live phone and e-mail support for customers to address any access, update or other issues they may encounter. This includes assisting the customer identification of the problem as well as solving it. Customers include registrars and the registry operator, but not registrants except in unusual circumstances. Customers have access to a web-based portal for a rapid and transparent view of the status of pending issues.
• Financial services: billing and account reconciliation for all registry services according to pricing established in respective agreements.

Reporting is an important component of supporting registry operations. Afilias will provide reporting to the registry operator and registrars, and financial reporting.

Reporting provided to registry operator
Afilias provides an extensive suite of reports to the registry operator, including daily, weekly and monthly reports with data at the transaction level that enable the registry operator to track and reconcile at whatever level of detail preferred. Afilias provides the exact data required by ICANN in the required format to enable the registry operator to meet its technical reporting requirements to ICANN.

In addition, Afilias offers access to a data warehouse capability that will enable near real-time data to be available 24x7. This can be arranged by informing the Afilias Account Manager regarding who should have access. Afilias' data warehouse capability enables drill-down analytics all the way to the transaction level.

Reporting available to registrars
Afilias provides an extensive suite of reporting to registrars and has been doing so in an exemplary manner for more than ten years. Specifically, Afilias provides

daily, weekly and monthly reports with detail at the transaction level to enable registrars to track and reconcile at whatever level of detail they prefer.

Reports are provided in standard formats, facilitating import for use by virtually any registrar analytical tool. Registrar reports are available for download via a secure administrative interface. A given registrar will only have access to its own reports. These include the following:
• Daily Reports: Transaction Report, Billable Transactions Report, and Transfer Reports;
• Weekly: Domain Status and Nameserver Report, Weekly Nameserver Report, Domains Hosted by Nameserver Weekly Report, and;
• Monthly: Billing Report and Monthly Expiring Domains Report.

Weekly registrar reports are maintained for each registrar for four weeks. Weekly reports older than four weeks will be archived for a period of six months, after which they will be deleted.

Financial reporting

Registrar account balances are updated real-time when payments and withdrawals are posted to the registrars' accounts. In addition, the registrar account balances are updated as and when they perform billable transactions at the registry level.

Afilias provides Deposit/Withdrawal Reports that are updated periodically to reflect payments received or credits and withdrawals posted to the registrar accounts.

The following reports are also available: a) Daily Billable Transaction Report, containing details of all the billable transactions performed by all the registrars in the SRS, b) daily e-mail reports containing the number of domains in the registry and a summary of the number and types of billable transactions performed by the registrars, and c) registry operator versions of most registrar reports (for example, a daily Transfer Report that details all transfer activity between all of the registrars in the SRS).

Afilias approach to registry support

Afilias, the back end registry services provider for this TLD, is dedicated to managing the technical operations and support of this TLD in a secure, stable and reliable manner. Afilias has worked closely with Kosher Marketing Assets to review specific needs and objectives of this TLD. The resulting comprehensive plans are illustrated in technical responses #24-44, drafted by Afilias given Kosher Marketing Assets requirements. Afilias and Kosher Marketing Assets also worked together to provide financial responses for this application which demonstrate cost and technology consistent with the size and objectives of this TLD.

Afilias is the registry services provider for this and several other TLD applications. Over the past 11 years of providing services for gTLD and ccTLDs, Afilias has accumulated experience about resourcing levels necessary to provide high quality services with conformance to strict service requirements. Afilias currently supports over 20 million domain names, spread across 16 TLDs, with over 400 accredited registrars.

Since its founding, Afilias is focused on delivering secure, stable and reliable registry services. Several essential management and staff who designed and launched the Afilias registry in 2001 and expanded the number of TLDs supported, all while maintaining strict service levels over the past decade, are still in place today. This experiential continuity will endure for the implementation and on-going maintenance of this TLD. Afilias operates in a matrix structure, which allows its staff to be allocated to various critical functions in both a dedicated

and a shared manner. With a team of specialists and generalists, the Afilias project management methodology allows efficient and effective use of our staff in a focused way.

With over a decade of registry experience, Afilias has the depth and breadth of experience that ensure existing and new needs are addressed, all while meeting or exceeding service level requirements and customer expectations. This is evident in Afilias' participation in business, policy and technical organizations supporting registry and Internet technology within ICANN and related organizations. This allows Afilias to be at the forefront of security initiatives such as: DNSSEC, wherein Afilias worked with Public Interest Registry (PIR) to make the .ORG registry the first DNSSEC enabled gTLD and the largest TLD enabled at the time; in enhancing the Internet experience for users across the globe by leading development of IDNs; in pioneering the use of open-source technologies by its usage of PostgreSQL, and; being the first to offer near-real-time dissemination of DNS zone data.

The ability to observe tightening resources for critical functions and the capacity to add extra resources ahead of a threshold event are factors that Afilias is well versed in. Afilias' human resources team, along with well-established relationships with external organizations, enables it to fill both long-term and short-term resource needs expediently.

Afilias' growth from a few domains to serving 20 million domain names across 16 TLDs and 400 accredited registrars indicates that the relationship between the number of people required and the volume of domains supported is not linear. In other words, servicing 100 TLDs does not automatically require 6 times more staff than servicing 16 TLDs. Similarly, an increase in the number of domains under management does not require in a linear increase in resources. Afilias carefully tracks the relationship between resources deployed and domains to be serviced, and pro-actively reviews this metric in order to retain a safe margin of error. This enables Afilias to add, train and prepare new staff well in advance of the need, allowing consistent delivery of high quality services.

Demonstration of Technical & Operational Capability

24. Shared Registration System (SRS) Performance

Answers for this question (#24) are provided directly from Afilias, the back-end provider of registry services for this TLD.

THE RESPONSE FOR THIS QUESTION USES ANGLE BRACKETS (THE " 〈" and "〉 " CHARACTERS), WHICH ICANN INFORMS AFILIAS (CASE ID 11027) CANNOT BE PROPERLY RENDERED IN TAS DUE TO SECURITY CONCERNS. HENCE, THE FULL ANSWER TO THIS QUESTION IS ATTACHED AS A PDF FILE.

Afilias operates a state-of-the-art EPP-based Shared Registration System (SRS) that is secure, stable and reliable. The SRS is a critical component of registry operations that must balance the business requirements for the registry and its customers, such as numerous domain acquisition and management functions. The SRS meets or exceeds all ICANN requirements given that Afilias:
• Operates a secure, stable and reliable SRS which updates in real-time and in full compliance with Specification 6 of the new gTLD Registry Agreement;

• Is committed to continuously enhancing our SRS to meet existing and future needs;
• Currently exceeds contractual requirements and will perform in compliance with Specification 10 of the new gTLD Registry Agreement;
• Provides SRS functionality and staff, financial, and other resources to more than adequately meet the technical needs of this TLD, and;
• Manages the SRS with a team of experienced technical professionals who can seamlessly integrate this TLD into the Afilias registry platform and support the TLD in a secure, stable and reliable manner.

Description of operation of the SRS, including diagrams

Afilias' SRS provides the same advanced functionality as that used in the .INFO and .ORG registries, as well as the fourteen other TLDs currently supported by Afilias. The Afilias registry system is standards-compliant and utilizes proven technology, ensuring global familiarity for registrars, and it is protected by our massively provisioned infrastructure that mitigates the risk of disaster.

EPP functionality is described fully in our response to question #25; please consider those answers incorporated here by reference. An abbreviated list of Afilias SRS functionality includes:
• Domain registration: Afilias provides registration of names in the TLD, in both ASCII and IDN forms, to accredited registrars via EPP and a web-based administration tool.
• Domain renewal: Afilias provides services that allow registrars the ability to renew domains under sponsorship at any time. Further, the registry performs the automated renewal of all domain names at the expiration of their term, and allows registrars to rescind automatic renewals within a specified number of days after the transaction for a full refund.
• Transfer: Afilias provides efficient and automated procedures to facilitate the transfer of sponsorship of a domain name between accredited registrars. Further, the registry enables bulk transfers of domains under the provisions of the Registry-Registrar Agreement.
• RGP and restoring deleted domain registrations: Afilias provides support for the Redemption Grace Period (RGP) as needed, enabling the restoration of deleted registrations.
• Other grace periods and conformance with ICANN guidelines: Afilias provides support for other grace periods that are evolving as standard practice inside the ICANN community. In addition, the Afilias registry system supports the evolving ICANN guidelines on IDNs.

Afilias also supports the basic check, delete, and modify commands.

As required for all new gTLDs, Afilias provides "thick" registry system functionality. In this model, all key contact details for each domain are stored in the registry. This allows better access to domain data and provides uniformity in storing the information.

Afilias' SRS complies today and will continue to comply with global best practices including relevant RFCs, ICANN requirements, and this TLD's respective domain policies. With over a decade of experience, Afilias has fully documented and tested policies and procedures, and our highly skilled team members are active participants of the major relevant technology and standards organizations, so ICANN can be assured that SRS performance and compliance are met. Full details regarding the SRS system and network architecture are provided in responses to questions #31 and #32; please consider those answers incorporated here by reference.

SRS servers and software

All applications and databases for this TLD will run in a virtual environment currently hosted by a cluster of servers equipped with the latest Intel Westmere multi-core processors. (It is possible that by the time this application is evaluated and systems deployed, Westmere processors may no longer be the "latest"; the Afilias policy is to use the most advanced, stable technology available at the time of deployment.) The data for the registry will be stored on storage arrays of solid state drives shared over a fast storage area network. The virtual environment allows the infrastructure to easily scale both vertically and horizontally to cater to changing demand. It also facilitates effective utilization of system resources, thus reducing energy consumption and carbon footprint.

The network firewalls, routers and switches support all applications and servers. Hardware traffic shapers are used to enforce an equitable access policy for connections coming from registrars. The registry system accommodates both IPv4 and IPv6 addresses. Hardware load balancers accelerate TLS⁄SSL handshaking and distribute load among a pool of application servers.

Each of the servers and network devices are equipped with redundant, hot-swappable components and multiple connections to ancillary systems. Additionally, 24x7 support agreements with a four-hour response time at all our data centers guarantee replacement of failed parts in the shortest time possible.

Examples of current system and network devices used are:
• Servers: Cisco UCS B230 blade servers
• SAN storage arrays: IBM Storwize V7000 with Solid State Drives
• SAN switches: Brocade 5100
• Firewalls: Cisco ASA 5585-X
• Load balancers: F5 Big-IP 6900
• Traffic shapers: Procera PacketLogic PL8720
• Routers: Juniper MX40 3D
• Network switches: Cisco Nexus 7010, Nexus 5548, Nexus 2232

These system components are upgraded and updated as required, and have usage and performance thresholds which trigger upgrade review points. In each data center, there is a minimum of two of each network component, a minimum of 25 servers, and a minimum of two storage arrays.

Technical components of the SRS include the following items, continually checked and upgraded as needed: SRS, WHOIS, web admin tool, DNS, DNS distributor, reporting, invoicing tools, and deferred revenue system (as needed).

All hardware is massively provisioned to ensure stability under all forecast volumes from launch through "normal" operations of average daily and peak capacities. Each and every system application, server, storage and network device is continuously monitored by the Afilias Network Operations Center for performance and availability. The data gathered is used by dynamic predictive analysis tools in real-time to raise alerts for unusual resource demands. Should any volumes exceed established thresholds, a capacity planning review is instituted which will address the need for additions well in advance of their actual need.

SRS diagram and interconnectivity description

As with all core registry services, the SRS is run from a global cluster of registry system data centers, located in geographic centers with high Internet bandwidth, power, redundancy and availability. All of the registry systems will be run in a ⟨n+1⟩ setup, with a primary data center and a secondary data center. For detailed site information, please see our responses to questions #32 and #35. Registrars access the SRS in real-time using EPP.

A sample of the Afilias SRS technical and operational capabilities (displayed in Figure 24-a) include:
• Geographically diverse redundant registry systems;
• Load balancing implemented for all registry services (e.g. EPP, WHOIS, web admin) ensuring equal experience for all customers and easy horizontal scalability;
• Disaster Recovery Point objective for the registry is within one minute of the loss of the primary system;
• Detailed and tested contingency plan, in case of primary site failure, and;
• Daily reports, with secure access for confidentiality protection.

As evidenced in Figure 24-a, the SRS contains several components of the registry system. The interconnectivity ensures near-real-time distribution of the data throughout the registry infrastructure, timely backups, and up-to-date billing information.

The WHOIS servers are directly connected to the registry database and provide real-time responses to queries using the most up-to-date information present in the registry.

Committed DNS-related EPP objects in the database are made available to the DNS Distributor via a dedicated set of connections. The DNS Distributor extracts committed DNS-related EPP objects in real time and immediately inserts them into the zone for dissemination.

The Afilias system is architected such that read-only database connections are executed on database replicas and connections to the database master (where write-access is executed) are carefully protected to ensure high availability.

This interconnectivity is monitored, as is the entire registry system, according to the plans detailed in our response to question #42.

Synchronization scheme

Registry databases are synchronized both within the same data center and in the backup data center using a database application called Slony. For further details, please see the responses to questions #33 and #37. Slony replication of transactions from the publisher (master) database to its subscribers (replicas) works continuously to ensure the publisher and its subscribers remain synchronized. When the publisher database completes a transaction the Slony replication system ensures that each replica also processes the transaction. When there are no transactions to process, Slony “sleeps” until a transaction arrives or for one minute, whichever comes first. Slony “wakes up” each minute to confirm with the publisher that there has not been a transaction and thus ensures subscribers are synchronized and the replication time lag is minimized. The typical replication time lag between the publisher and subscribers depends on the topology of the replication cluster, specifically the location of the subscribers relative to the publisher. Subscribers located in the same data center as the publisher are typically updated within a couple of seconds, and subscribers located in a secondary data center are typically updated in less than ten seconds. This ensures real-time or near-real-time synchronization between all databases, and in the case where the secondary data center needs to be activated, it can be done with minimal disruption to registrars.

SRS SLA performance compliance

Afilias has a ten-year record of delivering on the demanding ICANN SLAs, and will

continue to provide secure, stable and reliable service in compliance with SLA requirements as specified in the new gTLD Registry Agreement, Specification 10, as presented in Figure 24-b.

The Afilias SRS currently handles over 200 million EPP transactions per month for just .INFO and .ORG. Overall, the Afilias SRS manages over 700 million EPP transactions per month for all TLDs under management.

Given this robust functionality, and more than a decade of experience supporting a thick TLD registry with a strong performance history, Afilias, on behalf of Kosher Marketing Assets, will meet or exceed the performance metrics in Specification 10 of the new gTLD Registry Agreement. The Afilias services and infrastructure are designed to scale both vertically and horizontally without any downtime to provide consistent performance as this TLD grows. The Afilias architecture is also massively provisioned to meet seasonal demands and marketing campaigns. Afilias' experience also gives high confidence in the ability to scale and grow registry operations for this TLD in a secure, stable and reliable manner.

SRS resourcing plans

Since its founding, Afilias is focused on delivering secure, stable and reliable registry services. Several essential management and staff who designed and launched the Afilias registry in 2001 and expanded the number of TLDs supported, all while maintaining strict service levels over the past decade, are still in place today. This experiential continuity will endure for the implementation and on-going maintenance of this TLD. Afilias operates in a matrix structure, which allows its staff to be allocated to various critical functions in both a dedicated and a shared manner. With a team of specialists and generalists, the Afilias project management methodology allows efficient and effective use of our staff in a focused way.

Over 100 Afilias team members contribute to the management of the SRS code and network that will support this TLD. The SRS team is composed of Software Engineers, Quality Assurance Analysts, Application Administrators, System Administrators, Storage Administrators, Network Administrators, Database Administrators, and Security Analysts located at three geographically separate Afilias facilities. The systems and services set up and administered by these team members are monitored 24x7 by skilled analysts at two NOCs located in Toronto, Ontario (Canada) and Horsham, Pennsylvania (USA). In addition to these team members, Afilias also utilizes trained project management staff to maintain various calendars, work breakdown schedules, utilization and resource schedules and other tools to support the technical and management staff. It is this team who will both deploy this TLD on the Afilias infrastructure, and maintain it. Together, the Afilias team has managed 11 registry transitions and six new TLD launches, which illustrate its ability to securely and reliably deliver regularly scheduled updates as well as a secure, stable and reliable SRS service for this TLD.

25. Extensible Provisioning Protocol (EPP)

Answers for this question (#25) are provided by Afilias, the back-end provider of registry services for this TLD.

THE RESPONSE FOR THIS QUESTION USES ANGLE BRACKETS (THE " 〈" and "〉 " CHARACTERS), WHICH ICANN INFORMS AFILIAS (CASE ID 11027) CANNOT BE PROPERLY RENDERED IN TAS DUE TO SECURITY CONCERNS. HENCE, THE FULL ANSWER TO THIS QUESTION IS ATTACHED AS A PDF

FILE.

Afilias has been a pioneer and innovator in the use of EPP. .INFO was the first EPP-based gTLD registry and launched on EPP version 02⁄00. Afilias has a track record of supporting TLDs on standards-compliant versions of EPP. Afilias will operate the EPP registrar interface as well as a web-based interface for this TLD in accordance with RFCs and global best practices. In addition, Afilias will maintain a proper OT&E (Operational Testing and Evaluation) environment to facilitate registrar system development and testing.

Afilias' EPP technical performance meets or exceeds all ICANN requirements as demonstrated by:
• A completely functional, state-of-the-art, EPP-based SRS that currently meets the needs of various gTLDs and will meet this new TLD's needs;
• A track record of success in developing extensions to meet client and registrar business requirements such as multi-script support for IDNs;
• Supporting six ICANN gTLDs on EPP: .INFO, .ORG, .MOBI, .AERO, .ASIA and .XXX
• EPP software that is operating today and has been fully tested to be standards-compliant;
• Proven interoperability of existing EPP software with ICANN-accredited registrars, and;
• An SRS that currently processes over 200 million EPP transactions per month for both .INFO and .ORG. Overall, Afilias processes over 700 million EPP transactions per month for all 16 TLDs under management.

The EPP service is offered in accordance with the performance specifications defined in the new gTLD Registry Agreement, Specification 10.

EPP Standards

The Afilias registry system complies with the following revised versions of the RFCs and operates multiple ICANN TLDs on these standards, including .INFO, .ORG, .MOBI, .ASIA and .XXX. The systems have been tested by our Quality Assurance ("QA") team for RFC compliance, and have been used by registrars for an extended period of time:
• 3735 - Guidelines for Extending EPP
• 3915 - Domain Registry Grace Period Mapping
• 5730 - Extensible Provisioning Protocol (EPP)
• 5731 - Domain Name Mapping
• 5732 - Host Mapping
• 5733 - Contact Mapping
• 5734 - Transport Over TCP
• 5910 - Domain Name System (DNS) Security Extensions Mapping for the Extensible Provisioning Protocol (EPP)

This TLD will support all valid EPP commands. The following EPP commands are in operation today and will be made available for this TLD. See attachment #25a for the base set of EPP commands and copies of Afilias XSD schema files, which define all the rules of valid, RFC compliant EPP commands and responses that Afilias supports. Any customized EPP extensions, if necessary, will also conform to relevant RFCs.

Afilias staff members actively participated in the Internet Engineering Task Force (IETF) process that finalized the new standards for EPP. Afilias will continue to actively participate in the IETF and will stay abreast of any updates to the EPP standards.

EPP software interface and functionality

Afilias will provide all registrars with a free open-source EPP toolkit. Afilias provides this software for use with both Microsoft Windows and Unix/Linux operating systems. This software, which includes all relevant templates and schema defined in the RFCs, is available on sourceforge.net and will be available through the registry operator's website.

Afilias' SRS EPP software complies with all relevant RFCs and includes the following functionality:
• EPP Greeting: A response to a successful connection returns a greeting to the client. Information exchanged can include: name of server, server date and time in UTC, server features, e.g., protocol versions supported, languages for the text response supported, and one or more elements which identify the objects that the server is capable of managing;
• Session management controls: 〈login〉 to establish a connection with a server, and 〈logout〉 to end a session;
• EPP Objects: Domain, Host and Contact for respective mapping functions;
• EPP Object Query Commands: Info, Check, and Transfer (query) commands to retrieve object information, and;
• EPP Object Transform Commands: five commands to transform objects: 〈create〉 to create an instance of an object, 〈delete〉 to remove an instance of an object, 〈renew〉 to extend the validity period of an object, 〈update〉 to change information associated with an object, and 〈transfer〉 to manage changes in client sponsorship of a known object.

Currently, 100% of the top domain name registrars in the world have software that has already been tested and certified to be compatible with the Afilias SRS registry. In total, over 375 registrars, representing over 95% of all registration volume worldwide, operate software that has been certified compatible with the Afilias SRS registry. Afilias' EPP Registrar Acceptance Criteria are available in attachment #25b, EPP OT&E Criteria.

Free EPP software support
Afilias analyzes and diagnoses registrar EPP activity log files as needed and is available to assist registrars who may require technical guidance regarding how to fix repetitive errors or exceptions caused by misconfigured client software.

Registrars are responsible for acquiring a TLS/SSL certificate from an approved certificate authority, as the registry-registrar communication channel requires mutual authentication; Afilias will acquire and maintain the server-side TLS/SSL certificate. The registrar is responsible for developing support for TLS/SSL in their client application. Afilias will provide free guidance for registrars unfamiliar with this requirement.

Registrar data synchronization

There are two methods available for registrars to synchronize their data with the registry:
• Automated synchronization: Registrars can, at any time, use the EPP 〈info〉 command to obtain definitive data from the registry for a known object, including domains, hosts (nameservers) and contacts.
• Personalized synchronization: A registrar may contact technical support and request a data file containing all domains (and associated host (nameserver) and contact information) registered by that registrar, within a specified time interval. The data will be formatted as a comma separated values (CSV) file and made available for download using a secure server.

EPP modifications

There are no unique EPP modifications planned for this TLD.

All ICANN TLDs must offer a Sunrise as part of a rights protection program. Afilias uses EPP extensions that allow registrars to submit trademark and other intellectual property rights (IPR) data to the registry. These extensions are:
• An 〈ipr:name〉 element that indicates the name of Registered Mark.
• An 〈ipr:number〉 element that indicates the registration number of the IPR.
• An 〈ipr:ccLocality〉 element that indicates the origin for which the IPR is established (a national or international trademark registry).
• An 〈ipr:entitlement〉 element that indicates whether the applicant holds the trademark as the original "OWNER", "CO-OWNER" or "ASSIGNEE".
• An 〈ipr:appDate〉 element that indicates the date the Registered Mark was applied for.
• An 〈ipr:regDate〉 element that indicates the date the Registered Mark was issued and registered.
• An 〈ipr:class〉 element that indicates the class of the registered mark.
• An 〈ipr:type〉 element that indicates the Sunrise phase the application applies for.

Note that some of these extensions might be subject to change based on ICANN-developed requirements for the Trademark Clearinghouse.

EPP resourcing plans

Since its founding, Afilias is focused on delivering secure, stable and reliable registry services. Several essential management and staff who designed and launched the Afilias registry in 2001 and expanded the number of TLDs supported, all while maintaining strict service levels over the past decade, are still in place today. This experiential continuity will endure for the implementation and on-going maintenance of this TLD. Afilias operates in a matrix structure, which allows its staff to be allocated to various critical functions in both a dedicated and a shared manner. With a team of specialists and generalists, the Afilias project management methodology allows efficient and effective use of our staff in a focused way.

108 Afilias team members directly contribute to the management and development of the EPP based registry systems. As previously noted, Afilias is an active member of IETF and has a long documented history developing and enhancing EPP. These contributors include 11 developers and 14 QA engineers focused on maintaining and enhancing EPP server side software. These engineers work directly with business staff to timely address existing needs and forecast registry⁄registrar needs to ensure the Afilias EPP software is effective today and into the future. A team of eight data analysts work with the EPP software system to ensure that the data flowing through EPP is securely and reliably stored in replicated database systems. In addition to the EPP developers, QA engineers, and data analysts, other EPP contributors at Afilias include: Technical Analysts, the Network Operations Center and Data Services team members.

26. Whois

Answers for this question (#26) are provided by Afilias, the back-end provider of registry services for this TLD.

Afilias operates the WHOIS (registration data directory service) infrastructure in accordance with RFCs and global best practices, as it does for the 16 TLDs it

currently supports. Designed to be robust and scalable, Afilias' WHOIS service has exceeded all contractual requirements for over a decade. It has extended search capabilities, and methods of limiting abuse.

The WHOIS service operated by Afilias meets and exceeds ICANN's requirements. Specifically, Afilias will:
• Offer a WHOIS service made available on port 43 that is flexible and standards-compliant;
• Comply with all ICANN policies, and meeting or exceeding WHOIS performance requirements in Specification 10 of the new gTLD Registry Agreement;
• Enable a Searchable WHOIS with extensive search capabilities that offers ease of use while enforcing measures to mitigate access abuse, and;
• Employ a team with significant experience managing a compliant WHOIS service.

Such extensive knowledge and experience managing a WHOIS service enables Afilias to offer a comprehensive plan for this TLD that meets the needs of constituents of the domain name industry and Internet users. The service has been tested by our QA team for RFC compliance, and has been used by registrars and many other parties for an extended period of time. Afilias' WHOIS service currently serves almost 500 million WHOIS queries per month, with the capacity already built in to handle an order of magnitude increase in WHOIS queries, and the ability to smoothly scale should greater growth be needed.

WHOIS system description and diagram

The Afilias WHOIS system, depicted in figure 26-a, is designed with robustness, availability, compliance, and performance in mind. Additionally, the system has provisions for detecting abusive usage (e.g., excessive numbers of queries from one source). The WHOIS system is generally intended as a publicly available single object lookup system. Afilias uses an advanced, persistent caching system to ensure extremely fast query response times.

Afilias will develop restricted WHOIS functions based on specific domain policy and regulatory requirements as needed for operating the business (as long as they are standards compliant). It will also be possible for contact and registrant information to be returned according to regulatory requirements. The WHOIS database supports multiple string and field searching through a reliable, free, secure web-based interface.

Data objects, interfaces, access and lookups

Registrars can provide an input form on their public websites through which a visitor is able to perform WHOIS queries. The registry operator can also provide a Web-based search on its site. The input form must accept the string to query, along with the necessary input elements to select the object type and interpretation controls. This input form sends its data to the Afilias port 43 WHOIS server. The results from the WHOIS query are returned by the server and displayed in the visitor's Web browser. The sole purpose of the Web interface is to provide a user-friendly interface for WHOIS queries.

Afilias will provide WHOIS output as per Specification 4 of the new gTLD Registry Agreement. The output for domain records generally consists of the following elements:
• The name of the domain registered and the sponsoring registrar;
• The names of the primary and secondary nameserver(s) for the registered domain name;
• The creation date, registration status and expiration date of the registration;
• The name, postal address, e-mail address, and telephone and fax numbers of the domain name holder;
• The name, postal address, e-mail address, and telephone and fax numbers of the

technical contact for the domain name holder;
• The name, postal address, e-mail address, and telephone and fax numbers of the administrative contact for the domain name holder, and;
• The name, postal address, e-mail address, and telephone and fax numbers of the billing contact for the domain name holder.

The following additional features are also present in Afilias' WHOIS service:
• Support for IDNs, including the language tag and the Punycode representation of the IDN in addition to Unicode Hex and Unicode HTML formats;
• Enhanced support for privacy protection relative to the display of confidential information.

Afilias will also provide sophisticated WHOIS search functionality that includes the ability to conduct multiple string and field searches.

Query controls

For all WHOIS queries, a user is required to enter the character string representing the information for which they want to search. The object type and interpretation control parameters to limit the search may also be specified. If object type or interpretation control parameter is not specified, WHOIS will search for the character string in the Name field of the Domain object.

WHOIS queries are required to be either an "exact search" or a "partial search," both of which are insensitive to the case of the input string.

An exact search specifies the full string to search for in the database field. An exact match between the input string and the field value is required.

A partial search specifies the start of the string to search for in the database field. Every record with a search field that starts with the input string is considered a match. By default, if multiple matches are found for a query, then a summary containing up to 50 matching results is presented. A second query is required to retrieve the specific details of one of the matching records.

If only a single match is found, then full details will be provided. Full detail consists of the data in the matching object as well as the data in any associated objects. For example: a query that results in a domain object includes the data from the associated host and contact objects.

WHOIS query controls fall into two categories: those that specify the type of field, and those that modify the interpretation of the input or determine the level of output to provide. Each is described below.

The following keywords restrict a search to a specific object type:
• Domain: Searches only domain objects. The input string is searched in the Name field.
• Host: Searches only nameserver objects. The input string is searched in the Name field and the IP Address field.
• Contact: Searches only contact objects. The input string is searched in the ID field.
• Registrar: Searches only registrar objects. The input string is searched in the Name field.
By default, if no object type control is specified, then the Name field of the Domain object is searched.

In addition, Afilias WHOIS systems can perform and respond to WHOIS searches by registrant name, postal address and contact names. Deployment of these features is provided as an option to the registry operator, based upon registry policy and business decision making.

Figure 26-b presents the keywords that modify the interpretation of the input or determine the level of output to provide.

By default, if no interpretation control keywords are used, the output will include full details if a single match is found and a summary if multiple matches are found.

Unique TLD requirements

There are no unique WHOIS requirements for this TLD.

Sunrise WHOIS processes

All ICANN TLDs must offer a Sunrise as part of a rights protection program. Afilias uses EPP extensions that allow registrars to submit trademark and other intellectual property rights (IPR) data to the registry. The following corresponding data will be displayed in WHOIS for relevant domains:

- Trademark Name: element that indicates the name of the Registered Mark.
- Trademark Number: element that indicates the registration number of the IPR.
- Trademark Locality: element that indicates the origin for which the IPR is established (a national or international trademark registry).
- Trademark Entitlement: element that indicates whether the applicant holds the trademark as the original “OWNER”, “CO-OWNER” or “ASSIGNEE”.
- Trademark Application Date: element that indicates the date the Registered Mark was applied for.
- Trademark Registration Date: element that indicates the date the Registered Mark was issued and registered.
- Trademark Class: element that indicates the class of the Registered Mark.
- IPR Type: element that indicates the Sunrise phase the application applies for.

IT and infrastructure resources

All the applications and databases for this TLD will run in a virtual environment hosted by a cluster of servers equipped with the latest Intel Westmere multi-core processors (or a more advanced, stable technology available at the time of deployment). The registry data will be stored on storage arrays of solid-state drives shared over a fast storage area network. The virtual environment allows the infrastructure to easily scale both vertically and horizontally to cater to changing demand. It also facilitates effective utilization of system resources thus reducing energy consumption and carbon footprint.

The applications and servers are supported by network firewalls, routers and switches.

The WHOIS system accommodates both IPv4 and IPv6 addresses.

Each of the servers and network devices are equipped with redundant hot-swappable components and multiple connections to ancillary systems. Additionally, 24x7 support agreements with our hardware vendor with a 4-hour response time at all our data centers guarantees replacement of failed parts in the shortest time possible.

Models of system and network devices used are:

- Servers: Cisco UCS B230 blade servers
- SAN storage arrays: IBM Storwize V7000 with Solid State Drives
- Firewalls: Cisco ASA 5585-X
- Load balancers: F5 Big-IP 6900
- Traffic shapers: Procera PacketLogic PL8720
- Routers: Juniper MX40 3D
- Network switches: Cisco Nexus 7010, Nexus 5548, Nexus 2232

There will be at least four virtual machines (VMs) offering WHOIS service. Each VM

will run at least two WHOIS server instances - one for registrars and one for the public. All instances of the WHOIS service is made available to registrars and the public are rate limited to mitigate abusive behavior.

Frequency of synchronization between servers

Registration data records from the EPP publisher database will be replicated to the WHOIS system database on a near-real-time basis whenever an update occurs.

Specifications 4 and 10 compliance

The WHOIS service for this TLD will meet or exceed the performance requirements in the new gTLD Registry Agreement, Specification 10. Figure 26-c provides the exact measurements and commitments. Afilias has a 10 year track record of exceeding WHOIS performance and a skilled team to ensure this continues for all TLDs under management.

The WHOIS service for this TLD will meet or exceed the requirements in the new gTLD Registry Agreement, Specification 4.

RFC 3912 compliance

Afilias will operate the WHOIS infrastructure in compliance with RFCs and global best practices, as it does with the 16 TLDs Afilias currently supports.

Afilias maintains a registry-level centralized WHOIS database that contains information for every registered domain and for all host and contact objects. The WHOIS service will be available on the Internet standard WHOIS port (port 43) in compliance with RFC 3912. The WHOIS service contains data submitted by registrars during the registration process. Changes made to the data by a registrant are submitted to Afilias by the registrar and are reflected in the WHOIS database and service in near-real-time, by the instance running at the primary data center, and in under ten seconds by the instance running at the secondary data center, thus providing all interested parties with up-to-date information for every domain. This service is compliant with the new gTLD Registry Agreement, Specification 4.

The WHOIS service maintained by Afilias will be authoritative and complete, as this will be a “thick” registry (detailed domain contact WHOIS is all held at the registry); users do not have to query different registrars for WHOIS information, as there is one central WHOIS system. Additionally, visibility of different types of data is configurable to meet the registry operator’s needs.

Searchable WHOIS

Afilias offers a searchable WHOIS on a web-based Directory Service. Partial match capabilities are offered on the following fields: domain name, registrar ID, and IP address. In addition, Afilias WHOIS systems can perform and respond to WHOIS searches by registrant name, postal address and contact names.

Providing the ability to search important and high-value fields such as registrant name, address and contact names increases the probability of abusive behavior. An abusive user could script a set of queries to the WHOIS service and access contact data in order to create or sell a list of names and addresses of registrants in this TLD. Making the WHOIS machine readable, while preventing harvesting and mining of WHOIS data, is a key requirement integrated into the Afilias WHOIS systems. For instance, Afilias limits search returns to 50 records at a time. If

bulk queries were ever necessary (e.g., to comply with any applicable laws, government rules or requirements, requests of law enforcement, or any dispute resolution process), Afilias makes such query responses available to carefully screened and limited staff members at the registry operator (and customer support staff) via an internal data warehouse. The Afilias WHOIS system accommodates anonymous access as well as pre-identified and profile-defined uses, with full audit and log capabilities.

The WHOIS service has the ability to tag query responses with labels such as "Do not redistribute" or "Special access granted". This may allow for tiered response and reply scenarios. Further, the WHOIS service is configurable in parameters and fields returned, which allow for flexibility in compliance with various jurisdictions, regulations or laws.

Afilias offers exact-match capabilities on the following fields: registrar ID, nameserver name, and nameserver's IP address (only applies to IP addresses stored by the registry, i.e., glue records). Search capabilities are fully available, and results include domain names matching the search criteria (including IDN variants). Afilias manages abuse prevention through rate limiting and CAPTCHA (described below). Queries do not require specialized transformations of internationalized domain names or internationalized data fields

Please see "Query Controls" above for details about search options and capabilities.

Deterring WHOIS abuse

Afilias has adopted two best practices to prevent abuse of the WHOIS service: rate limiting and CAPTCHA.

Abuse of WHOIS services on port 43 and via the Web is subject to an automated rate -limiting system. This ensures that uniformity of service to users is unaffected by a few parties whose activities abuse or otherwise might threaten to overload the WHOIS system.

Abuse of web-based public WHOIS services is subject to the use of CAPTCHA (Completely Automated Public Turing test to tell Computers and Humans Apart) technology. The use of CAPTCHA ensures that uniformity of service to users is unaffected by a few parties whose activities abuse or otherwise might threaten to overload the WHOIS system. The registry operator will adopt a CAPTCHA on its Web-based WHOIS.

Data mining of any sort on the WHOIS system is strictly prohibited, and this prohibition is published in WHOIS output and in terms of service.

For rate limiting on IPv4, there are configurable limits per IP and subnet. For IPv6, the traditional limitations do not apply. Whenever a unique IPv6 IP address exceeds the limit of WHOIS queries per minute, the same rate-limit for the given 64 bits of network prefix that the offending IPv6 IP address falls into will be applied. At the same time, a timer will start and rate-limit validation logic will identify if there are any other IPv6 address within the original 80-bit(/48) prefix. If another offending IPv6 address does fall into the /48 prefix then rate-limit validation logic will penalize any other IPv6 addresses that fall into that given 80-bit (/48) network. As a security precaution, Afilias will not disclose these limits.

Pre-identified and profile-driven role access allows greater granularity and configurability in both access to the WHOIS service, and in volume/frequency of responses returned for queries.

Afilias staff are key participants in the ICANN Security & Stability Advisory Committee's deliberations and outputs on WHOIS, including SAC003, SAC027, SAC033, SAC037, SAC040, and SAC051. Afilias staff are active participants in both technical and policy decision making in ICANN, aimed at restricting abusive behavior.

WHOIS staff resourcing plans

Since its founding, Afilias is focused on delivering secure, stable and reliable registry services. Several essential management and staff who designed and launched the Afilias registry in 2001 and expanded the number of TLDs supported, all while maintaining strict service levels over the past decade, are still in place today. This experiential continuity will endure for the implementation and on-going maintenance of this TLD. Afilias operates in a matrix structure, which allows its staff to be allocated to various critical functions in both a dedicated and a shared manner. With a team of specialists and generalists, the Afilias project management methodology allows efficient and effective use of our staff in a focused way.

Within Afilias, there are 11 staff members who develop and maintain the compliant WHOIS systems. They keep pace with access requirements, thwart abuse, and continually develop software. Of these resources, approximately two staffers are typically required for WHOIS-related code customization. Other resources provide quality assurance, and operations personnel maintain the WHOIS system itself. This team will be responsible for the implementation and on-going maintenance of the new TLD WHOIS service.

27. Registration Life Cycle

THE RESPONSE FOR THIS QUESTION USES ANGLE BRACKETS (THE " 〈" and "〉 " CHARACTERS), WHICH ICANN INFORMS AFILIAS (CASE ID 11027) CANNOT BE PROPERLY RENDERED IN TAS DUE TO SECURITY CONCERNS. HENCE, THE FULL ANSWER TO THIS QUESTION IS ATTACHED AS A PDF FILE.

The mission and purpose of this TLD is to enhance and complement existing brand strategies of Kosher Marketing Assets and present the organization in a consistent manner. As such, Kosher Marketing Assets intends to limit registration of domains either for its exclusive use or for use by closely affiliated organizations in a manner that contributes to the purpose of this TLD. Kosher Marketing Assets also intends to govern the domain names registered to limit confusion and enhance user experience. To accomplish these objectives, Kosher Marketing Assets may be the sole registrant of domains in the TLD. However, due consideration has been made to all aspects of registry operations including the functions and policies defined below.

Answers for this question (#27) are provided by Afilias, the back-end provider of registry services for this TLD.

Afilias has had experience managing registrations for over a decade and supports comprehensive registration lifecycle services including the registration states, all standard grace periods, and can address any modifications required with the introduction of any new ICANN policies.

This TLD will follow the ICANN standard domain lifecycle, as is currently implemented in TLDs such as .ORG and .INFO. The below response includes: a diagram

and description of the lifecycle of a domain name in this TLD, including domain creation, transfer protocols, grace period implementation and the respective time frames for each; and the existing resources to support the complete lifecycle of a domain.

As depicted in Figure 27-a, prior to the beginning of the Trademark Claims Service or Sunrise IP protection program, Afilias will support the reservation of names in accordance with the new gTLD Registry Agreement, Specification 5.

Registration period

After the IP protection programs and the general launch, eligible registrants may choose an accredited registrar to register a domain name. The registrar will check availability on the requested domain name and if available, will collect specific objects such as, the required contact and host information from the registrant. The registrar will then provision the information into the registry system using standard Extensible Provisioning Protocol ("EPP") commands through a secure connection to the registry backend service provider.

When the domain is created, the standard five day Add Grace Period begins, the domain and contact information are available in WHOIS, and normal operating EPP domain statuses will apply. Other specifics regarding registration rules for an active domain include:
• The domain must be unique;
• Restricted or reserved domains cannot be registered;
• The domain can be registered from 1-10 years;
• The domain can be renewed at any time for 1-10 years, but cannot exceed 10 years;
• The domain can be explicitly deleted at any time;
• The domain can be transferred from one registrar to another except during the first 60 days following a successful registration or within 60 days following a transfer; and,
• Contacts and hosts can be modified at any time.

The following describe the domain status values recognized in WHOIS when using the EPP protocol following RFC 5731.
• OK or Active: This is the normal status for a domain that has no pending operations or restrictions.
• Inactive: The domain has no delegated name servers.
• Locked: No action can be taken on the domain. The domain cannot be renewed, transferred, updated, or deleted. No objects such as contacts or hosts can be associated to, or disassociated from the domain. This status includes: Delete Prohibited ⁄ Server Delete Prohibited, Update Prohibited ⁄ Server Update Prohibited, Transfer Prohibited, Server Transfer Prohibited, Renew Prohibited, Server Renew Prohibited.
• Hold: The domain will not be included in the zone. This status includes: Client Hold, Server Hold.
• Transfer Prohibited: The domain cannot be transferred away from the sponsoring registrar. This status includes: Client Transfer Prohibited, Server Transfer Prohibited.

The following describe the registration operations that apply to the domain name during the registration period.

a. DOMAIN MODIFICATIONS: This operation allows for modifications or updates to the domain attributes to include:
i. Registrant Contact
ii. Admin Contact
iii. Technical Contact

iv. Billing Contact
v. Host or nameservers
vi. Authorization information
vii. Associated status values

A domain with the EPP status of Client Update Prohibited or Server Update Prohibited may not be modified until the status is removed.

b. DOMAIN RENEWALS: This operation extends the registration period of a domain by changing the expiration date. The following rules apply:
i. A domain can be renewed at any time during its registration term,
ii. The registration term cannot exceed a total of 10 years.

A domain with the EPP status of Client Renew Prohibited or Server Renew Prohibited cannot be renewed.

c. DOMAIN DELETIONS: This operation deletes the domain from the Shared Registry Services (SRS). The following rules apply:
i. A domain can be deleted at any time during its registration term, f the domain is deleted during the Add Grace Period or the Renew⁄Extend Grace Period, the sponsoring registrar will receive a credit,
ii. A domain cannot be deleted if it has “child” nameservers that are associated to other domains.

A domain with the EPP status of Client Delete Prohibited or Server Delete Prohibited cannot be deleted.

d. DOMAIN TRANSFERS: A transfer of the domain from one registrar to another is conducted by following the steps below.
i. The registrant must obtain the applicable 〈authInfo〉 code from the sponsoring (losing) registrar.
• Every domain name has an authInfo code as per EPP RFC 5731. The authInfo code is a six- to 16-character code assigned by the registrar at the time the name was created. Its purpose is to aid identification of the domain owner so proper authority can be established (it is the "password" to the domain).
• Under the Registry-Registrar Agreement, registrars will be required to provide a copy of the authInfo code to the domain registrant upon his or her request.
ii. The registrant must provide the authInfo code to the new (gaining) registrar, who will then initiate a domain transfer request. A transfer cannot be initiated without the authInfo code.
• Every EPP 〈transfer〉 command must contain the authInfo code or the request will fail. The authInfo code represents authority to the registry to initiate a transfer.
iii. Upon receipt of a valid transfer request, the registry automatically asks the sponsoring (losing) registrar to approve the request within five calendar days.
• When a registry receives a transfer request the domain cannot be modified, renewed or deleted until the request has been processed. This status must not be combined with either Client Transfer Prohibited or Server Transfer Prohibited status.
• If the sponsoring (losing) registrar rejects the transfer within five days, the transfer request is cancelled. A new domain transfer request will be required to reinitiate the process.
• If the sponsoring (losing) registrar does not approve or reject the transfer within five days, the registry automatically approves the request.
iv. After a successful transfer, it is strongly recommended that registrars change the authInfo code, so that the prior registrar or registrant cannot use it anymore.
v. Registrars must retain all transaction identifiers and codes associated with successful domain object transfers and protect them from disclosure.
vi. Once a domain is successfully transferred the status of TRANSFERPERIOD is

added to the domain for a period of five days.
vii. Successful transfers will result in a one year term extension (resulting in a maximum total of 10 years), which will be charged to the gaining registrar.

e. BULK TRANSFER: Afilias, supports bulk transfer functionality within the SRS for situations where ICANN may request the registry to perform a transfer of some or all registered objects (includes domain, contact and host objects) from one registrar to another registrar. Once a bulk transfer has been executed, expiry dates for all domain objects remain the same, and all relevant states of each object type are preserved. In some cases the gaining and the losing registrar as well as the registry must approved bulk transfers. A detailed log is captured for each bulk transfer process and is archived for audit purposes.

Kosher Marketing Assets will support ICANN's Transfer Dispute Resolution Process. Kosher Marketing Assets will work with Afilias to respond to Requests for Enforcement (law enforcement or court orders) and will follow that process.

1. Auto-renew grace period
The Auto-Renew Grace Period displays as AUTORENEWPERIOD in WHOIS. An auto-renew must be requested by the registrant through the sponsoring registrar and occurs if a domain name registration is not explicitly renewed or deleted by the expiration date and is set to a maximum of 45 calendar days. In this circumstance the registration will be automatically renewed by the registry system the first day after the expiration date. If a Delete, Extend, or Transfer occurs within the AUTORENEWPERIOD the following rules apply:
i. DELETE. If a domain is deleted the sponsoring registrar at the time of the deletion receives a credit for the auto-renew fee. The domain then moves into the Redemption Grace Period with a status of PENDING DELETE RESTORABLE.
ii. RENEW/EXTEND. A domain can be renewed as long as the total term does not exceed 10 years. The account of the sponsoring registrar at the time of the extension will be charged for the additional number of years the registration is renewed.
iii. TRANSFER. (other than ICANN-approved bulk transfer). If a domain is transferred, the losing registrar is credited for the auto-renew fee, and the year added by the operation is cancelled. As a result of the transfer, the expiration date of the domain is extended by minimum of one year as long as the total term does not exceed 10 years. The gaining registrar is charged for the additional transfer year(s) even in cases where a full year is not added because of the maximum 10 year registration restriction.

2. Redemption grace period
During this period, a domain name is placed in the PENDING DELETE RESTORABLE status when a registrar requests the deletion of a domain that is not within the Add Grace Period. A domain can remain in this state for up to 30 days and will not be included in the zone file. The only action a registrar can take on a domain is to request that it be restored. Any other registrar requests to modify or otherwise update the domain will be rejected. If the domain is restored it moves into PENDING RESTORE and then OK. After 30 days if the domain is not restored it moves into PENDING DELETE SCHEDULED FOR RELEASE before the domain is released back into the pool of available domains.

3. Pending delete
During this period, a domain name is placed in PENDING DELETE SCHEDULED FOR RELEASE status for five days, and all Internet services associated with the domain will remain disabled and domain cannot be restored. After five days the domain is released back into the pool of available domains.

Other grace periods

All ICANN required grace periods will be implemented in the registry backend service provider's system including the Add Grace Period (AGP), Renew/Extend Grace Period (EGP), Transfer Grace Period (TGP), Auto-Renew Grace Period (ARGP), and Redemption Grace Period (RGP). The lengths of grace periods are configurable in the registry system. At this time, the grace periods will be implemented following other gTLDs such as .ORG. More than one of these grace periods may be in effect at any one time. The following are accompanying grace periods to the registration lifecycle.

Add grace period

The Add Grace Period displays as ADDPERIOD in WHOIS and is set to five calendar days following the initial registration of a domain. If the domain is deleted by the registrar during this period, the registry provides a credit to the registrar for the cost of the registration. If a Delete, Renew/Extend, or Transfer operation occurs within the five calendar days, the following rules apply.
i. DELETE. If a domain is deleted within this period the sponsoring registrar at the time of the deletion is credited for the amount of the registration. The domain is deleted from the registry backend service provider's database and is released back into the pool of available domains.
ii. RENEW/EXTEND. If the domain is renewed within this period and then deleted, the sponsoring registrar will receive a credit for both the registration and the extended amounts. The account of the sponsoring registrar at the time of the renewal will be charged for the initial registration plus the number of years the registration is extended. The expiration date of the domain registration is extended by that number of years as long as the total term does not exceed 10 years.
iii. TRANSFER (other than ICANN-approved bulk transfer). Transfers under Part A of the ICANN Policy on Transfer of Registrations between registrars may not occur during the ADDPERIOD or at any other time within the first 60 days after the initial registration. Enforcement is the responsibility of the registrar sponsoring the domain name registration and is enforced by the SRS.

Renew / extend grace period

The Renew / Extend Grace Period displays as RENEWPERIOD in WHOIS and is set to five calendar days following an explicit renewal on the domain by the registrar. If a Delete, Extend, or Transfer occurs within the five calendar days, the following rules apply:
i. DELETE. If a domain is deleted within this period the sponsoring registrar at the time of the deletion receives a credit for the renewal fee. The domain then moves into the Redemption Grace Period with a status of PENDING DELETE RESTORABLE.
ii. RENEW/EXTEND. A domain registration can be renewed within this period as long as the total term does not exceed 10 years. The account of the sponsoring registrar at the time of the extension will be charged for the additional number of years the registration is renewed.
iii. TRANSFER (other than ICANN-approved bulk transfer). If a domain is transferred within the Renew/Extend Grace Period, there is no credit to the losing registrar for the renewal fee. As a result of the transfer, the expiration date of the domain registration is extended by a minimum of one year as long as the total term for the domain does not exceed 10 years.

If a domain is auto-renewed, then extended, and then deleted within the Renew/Extend Grace Period, the registrar will be credited for any auto-renew fee charged and the number of years for the extension. The years that were added to the domain's expiration as a result of the auto-renewal and extension are removed. The deleted domain is moved to the Redemption Grace Period with a status of PENDING DELETE RESTORABLE.

Transfer Grace Period

The Transfer Grace period displays as TRANSFERPERIOD in WHOIS and is set to five calendar days after the successful transfer of domain name registration from one registrar to another registrar. Transfers under Part A of the ICANN Policy on Transfer of Registrations between registrars may not occur during the TRANSFERPERIOD or within the first 60 days after the transfer. If a Delete or Renew/Extend occurs within that five calendar days, the following rules apply:
i. DELETE. If the domain is deleted by the new sponsoring registrar during this period, the registry provides a credit to the registrar for the cost of the transfer. The domain then moves into the Redemption Grace Period with a status of PENDING DELETE RESTORABLE.
ii. RENEW/EXTEND. If a domain registration is renewed within the Transfer Grace Period, there is no credit for the transfer. The registrar's account will be charged for the number of years the registration is renewed. The expiration date of the domain registration is extended by the renewal years as long as the total term does not exceed 10 years.

Auction

This TLD will conduct an auction for certain domain names. Afilias will manage the domain name auction using existing technology. Upon the completion of the auction, any domain name acquired will then follow the standard lifecycle of a domain.

Registration lifecycle resources

Since its founding, Afilias is focused on delivering secure, stable and reliable registry services. Several essential management and staff who designed and launched the Afilias registry in 2001 and expanded the number of TLDs supported, all while maintaining strict service levels over the past decade, are still in place today. This experiential continuity will endure for the implementation and on-going maintenance of this TLD. Afilias operates in a matrix structure, which allows its staff to be allocated to various critical functions in both a dedicated and a shared manner. With a team of specialists and generalists, the Afilias project management methodology allows efficient and effective use of our staff in a focused way. Virtually all Afilias resource are involved in the registration lifecycle of domains.

There are a few areas where registry staff devote resources to registration lifecycle issues:
a. Supporting Registrar Transfer Disputes. The registry operator will have a compliance staffer handle these disputes as they arise; they are very rare in the existing gTLDs.
b. Afilias has its development and quality assurance departments on hand to modify the grace period functionality as needed, if ICANN issues new Consensus Policies or the RFCs change.

Afilias has more than 30 staff members in these departments.

28. Abuse Prevention and Mitigation

Kosher Marketing Assets, working with Afilias, will take the requisite operational and technical steps to promote WHOIS data accuracy, limit domain abuse, remove

outdated and inaccurate data, and other security measures to ensure the integrity of the TLD. The specific measures include, but are not limited to:
• Posting a TLD Anti-Abuse Policy that clearly defines abuse, and provide point-of-contact information for reporting suspected abuse;
• Committing to rapid identification and resolution of abuse, including suspensions;
• Ensuring completeness of WHOIS information at the time of registration;
• Publishing and maintaining procedures for removing orphan glue records for names removed from the zone, and;
• Establishing measures to deter WHOIS abuse, including rate-limiting, determining data syntax validity, and implementing and enforcing requirements from the Registry-Registrar Agreement.

Abuse policy
The Anti-Abuse Policy stated below will be enacted under the contractual authority of the registry operator through the Registry-Registrar Agreement, and the obligations will be passed on to and made binding upon registrants. This policy will be posted on the TLD web site along with contact information for registrants or users to report suspected abuse.

The policy is designed to address the malicious use of domain names. The registry operator and its registrars will make reasonable attempts to limit significant harm to Internet users. This policy is not intended to take the place of the Uniform Domain Name Dispute Resolution Policy (UDRP) or the Uniform Rapid Suspension System (URS), and it is not to be used as an alternate form of dispute resolution or as a brand protection mechanism. Its intent is not to burden law-abiding or innocent registrants and domain users; rather, the intent is to deter those who use domain names maliciously by engaging in illegal or fraudulent activity.

Repeat violations of the abuse policy will result in a case-by-case review of the abuser(s), and the registry operator reserves the right to escalate the issue, with the intent of levying sanctions that are allowed under the TLD anti-abuse policy.

The below policy is a recent version of the policy that has been used by the .INFO registry since 2008, and the .ORG registry since 2009. It has proven to be an effective and flexible tool.

.KOSHER Anti-Abuse Policy
The following Anti-Abuse Policy is effective upon launch of the TLD. Malicious use of domain names will not be tolerated. The nature of such abuses creates security and stability issues for the registry, registrars, and registrants, as well as for users of the Internet in general. The registry operator definition of abusive use of a domain includes, without limitation, the following:
• Illegal or fraudulent actions;
• Spam: The use of electronic messaging systems to send unsolicited bulk messages. The term applies to email spam and similar abuses such as instant messaging spam, mobile messaging spam, and the spamming of web sites and Internet forums;
• Phishing: The use of counterfeit web pages that are designed to trick recipients into divulging sensitive data such as personally identifying information, usernames, passwords, or financial data;
• Pharming: The redirecting of unknowing users to fraudulent sites or services, typically through, but not limited to, DNS hijacking or poisoning;
• Willful distribution of malware: The dissemination of software designed to infiltrate or damage a computer system without the owner's informed consent. Examples include, without limitation, computer viruses, worms, keyloggers, and Trojan horses.
• Malicious fast-flux hosting: Use of fast-flux techniques with a botnet to disguise the location of web sites or other Internet services, or to avoid

detection and mitigation efforts, or to host illegal activities.
• Botnet command and control: Services run on a domain name that are used to control a collection of compromised computers or "zombies," or to direct distributed denial-of-service attacks (DDoS attacks);
• Illegal Access to Other Computers or Networks: Illegally accessing computers, accounts, or networks belonging to another party, or attempting to penetrate security measures of another individual's system (often known as "hacking"). Also, any activity that might be used as a precursor to an attempted system penetration (e.g., port scan, stealth scan, or other information gathering activity).

Pursuant to the Registry-Registrar Agreement, registry operator reserves the right at its sole discretion to deny, cancel, or transfer any registration or transaction, or place any domain name(s) on registry lock, hold, or similar status, that it deems necessary: (1) to protect the integrity and stability of the registry; (2) to comply with any applicable laws, government rules or requirements, requests of law enforcement, or any dispute resolution process; (3) to avoid any liability, civil or criminal, on the part of registry operator, as well as its affiliates, subsidiaries, officers, directors, and employees; (4) per the terms of the registration agreement and this Anti-Abuse Policy, or (5) to correct mistakes made by registry operator or any registrar in connection with a domain name registration. Registry operator also reserves the right to place upon registry lock, hold, or similar status a domain name during resolution of a dispute.

The policy stated above will be accompanied by notes about how to submit a report to the registry operator's abuse point of contact, and how to report an orphan glue record suspected of being used in connection with malicious conduct (see below).

Abuse point of contact and procedures for handling abuse complaints
The registry operator will establish an abuse point of contact. This contact will be a role-based e-mail address of the form "abuse@registry.KOSHER". This e-mail address will allow multiple staff members to monitor abuse reports on a 24x7 basis, and then work toward closure of cases as each situation calls for. For tracking purposes, the registry operator will have a ticketing system with which all complaints will be tracked internally. The reporter will be provided with the ticket reference identifier for potential follow-up. Afilias will integrate its existing ticketing system with the registry operator's to ensure uniform tracking and handling of the complaint. This role-based approach has been used successfully by ISPs, e-mail service providers, and registrars for many years, and is considered a global best practice.

The registry operator's designated abuse handlers will then evaluate complaints received via the abuse system address. They will decide whether a particular issue is of concern, and decide what action, if any, is appropriate.

In general, the registry operator will find itself receiving abuse reports from a wide variety of parties, including security researchers and Internet security companies, financial institutions such as banks, Internet users, and law enforcement agencies among others. Some of these parties may provide good forensic data or supporting evidence of the malicious behavior. In other cases, the party reporting an issue may not be familiar with how to provide such data or proof of malicious behavior. It is expected that a percentage of abuse reports to the registry operator will not be actionable, because there will not be enough evidence to support the complaint (even after investigation), and because some reports or reporters will simply not be credible.

The security function includes a communication and outreach function, with information sharing with industry partners regarding malicious or abusive behavior, in order to ensure coordinated abuse mitigation across multiple TLDs.

Assessing abuse reports requires great care, and the registry operator will rely upon professional, trained investigators who are versed in such matters. The goals are accuracy, good record-keeping, and a zero false-positive rate so as not to harm innocent registrants.

Different types of malicious activities require different methods of investigation and documentation. Further, the registry operator expects to face unexpected or complex situations that call for professional advice, and will rely upon professional, trained investigators as needed.

In general, there are two types of domain abuse that must be addressed:
a) Compromised domains. These domains have been hacked or otherwise compromised by criminals, and the registrant is not responsible for the malicious activity taking place on the domain. For example, the majority of domain names that host phishing sites are compromised. The goal in such cases is to get word to the registrant (usually via the registrar) that there is a problem that needs attention with the expectation that the registrant will address the problem in a timely manner. Ideally such domains do not get suspended, since suspension would disrupt legitimate activity on the domain.
b) Malicious registrations. These domains are registered by malefactors for the purpose of abuse. Such domains are generally targets for suspension, since they have no legitimate use.

The standard procedure is that the registry operator will forward a credible alleged case of malicious domain name use to the domain's sponsoring registrar with a request that the registrar investigate the case and act appropriately. The registrar will be provided evidence collected as a result of the investigation conducted by the trained abuse handlers. As part of the investigation, if inaccurate or false WHOIS registrant information is detected, the registrar is notified about this. The registrar is the party with a direct relationship with—and a direct contract with—the registrant. The registrar will also have vital information that the registry operator will not, such as:
• Details about the domain purchase, such as the payment method used (credit card, PayPal, etc.);
• The identity of a proxy-protected registrant;
• The purchaser's IP address;
• Whether there is a reseller involved, and;
• The registrant's past sales history and purchases in other TLDs (insofar as the registrar can determine this).

Registrars do not share the above information with registry operators due to privacy and liability concerns, among others. Because they have more information with which to continue the investigation, and because they have a direct relationship with the registrant, the registrar is in the best position to evaluate alleged abuse. The registrar can determine if the use violates the registrar's legal terms of service or the registry Anti-Abuse Policy, and can decide whether or not to take any action. While the language and terms vary, registrars will be expected to include language in their registrar-registrant contracts that indemnifies the registrar if it takes action, and allows the registrar to suspend or cancel a domain name; this will be in addition to the registry Anti-Abuse Policy. Generally, registrars can act if the registrant violates the registrar's terms of service, or violates ICANN policy, or if illegal activity is involved, or if the use violates the registry's Anti-Abuse Policy.

If a registrar does not take action within a time period indicated by the registry operator (usually 24 hours), the registry operator might then decide to take action itself. At all times, the registry operator reserves the right to act directly and immediately if the potential harm to Internet users seems significant or imminent, with or without notice to the sponsoring registrar.

The registry operator will be prepared to call upon relevant law enforcement bodies as needed. There are certain cases, for example, Illegal pharmacy domains, where the registry operator will contact the Law Enforcement Agencies to share information about these domains, provide all the evidence collected and work closely with them before any action will be taken for suspension. The specific action is often dependent upon the jurisdiction of which the registry operator, although the operator in all cases will adhere to applicable laws and regulations.

When valid court orders or seizure warrants are received from courts or law enforcement agencies of relevant jurisdiction, the registry operator will order execution in an expedited fashion. Compliance with these will be a top priority and will be completed as soon as possible and within the defined timelines of the order. There are certain cases where Law Enforcement Agencies request information about a domain including but not limited to:
• Registration information
• History of a domain, including recent updates made
• Other domains associated with a registrant's account
• Patterns of registrant portfolio

Requests for such information is handled on a priority basis and sent back to the requestor as soon as possible. Afilias sets a goal to respond to such requests within 24 hours.

The registry operator may also engage in proactive screening of its zone for malicious use of the domains in the TLD, and report problems to the sponsoring registrars. The registry operator could take advantage of a combination of the following resources, among others:
• Blocklists of domain names and nameservers published by organizations such as SURBL and Spamhaus.
• Anti-phishing feeds, which will provide URLs of compromised and maliciously registered domains being used for phishing.
• Analysis of registration or DNS query data [DNS query data received by the TLD nameservers.]

The registry operator will keep records and track metrics regarding abuse and abuse reports. These will include:
• Number of abuse reports received by the registry's abuse point of contact described above;
• Number of cases and domains referred to registrars for resolution;
• Number of cases and domains where the registry took direct action;
• Resolution times;
• Number of domains in the TLD that have been blacklisted by major anti-spam blocklist providers, and;
• Phishing site uptimes in the TLD.

Removal of orphan glue records
By definition, orphan glue records used to be glue records. Glue records are related to delegations and are necessary to guide iterative resolvers to delegated nameservers. A glue record becomes an orphan when its parent nameserver record is removed without also removing the corresponding glue record. (Please reference the ICANN SSAC paper SAC048 at:
http://www.icann.org/en/committees/security/sac048.pdf.) Orphan glue records may be created when a domain (example.tld) is placed on EPP ServerHold or ClientHold status. When placed on Hold, the domain is removed from the zone and will stop resolving. However, any child nameservers (now orphan glue) of that domain (e.g., ns1.example.tld) are left in the zone. It is important to keep these orphan glue records in the zone so that any innocent sites using that nameserver will continue to resolve. This use of Hold status is an essential tool for suspending malicious domains.

Afilias observes the following procedures, which are being followed by other registries and are generally accepted as DNS best practices. These procedures are also in keeping with ICANN SSAC recommendations.

When a request to delete a domain is received from a registrar, the registry first checks for the existence of glue records. If glue records exist, the registry will check to see if other domains in the registry are using the glue records. If other domains in the registry are using the glue records then the request to delete the domain will fail until no other domains are using the glue records. If no other domains in the registry are using the glue records then the glue records will be removed before the request to delete the domain is satisfied. If no glue records exist then the request to delete the domain will be satisfied.

If a registrar cannot delete a domain because of the existence of glue records that are being used by other domains, then the registrar may refer to the zone file or the "weekly domain hosted by nameserver report" to find out which domains are using the nameserver in question and attempt to contact the corresponding registrar to request that they stop using the nameserver in the glue record. The registry operator does not plan on performing mass updates of the associated DNS records.

The registry operator will accept, evaluate, and respond appropriately to complaints that orphan glue is being used maliciously. Such reports should be made in writing to the registry operator, and may be submitted to the registry's abuse point-of-contact. If it is confirmed that an orphan glue record is being used in connection with malicious conduct, the registry operator will have the orphan glue record removed from the zone file. Afilias has the technical ability to execute such requests as needed.

Methods to promote WHOIS accuracy
The creation and maintenance of accurate WHOIS records is an important part of registry management. As described in our response to question #26, WHOIS, the registry operator will manage a secure, robust and searchable WHOIS service for this TLD.

WHOIS data accuracy
The registry operator will offer a "thick" registry system. In this model, all key contact details for each domain name will be stored in a central location by the registry. This allows better access to domain data, and provides uniformity in storing the information. The registry operator will ensure that the required fields for WHOIS data (as per the defined policies for the TLD) are enforced at the registry level. This ensures that the registrars are providing required domain registration data. Fields defined by the registry policy to be mandatory are documented as such and must be submitted by registrars. The Afilias registry system verifies formats for relevant individual data fields (e.g. e-mail, and phone/fax numbers). Only valid country codes are allowed as defined by the ISO 3166 code list. The Afilias WHOIS system is extensible, and is capable of using the VAULT system, described further below.

Similar to the centralized abuse point of contact described above, the registry operator can institute a contact email address which could be utilized by third parties to submit complaints for inaccurate or false WHOIS data detected. This information will be processed by Afilias' support department and forwarded to the registrars. The registrars can work with the registrants of those domains to address these complaints. Afilias will audit registrars on a yearly basis to verify whether the complaints being forwarded are being addressed or not. This functionality, available to all registry operators, is activated based on the registry operator's business policy.

Afilias also incorporates a spot-check verification system where a randomly selected set of domain names are checked periodically for accuracy of WHOIS data. Afilias' .PRO registry system incorporates such a verification system whereby 1% of total registrations or 100 domains, whichever number is larger, are spot-checked every month to verify the domain name registrant's critical information provided with the domain registration data. With both a highly qualified corps of engineers and a 24x7 staffed support function, Afilias has the capacity to integrate such spot-check functionality into this TLD, based on the registry operator's business policy. Note: This functionality will not work for proxy protected WHOIS information, where registrars or their resellers have the actual registrant data. The solution to that problem lies with either registry or registrar policy, or a change in the general marketplace practices with respect to proxy registrations.

Finally, Afilias' registry systems have a sophisticated set of billing and pricing functionality which aids registry operators who decide to provide a set of financial incentives to registrars for maintaining or improving WHOIS accuracy. For instance, it is conceivable that the registry operator may decide to provide a discount for the domain registration or renewal fees for validated registrants, or levy a larger cost for the domain registration or renewal of proxy domain names. The Afilias system has the capability to support such incentives on a configurable basis, towards the goal of promoting better WHOIS accuracy.

Role of registrars
As part of the RRA (Registry Registrar Agreement), the registry operator will require the registrar to be responsible for ensuring the input of accurate WHOIS data by their registrants. The Registrar⁄Registered Name Holder Agreement will include a specific clause to ensure accuracy of WHOIS data, and to give the registrar rights to cancel or suspend registrations if the Registered Name Holder fails to respond to the registrar's query regarding accuracy of data. ICANN's WHOIS Data Problem Reporting System (WDPRS) will be available to those who wish to file WHOIS inaccuracy reports, as per ICANN policy (http:⁄⁄wdprs.internic.net⁄).

Controls to ensure proper access to domain functions
Several measures are in place in the Afilias registry system to ensure proper access to domain functions, including authentication provisions in the RRA relative to notification and contact updates via use of AUTH-INFO codes.

IP address access control lists, TLS⁄SSL certificates and proper authentication are used to control access to the registry system. Registrars are only given access to perform operations on the objects they sponsor.

Every domain will have a unique AUTH-INFO code. The AUTH-INFO code is a 6- to 16-character code assigned by the registrar at the time the name is created. Its purpose is to aid identification of the domain owner so proper authority can be established. It is the "password" to the domain name. Registrars must use the domain's password in order to initiate a registrar-to-registrar transfer. It is used to ensure that domain updates (update contact information, transfer, or deletion) are undertaken by the proper registrant, and that this registrant is adequately notified of domain update activity. Only the sponsoring registrar of a domain has access to the domain's AUTH-INFO code stored in the registry, and this is accessible only via encrypted, password-protected channels.

Information about other registry security measures such as encryption and security of registrar channels are confidential to ensure the security of the registry system. The details can be found in the response to question #30b.

Validation and abuse mitigation mechanisms
Afilias has developed advanced validation and abuse mitigation mechanisms. These capabilities and mechanisms are described below. These services and capabilities

are discretionary and may be utilized by the registry operator based on their policy and business need.

Afilias has the ability to analyze the registration data for known patterns at the time of registration. A database of these known patterns is developed from domains and other associated objects (e.g., contact information) which have been previously detected and suspended after being flagged as abusive. Any domains matching the defined criteria can be flagged for investigation. Once analyzed and confirmed by the domain anti-abuse team members, these domains may be suspended. This provides proactive detection of abusive domains.

Provisions are available to enable the registry operator to only allow registrations by pre-authorized and verified contacts. These verified contacts are given a unique code that can be used for registration of new domains.

Registrant pre-verification and authentication
One of the systems that could be used for validity and identity authentication is VAULT (Validation and Authentication Universal Lookup). It utilizes information obtained from a series of trusted data sources with access to billions of records containing data about individuals for the purpose of providing independent age and id verification as well as the ability to incorporate additional public or private data sources as required. At present it has the following: US Residential Coverage - 90% of Adult Population and also International Coverage - Varies from Country to Country with a minimum of 80% coverage (24 countries, mostly European).

Various verification elements can be used. Examples might include applicant data such as name, address, phone, etc. Multiple methods could be used for verification include integrated solutions utilizing API (XML Application Programming Interface) or sending batches of requests.

• Verification and Authentication requirements would be based on TLD operator requirements or specific criteria.
• Based on required WHOIS Data; registrant contact details (name, address, phone)
• If address⁄ZIP can be validated by VAULT, the validation process can continue (North America +25 International countries)
• If in-line processing and registration and EPP⁄API call would go to the verification clearinghouse and return up to 4 challenge questions.
• If two-step registration is required, then registrants would get a link to complete the verification at a separate time. The link could be specific to a domain registration and pre-populated with data about the registrant.
• If WHOIS data is validated a token would be generated and could be given back to the registrar which registered the domain.
• WHOIS data would reflect the Validated Data or some subset, i.e., fields displayed could be first initial and last name, country of registrant and date validated. Other fields could be generic validation fields much like a “privacy service”.
• A “Validation Icon” customized script would be sent to the registrants email address. This could be displayed on the website and would be dynamically generated to avoid unauthorized use of the Icon. When clicked on the Icon would should limited WHOIS details i.e. Registrant: jdoe, Country: USA, Date Validated: March 29, 2011, as well as legal disclaimers.
• Validation would be annually renewed, and validation date displayed in the WHOIS.

Abuse prevention resourcing plans
Since its founding, Afilias is focused on delivering secure, stable and reliable registry services. Several essential management and staff who designed and launched the Afilias registry in 2001 and expanded the number of TLDs supported, all while maintaining strict service levels over the past decade, are still in place today. This experiential continuity will endure for the implementation and

on-going maintenance of this TLD. Afilias operates in a matrix structure, which allows its staff to be allocated to various critical functions in both a dedicated and a shared manner. With a team of specialists and generalists, the Afilias project management methodology allows efficient and effective use of our staff in a focused way. Abuse prevention and detection is a function that is staffed across the various groups inside Afilias, and requires a team effort when abuse is either well hidden or widespread, or both. While all of Afilias' 200+ employees are charged with responsibility to report any detected abuse, the engineering and analysis teams, numbering over 30, provide specific support based on the type of abuse and volume and frequency of analysis required. The Afilias security and support teams have the authority to initiate mitigation.

Afilias has developed advanced validation and abuse mitigation mechanisms. These capabilities and mechanisms are described below. These services and capabilities are discretionary and may be utilized by the registry operator based on their policy and business need.

This TLD's anticipated volume of registrations in the first three years of operations is listed in response #46. Afilias and the registry operator's anti-abuse function anticipates the expected volume and type of registrations, and together will adequately cover the staffing needs for this TLD. The registry operator will maintain an abuse response team, which may be a combination of internal staff and outside specialty contractors, adjusting to the needs of the size and type of TLD. The team structure planned for this TLD is based on several years of experience responding to, mitigating, and managing abuse for TLDs of various sizes. The team will generally consist of abuse handlers (probably internal), a junior analyst, (either internal or external), and a senior security consultant (likely an external resource providing the registry operator with extra expertise as needed). These responders will be specially trained in the investigation of abuse complaints, and will have the latitude to act expeditiously to suspend domain names (or apply other remedies) when called for.

The exact resources required to maintain an abuse response team must change with the size and registration procedures of the TLD. An initial abuse handler is necessary as a point of contact for reports, even if a part-time responsibility. The abuse handlers monitor the abuse email address for complaints and evaluate incoming reports from a variety of sources. A large percentage of abuse reports to the registry operator may be unsolicited commercial email. The designated abuse handlers can identify legitimate reports and then decide what action is appropriate, either to act upon them, escalate to a security analyst for closer investigation, or refer them to registrars as per the above-described procedures. A TLD with rare cases of abuse would conform to this structure.

If multiple cases of abuse within the same week occur regularly, the registry operator will consider staffing internally a security analyst to investigate the complaints as they become more frequent. Training an abuse analyst requires 3-6 months and likely requires the active guidance of an experienced senior security analyst for guidance and verification of assessments and recommendations being made.

If this TLD were to regularly experience multiple cases of abuse within the same day, a full-time senior security analyst would likely be necessary. A senior security analyst capable of fulfilling this role should have several years of experience and able to manage and train the internal abuse response team.

The abuse response team will also maintain subscriptions for several security information services, including the blocklists from organizations like SURBL and Spamhaus and anti-phishing and other domain related abuse (malware, fast-flux etc.) feeds. The pricing structure of these services may depend on the size of the domain and some services will include a number of rapid suspension requests for

use as needed.

For a large TLD, regular audits of the registry data are required to maintain control over abusive registrations. When a registrar with a significant number of registrations has been compromised or acted maliciously, the registry operator may need to analyze a set of registration or DNS query data. A scan of all the domains of a registrar is conducted only as needed. Scanning and analysis for a large registrar may require as much as a week of full-time effort for a dedicated machine and team.

29. Rights Protection Mechanisms

The mission and purpose of this TLD is to enhance and complement existing brand strategies of Kosher Marketing Assets and present the organization in a consistent manner. As such, Kosher Marketing Assets intends to limit registration of domains either for its exclusive use or for use by closely affiliated organizations in a manner that contributes to the purpose of this TLD. Kosher Marketing Assets also intends to govern the domain names registered to limit confusion and enhance user experience. To accomplish these objectives, Kosher Marketing Assets may be the sole registrant of domains in the TLD. However, due consideration has been made to all aspects of registry operations including the functions and policies defined below.

Rights protection is a core responsibility of the TLD operator, and is supported by a fully-developed plan for rights protection that includes:
• Establishing mechanisms to prevent unqualified registrations (e.g., registrations made in violation of the registry's eligibility restrictions or policies);
• Implementing a robust Sunrise program, utilizing the Trademark Clearinghouse, the services of one of ICANN's approved dispute resolution providers, a trademark validation agent, and drawing upon sunrise policies and rules used successfully in previous gTLD launches;
• Implementing a professional trademark claims program that utilizes the Trademark Clearinghouse, and drawing upon models of similar programs used successfully in previous TLD launches;
• Complying with the URS requirements;
• Complying with the UDRP;
• Complying with the PDDRP, and;
• Including all ICANN-mandated and independently developed rights protection mechanisms ("RPMs") in the registry-registrar agreement entered into by ICANN-accredited registrars authorized to register names in the TLD.

The response below details the rights protection mechanisms at the launch of the TLD (Sunrise and Trademark Claims Service) which comply with rights protection policies (URS, UDRP, PDDRP, and other ICANN RPMs), outlines additional provisions made for rights protection, and provides the resourcing plans.

Safeguards for rights protection at the launch of the TLD

The launch of this TLD will include the operation of a trademark claims service according to the defined ICANN processes for checking a registration request and alerting trademark holders of potential rights infringement.

The Sunrise Period will be an exclusive period of time, prior to the opening of public registration, when trademark and service mark holders will be able to reserve marks that are an identical match in the .KOSHER domain. Following the

Sunrise Period, Kosher Marketing Assets will open registration to qualified applicants.

The anticipated Rollout Schedule for the Sunrise Period will be approximately as follows:
Launch of the TLD – Sunrise Period begins for trademark holders and service mark holders to submit registrations for their exact marks in the .KOSHER domain.
Quiet Period – The Sunrise Period will close and will be followed by a Quiet Period for testing and evaluation.
One month after close of Quiet Period – Registration in the .KOSHER domain will be opened to qualified applicants.

Sunrise Period Requirements & Restrictions

Those wishing to reserve their marks in the .KOSHER domain during the Sunrise Period must own a current trademark or service mark listed in the Trademark Clearinghouse.

Notice will be provided to all trademark holders in the Clearinghouse if someone is seeking a Sunrise registration. This notice will be provided to holders of marks in the Clearinghouse that are an Identical Match (as defined in the Trademark Clearing House) to the name to be registered during Sunrise.

Each Sunrise registration will require a minimum term of five years.

Kosher Marketing Assets will establish the following Sunrise eligibility requirements (SERs) as minimum requirements, verified by Clearinghouse data, and incorporate a Sunrise Dispute Resolution Policy (SDRP). The SERs include: (i) ownership of a mark that satisfies the criteria set forth in section 7.2 of the Trademark Clearing House specifications, (ii) description of international class of goods or services covered by registration; (iii) representation that all provided information is true and correct; and (iv) provision of data sufficient to document rights in the trademark.

The SDRP will allow challenges based on the following four grounds: (i) at time the challenged domain name was registered, the registrants did not hold a trademark registration of national effect (or regional effect) or the trademark had not been court-validated or protected by statute or treaty; (ii) the domain name is not identical to the mark on which the registrant based its Sunrise registration; (iii) the trademark registration on which the registrant based its Sunrise registration is not of national effect (or regional effect) or the trademark had not been court-validated or protected by statute or treaty; or (iv) the trademark registration on which the domain name registrant based its Sunrise registration did not issue on or before the effective date of the Registry Agreement and was not applied for on or before ICANN announced the applications received.

Ongoing rights protection mechanisms

Several mechanisms will be in place to protect rights in this TLD. As described in our responses to questions #27 and #28, measures are in place to ensure domain transfers and updates are only initiated by the appropriate domain holder, and an experienced team is available to respond to legal actions by law enforcement or court orders.

This TLD will conform to all ICANN RPMs including URS (defined below), UDRP, PDDRP, and all measures defined in Specification 7 of the new TLD agreement.

Uniform Rapid Suspension (URS)

Kosher Marketing Assets will implement decisions rendered under the URS on an ongoing basis. Per the URS policy posted on ICANN's Web site as of this writing, the registry operator will receive notice of URS actions from the ICANN-approved URS providers. These emails will be directed immediately to the registry operator's support staff, which is on duty 24x7. The support staff will be responsible for creating a ticket for each case, and for executing the directives from the URS provider. All support staff will receive pertinent training.

As per ICANN's URS guidelines, within 24 hours of receipt of the notice of complaint from the URS provider, the registry operator shall "lock" the domain, meaning the registry shall restrict all changes to the registration data, including transfer and deletion of the domain names, but the name will remain in the TLD DNS zone file and will thus continue to resolve. The support staff will "lock" the domain by associating the following EPP statuses with the domain and relevant contact objects:

• ServerUpdateProhibited, with an EPP reason code of "URS"
• ServerDeleteProhibited, with an EPP reason code of "URS"
• ServerTransferProhibited, with an EPP reason code of "URS"
• The registry operator's support staff will then notify the URS provider immediately upon locking the domain name, via email.

The registry operator's support staff will retain all copies of emails from the URS providers, assign them a tracking or ticket number, and will track the status of each opened URS case through to resolution via spreadsheet or database.

The registry operator's support staff will execute further operations upon notice from the URS providers. The URS provider is required to specify the remedy and required actions of the registry operator, with notification to the registrant, the complainant, and the registrar.

As per the URS guidelines, if the complainant prevails, the registry operator shall suspend the domain name, which shall remain suspended for the balance of the registration period and would not resolve to the original web site. The nameservers shall be redirected to an informational web page provided by the URS provider about the URS. The WHOIS for the domain name shall continue to display all of the information of the original registrant except for the redirection of the nameservers. In addition, the WHOIS shall reflect that the domain name will not be able to be transferred, deleted or modified for the life of the registration."

Rights protection via the RRA

The following will be memorialized and be made binding via the Registry-Registrar and Registrar-Registrant Agreements:

• The registry may reject a registration request or a reservation request, or may delete, revoke, suspend, cancel, or transfer a registration or reservation under the following criteria:
a. to enforce registry policies and ICANN requirements; each as amended from time to time;
b. that is not accompanied by complete and accurate information as required by ICANN requirements and⁄or registry policies or where required information is not updated and⁄or corrected as required by ICANN requirements and⁄or registry policies;
c. to protect the integrity and stability of the registry, its operations, and the TLD system;
d. to comply with any applicable law, regulation, holding, order, or decision issued by a court, administrative authority, or dispute resolution service provider with jurisdiction over the registry;
e. to establish, assert, or defend the legal rights of the registry or a third

party or to avoid any civil or criminal liability on the part of the registry and⁄or its affiliates, subsidiaries, officers, directors, representatives, employees, contractors, and stockholders;
f. to correct mistakes made by the registry or any accredited registrar in connection with a registration; or
g. as otherwise provided in the Registry-Registrar Agreement and⁄or the Registrar-Registrant Agreement.

Reducing opportunities for behaviors such as phishing or pharming

In our response to question #28, Kosher Marketing Assets has described its anti-abuse program. Rather than repeating the policies and procedures here, please see our response to question #28 for full details.

In the case of this TLD, Kosher Marketing Assets will apply an approach that addresses registered domain names (rather than potentially registered domains). This approach will not infringe upon the rights of eligible registrants to register domains, and allows Kosher Marketing Assets internal controls, as well as community-developed UDRP and URS policies and procedures if needed, to deal with complaints, should there be any.

Afilias is a member of various security fora which provide access to lists of names in each TLD which may be used for malicious purposes. Such identified names will be subject to the TLD anti-abuse policy, including rapid suspensions after due process.

Rights protection resourcing plans

Since its founding, Afilias is focused on delivering secure, stable and reliable registry services. Several essential management and staff who designed and launched the Afilias registry in 2001 and expanded the number of TLDs supported, all while maintaining strict service levels over the past decade, are still in place today. This experiential continuity will endure for the implementation and on-going maintenance of this TLD. Afilias operates in a matrix structure, which allows its staff to be allocated to various critical functions in both a dedicated and a shared manner. With a team of specialists and generalists, the Afilias project management methodology allows efficient and effective use of our staff in a focused way.

Supporting RPMs requires several departments within the registry operator as well as within Afilias. The implementation of Sunrise and the Trademark Claims service and on-going RPM activities will pull from the 102 Afilias staff members of the engineering, product management, development, security and policy teams at Afilias, which is on duty 24x7, and the support staff of the registry operator. A trademark validator will also be assigned within the registry operator, whose responsibilities may require as much as 50% of full-time employment if the domains under management were to exceed several million. No additional hardware or software resources are required to support this as Afilias has fully-operational capabilities to manage abuse today.

30(a). Security Policy: Summary of the security policy for the proposed registry

The answer to question #30a is provided by Afilias, the back-end provider of registry services for this TLD.

Afilias aggressively and actively protects the registry system from known threats and vulnerabilities, and has deployed an extensive set of security protocols, policies and procedures to thwart compromise. Afilias' robust and detailed plans are continually updated and tested to ensure new threats are mitigated prior to becoming issues. Afilias will continue these rigorous security measures, which include:
• Multiple layers of security and access controls throughout registry and support systems;
• 24x7 monitoring of all registry and DNS systems, support systems and facilities;
• Unique, proven registry design that ensures data integrity by granting only authorized access to the registry system, all while meeting performance requirements;
• Detailed incident and problem management processes for rapid review, communications, and problem resolution, and;
• Yearly external audits by independent, industry-leading firms, as well as twice-yearly internal audits.

Security policies and protocols

Afilias has included security in every element of its service, including facilities, hardware, equipment, connectivity/Internet services, systems, computer systems, organizational security, outage prevention, monitoring, disaster mitigation, and escrow/insurance, from the original design, through development, and finally as part of production deployment. Examples of threats and the confidential and proprietary mitigation procedures are detailed in our response to question #30(b).

There are several important aspects of the security policies and procedures to note:
• Afilias hosts domains in data centers around the world that meet or exceed global best practices.
• Afilias' DNS infrastructure is massively provisioned as part of its DDoS mitigation strategy, thus ensuring sufficient capacity and redundancy to support new gTLDs.
• Diversity is an integral part of all of our software and hardware stability and robustness plan, thus avoiding any single points of failure in our infrastructure.
• Access to any element of our service (applications, infrastructure and data) is only provided on an as-needed basis to employees and a limited set of others to fulfill their job functions. The principle of least privilege is applied.
• All registry components – critical and non-critical – are monitored 24x7 by staff at our NOCs, and the technical staff has detailed plans and procedures that have stood the test of time for addressing even the smallest anomaly. Well-documented incident management procedures are in place to quickly involve the on-call technical and management staff members to address any issues.

Afilias follows the guidelines from the ISO 27001 Information Security Standard (Reference: http://www.iso.org/iso/iso_catalogue/catalogue_tc/catalogue_detail.htm?csnumber=42103) for the management and implementation of its Information Security Management System. Afilias also utilizes the COBIT IT governance framework to facilitate policy development and enable controls for appropriate management of risk (Reference: http://www.isaca.org/cobit). Best practices defined in ISO 27002 are followed for defining the security controls within the organization. Afilias continually looks to improve the efficiency and effectiveness of our processes, and follows industry best practices as defined by the IT Infrastructure Library, or ITIL (Reference: http://www.itil-officialsite.com/).

The Afilias registry system is located within secure data centers that implement a

multitude of security measures both to minimize any potential points of vulnerability and to limit any damage should there be a breach. The characteristics of these data centers are described fully in our response to question #30(b).

The Afilias registry system employs a number of multi-layered measures to prevent unauthorized access to its network and internal systems. Before reaching the registry network, all traffic is required to pass through a firewall system. Packets passing to and from the Internet are inspected, and unauthorized or unexpected attempts to connect to the registry servers are both logged and denied. Management processes are in place to ensure each request is tracked and documented, and regular firewall audits are performed to ensure proper operation. 24x7 monitoring is in place and, if potential malicious activity is detected, appropriate personnel are notified immediately.

Afilias employs a set of security procedures to ensure maximum security on each of its servers, including disabling all unnecessary services and processes and regular application of security-related patches to the operating system and critical system applications. Regular external vulnerability scans are performed to verify that only services intended to be available are accessible.

Regular detailed audits of the server configuration are performed to verify that the configurations comply with current best security practices. Passwords and other access means are changed on a regular schedule and are revoked whenever a staff member's employment is terminated.

Access to registry system
Access to all production systems and software is strictly limited to authorized operations staff members. Access to technical support and network operations teams where necessary are read only and limited only to components required to help troubleshoot customer issues and perform routine checks. Strict change control procedures are in place and are followed each time a change is required to the production hardware/application. User rights are kept to a minimum at all times. In the event of a staff member's employment termination, all access is removed immediately.

Afilias applications use encrypted network communications. Access to the registry server is controlled. Afilias allows access to an authorized registrar only if each of the authentication factors matches the specific requirements of the requested authorization. These mechanisms are also used to secure any web-based tools that allow authorized registrars to access the registry. Additionally, all write transactions in the registry (whether conducted by authorized registrars or the registry's own personnel) are logged.

EPP connections are encrypted using TLS/SSL, and mutually authenticated using both certificate checks and login/password combinations. Web connections are encrypted using TLS/SSL for an encrypted tunnel to the browser, and authenticated to the EPP server using login/password combinations.

All systems are monitored for security breaches from within the data center and without, using both system-based and network-based testing tools. Operations staff also monitor systems for security-related performance anomalies. Triple-redundant continual monitoring ensures multiple detection paths for any potential incident or problem. Details are provided in our response to questions #30(b) and #42. Network Operations and Security Operations teams perform regular audits in search of any potential vulnerability.

To ensure that registrar hosts configured erroneously or maliciously cannot deny service to other registrars, Afilias uses traffic shaping technologies to prevent attacks from any single registrar account, IP address, or subnet. This additional

layer of security reduces the likelihood of performance degradation for all registrars, even in the case of a security compromise at a subset of registrars.

There is a clear accountability policy that defines what behaviors are acceptable and unacceptable on the part of non-staff users, staff users, and management. Periodic audits of policies and procedures are performed to ensure that any weaknesses are discovered and addressed. Aggressive escalation procedures and well-defined Incident Response management procedures ensure that decision makers are involved at early stages of any event.

In short, security is a consideration in every aspect of business at Afilias, and this is evidenced in a track record of a decade of secure, stable and reliable service.

Independent assessment

Supporting operational excellence as an example of security practices, Afilias performs a number of internal and external security audits each year of the existing policies, procedures and practices for:
• Access control;
• Security policies;
• Production change control;
• Backups and restores;
• Batch monitoring;
• Intrusion detection, and
• Physical security.

Afilias has an annual Type 2 SSAE 16 audit performed by PricewaterhouseCoopers (PwC). Further, PwC performs testing of the general information technology controls in support of the financial statement audit. A Type 2 report opinion under SSAE 16 covers whether the controls were properly designed, were in place, and operating effectively during the audit period (calendar year). This SSAE 16 audit includes testing of internal controls relevant to Afilias' domain registry system and processes. The report includes testing of key controls related to the following control objectives:
• Controls provide reasonable assurance that registrar account balances and changes to the registrar account balances are authorized, complete, accurate and timely.
• Controls provide reasonable assurance that billable transactions are recorded in the Shared Registry System (SRS) in a complete, accurate and timely manner.
• Controls provide reasonable assurance that revenue is systemically calculated by the Deferred Revenue System (DRS) in a complete, accurate and timely manner.
• Controls provide reasonable assurance that the summary and detail reports, invoices, statements, registrar and registry billing data files, and ICANN transactional reports provided to registry operator(s) are complete, accurate and timely.
• Controls provide reasonable assurance that new applications and changes to existing applications are authorized, tested, approved, properly implemented and documented.
• Controls provide reasonable assurance that changes to existing system software and implementation of new system software are authorized, tested, approved, properly implemented and documented.
• Controls provide reasonable assurance that physical access to data centers is restricted to properly authorized individuals.
• Controls provide reasonable assurance that logical access to system resources is restricted to properly authorized individuals.
• Controls provide reasonable assurance that processing and backups are appropriately authorized and scheduled and that deviations from scheduled processing and backups are identified and resolved.

The last Type 2 report issued was for the year 2010, and it was unqualified, i.e., all systems were evaluated with no material problems found.

During each year, Afilias monitors the key controls related to the SSAE controls. Changes or additions to the control objectives or activities can result due to deployment of new services, software enhancements, infrastructure changes or process enhancements. These are noted and after internal review and approval, adjustments are made for the next review.

In addition to the PricewaterhouseCoopers engagement, Afilias performs internal security audits twice a year. These assessments are constantly being expanded based on risk assessments and changes in business or technology.

Additionally, Afilias engages an independent third-party security organization, PivotPoint Security, to perform external vulnerability assessments and penetration tests on the sites hosting and managing the Registry infrastructure. These assessments are performed with major infrastructure changes, release of new services or major software enhancements. These independent assessments are performed at least annually. A report from a recent assessment is attached with our response to question #30(b).

Afilias has engaged with security companies specializing in application and web security testing to ensure the security of web-based applications offered by Afilias, such as the Web Admin Tool (WAT) for registrars and registry operators.

Finally, Afilias has engaged IBM's Security services division to perform ISO 27002 gap assessment studies so as to review alignment of Afilias' procedures and policies with the ISO 27002 standard. Afilias has since made adjustments to its security procedures and policies based on the recommendations by IBM.

Special TLD considerations

Afilias' rigorous security practices are regularly reviewed; if there is a need to alter or augment procedures for this TLD, they will be done so in a planned and deliberate manner.

Commitments to registrant protection

With over a decade of experience protecting domain registration data, Afilias understands registrant security concerns. Afilias supports a "thick" registry system in which data for all objects are stored in the registry database that is the centralized authoritative source of information. As an active member of IETF (Internet Engineering Task Force), ICANN's SSAC (Security & Stability Advisory Committee), APWG (Anti-Phishing Working Group), MAAWG (Messaging Anti-Abuse Working Group), USENIX, and ISACA (Information Systems Audits and Controls Association), the Afilias team is highly attuned to the potential threats and leading tools and procedures for mitigating threats. As such, registrants should be confident that:

- Any confidential information stored within the registry will remain confidential;
- The interaction between their registrar and Afilias is secure;
- The Afilias DNS system will be reliable and accessible from any location;
- The registry system will abide by all polices, including those that address registrant data;
- Afilias will not introduce any features or implement technologies that compromise access to the registry system or that compromise registrant security.

Afilias has directly contributed to the development of the documents listed below and we have implemented them where appropriate. All of these have helped improve registrants' ability to protect their domains name(s) during the domain name lifecycle.
• [SAC049]: SSAC Report on DNS Zone Risk Assessment and Management (03 June 2011)
• [SAC044]: A Registrant's Guide to Protecting Domain Name Registration Accounts (05 November 2010)
• [SAC040]: Measures to Protect Domain Registration Services Against Exploitation or Misuse (19 August 2009)
• [SAC028]: SSAC Advisory on Registrar Impersonation Phishing Attacks (26 May 2008)
• [SAC024]: Report on Domain Name Front Running (February 2008)
• [SAC022]: Domain Name Front Running (SAC022, SAC024) (20 October 2007)
• [SAC011]: Problems caused by the non-renewal of a domain name associated with a DNS Name Server (7 July 2006)
• [SAC010]: Renewal Considerations for Domain Name Registrants (29 June 2006)
• [SAC007]: Domain Name Hijacking Report (SAC007) (12 July 2005)

To protect any unauthorized modification of registrant data, Afilias mandates TLS/SSL transport (per RFC 5246) and authentication methodologies for access to the registry applications. Authorized registrars are required to supply a list of specific individuals (five to ten people) who are authorized to contact the registry. Each such individual is assigned a pass phrase. Any support requests made by an authorized registrar to registry customer service are authenticated by registry customer service. All failed authentications are logged and reviewed regularly for potential malicious activity. This prevents unauthorized changes or access to registrant data by individuals posing to be registrars or their authorized contacts.

These items reflect an understanding of the importance of balancing data privacy and access for registrants, both individually and as a collective, worldwide user base.

The Afilias 24/7 Customer Service Center consists of highly trained staff who collectively are proficient in 15 languages, and who are capable of responding to queries from registrants whose domain name security has been compromised – for example, a victim of domain name hijacking. Afilias provides specialized registrant assistance guides, including specific hand-holding and follow-through in these kinds of commonly occurring circumstances, which can be highly distressing to registrants

Security resourcing plans

Please refer to our response to question #30b for security resourcing plans.

Reconsideration Request

Union of Orthodox Jewish Congregations of America, *et al.*

Annex F

E-mail from Luca G. Radicati di Brozolo, ICC Expert,
to Brian J. Winterfeldt, counsel for Applicant
(2 Sept. 2013, 10:29 a.m. EST)

Meltzer, Ari

From: Radicati di Brozolo, Luca G. Contact Information Redacted
Sent: Monday, September 02, 2013 10:29 AM
To: Winterfeldt, Brian J.
Cc: Weslow, David; Meltzer, Ari; Contact Information Redacted Ciocca, Valentina
Subject: RE: ICC Expertise No. 424_ICANN - Community Objection to .KOSHER (ICC Ref. No.: EXP/424/ICANN/41) (Katten Ref.: 384026.00001)

Dear Mr Winterfeld:

The Applicant is kindly requested to explain the statement in § 18(b)(iv), second paragraph of its Application for the ".kosher" gTLD, that "*Kosher Marketing Assets intends to limit registration of domains either for its exclusive use or for use by closely affiliated organizations*". In particular it would be helpful if the explanation could focus on the compatibility of that statement with the arguments contained in the Applicant's written submissions concerning the "material detriment" factor and specifically the non-discrimination and other obligations to which it contends it would be subject under Specification 11.

I would appreciate it if this explanation, which should not exceed two pages, were submitted by close of business tomorrow, September 3.

The Objector will have 48 hours to reply.

Kind regards.

Luca G. Radicati di Brozolo

From: Winterfeldt, Brian J. Contact Information Redacted
Sent: martedì 27 agosto 2013 19:45
To: Radicati di Brozolo, Luca G.; Ciocca, Valentina
Cc: Contact Information Redacted
Subject: ICC Expertise No. 424_ICANN - Community Objection to .KOSHER (ICC Ref. Con EXP/424/ICANN/41) (Katten Ref.: 384026.00001)

Dear Professor Radicati:

Attached please find Kosher Marketing Assets LLC's Response to OU Kosher 's Additional Submission in the above-referenced proceeding. This transmittal includes the Response to the Additional Submission and Annex AE to Annex AM.

Respectfully submitted,

Brian J. Winterfeldt
Representative for Applicant

Brian J. Winterfeldt
Partner
Katten Muchin Rosenman LLP
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Reconsideration Request

Union of Orthodox Jewish Congregations of America, *et al.*

Annex G

E-mail from Luca G. Radicati di Brozolo, ICC Expert,
to Brian J. Winterfeldt, counsel for Applicant
(2 Sept. 2013, 12:21 p.m. EST)

Meltzer, Ari

From: Radicati di Brozolo, Luca G. Contact Information Redacted
Sent: Monday, September 02, 2013 12:21 PM
To: Winterfeldt, Brian J.
Cc: Weslow, David; Meltzer, Contact Information Redacted Ciocca, Valentina
Subject: RE: ICC Expertise No. 424_ICANN - Community Objection to .KOSHER (ICC Ref. No.: EXP/424/ICANN/41) (Katten Ref.: 384026.00001)

Dear Mr Winterfeld:

I would also be grateful if in the reply to my request of earlier today the Applicant would clarify the conditions under which domains under the ".kosher" gTLD "*will only be made available to companies that have been personally visited, inspected, and are known to be using the domain to promote Kosher Certification*" as stated in § 18(b)(iii) of the Application, and specifically who will be in charge of personally visiting the companies who seek to register the domains.

The same deadlines indicated in my earlier email will apply.

Kind regards.

Luca G. Radicati di Brozolo

From: Radicati di Brozolo, Luca G.
Sent: lunedì 2 settembre 2013 16:29
To: Winterfeldt, Brian J.
Cc: Contact Information Redacted Ciocca, Valentina
Subject: RE: ICC Expertise No. 424_ICANN - Community Objection to .KOSHER (ICC Ref. No.: EXP/424/ICANN/41) (Katten Ref.: 384026.00001)

Dear Mr Winterfeld:

The Applicant is kindly requested to explain the statement in § 18(b)(iv), second paragraph of its Application for the ".kosher" gTLD, that "*Kosher Marketing Assets intends to limit registration of domains either for its exclusive use or for use by closely affiliated organizations*". In particular it would be helpful if the explanation could focus on the compatibility of that statement with the arguments contained in the Applicant's written submissions concerning the "material detriment" factor and specifically the non-discrimination and other obligations to which it contends it would be subject under Specification 11.

I would appreciate it if this explanation, which should not exceed two pages, were submitted by close of business tomorrow, September 3.

The Objector will have 48 hours to reply.

Kind regards.

Luca G. Radicati di Brozolo

From: Winterfeldt, Brian J. Contact Information Redacted
Sent: martedì 27 agosto 2013 19:45
To: Radicati di Brozolo, Luca G.; Ciocca, Valentina
Cc: Contact Information Redacted
Subject: ICC Expertise No. 424_ICANN - Community Objection to .KOSHER (ICC Ref. No.: EXP/424/ICANN/41) (Katten Ref.: 384026.00001)

Dear Professor Radicati:

Attached please find Kosher Marketing Assets LLC's Response to OU Kosher 's Additional Submission in the above-referenced proceeding. This transmittal includes the Response to the Additional Submission and Annex AE to Annex AM.

Respectfully submitted,

Brian J. Winterfeldt
Representative for Applicant

Brian J. Winterfeldt
Partner
Katten Muchin Rosenman LLP
Contact Information Redacted

Reconsideration Request

Union of Orthodox Jewish Congregations of America, *et al.*

Annex H

SportAccord v. dot Sport Limited,
EXP/471/ICANN/88 (23 Oct. 2013)

THE INTERNATIONAL CENTRE FOR EXPERTISE OF THE

INTERNATIONAL CHAMBER OF COMMERCE

CASE No. EXP/471/ICANN/88

SPORTACCORD

(SWITZERLAND)

vs/

DOT SPORT LIMITED

(GIBRALTAR)

This document is an original of the Expert Determination rendered in conformity with the New gTLD Dispute Resolution Procedure as provided in Module 3 of the gTLD Applicant Guidebook from ICANN and the ICC Rules for Expertise.

INTERNATIONAL CENTRE FOR EXPERTISE

INTERNATIONAL CHAMBER OF COMMERCE

SPORTACCORD
(Switzerland)

v.

DOT SPORT LIMITED
(Gibraltar)

EXP/471/ICANN/88

EXPERT DETERMINATION

By

Prof. Dr. Guido Santiago Tawil

This document is an original of the Expert Determination rendered in conformity with Article 21 of the ICANN New gTLD Dispute Resolution Procedure

TABLE OF CONTENTS

TABLE OF ABBREVIATIONS

Applicant	dot Sport Limited
Appointed Expert	The Appointed Expert as defined in Section II of this Expert Determination
DRSP	Dispute Resolution Service Provider
GNSO	ICANN Generic Names Supporting Organization
gTLD	generic Top-Level Domain
ICANN	The Internet Corporation for Assigned Names and Numbers
ICANN Guidebook	Module 3 of the ICANN's gTLD Applicant Guidebook, version dated June 4, 2012.
ICC	The International Chamber of Commerce
ICC Centre	The International Centre for Expertise of the International Chamber of Commerce
ICC Practice Note	ICC Practice Note on the Administration of Cases
ICC Rules for Expertise	The Rules for Expertise of the International Chamber of Commerce in force as from January 1st, 2003
Objector	SportAccord
Parties	SportAccord and dot Sport Limited
Rules of Procedure	The ICANN's Attachment to Module 3 – New gTLD Dispute Resolution Procedure

EXPERT DETERMINATION

1. In accordance with Article 21 of the New gTLD Dispute Resolution Procedure ("Rules of Procedure"), the Appointed Expert renders this Expert Determination.

I. The Parties

A. *Objector*

2. Objector in these proceedings is SPORTACCORD ("SportAccord" or "Objector"), an association established according to the laws of Switzerland, domiciled at

Contact Information Redacted

3. In these proceedings, Objector is represented by:

Mr. Pierre Germeau
SportAccord
Contact Information Redacted

4. Notifications and communications arising in the course of these proceedings were made to the aforementioned e-mail address.

B. *Applicant*

5. Applicant in these proceedings is DOT SPORT LIMITED ("dot Sport Limited" or "Applicant"), a company established according to the laws of Gibraltar, domiciled at :

Contact Information Redacted

6. In these proceedings, Applicant is represented by:

Mr. Peter Young
Contact Information Redacted

Contact Information Redacted

7. Notifications and communications arising in the course of these proceedings were made to the aforementioned e-mail address.

II. The Appointed Expert

8. On July 29, 2013, the Chairman of the Standing Committee of the International Centre for Expertise of the International Chamber of Commerce (the "ICC Centre") appointed Prof. Dr. Guido Santiago Tawil as Expert in accordance with Articles 7 and 11(5) of the the Rules for Expertise of the International Chamber of Commerce in force as from January 1st, 2003 (the "ICC Rules for Expertise"). The Appointed Expert contact details are:

Guido Santiago Tawil
M. & M. Bomchil
Contact Information Redacted

9. Managers of the ICC Centre who are in charge of the file are:

Hannah Tümpel (Manager)
Spela Kosak (Deputy Manager)
ICC International Centre for Expertise
Contact Information Redacted

III. Summary of the Procedural History

10. On March 13, 2013, SportAccord filed an Objection pursuant to Module 3 of the gTLD Applicant Guidebook, version dated June 4, 2012 ("ICANN Guidebook"), the Attachment to Module 3 – New gTLD Dispute Resolution Procedure ("Rules of Procedure") and the Rules for Expertise of the International Chamber of Commerce in force as from January 1st, 2003 ("ICC Rules for Expertise") supplemented by the ICC Practice Note on the Administration of Cases ("ICC Practice

Note").

11. On March 16, 2013, the ICC Centre acknowledged receipt of the Objection and conducted the administrative review of it in accordance with Article 9 of the Rules of Procedure for the purpose of verifying compliance with the requirements set forth in Articles 5 to 8 of the Rules of Procedure.

12. On April 5, 2013, the ICC Centre informed the Parties that the Objection was in compliance with Articles 5 to 8 of the Rules of Procedure. Accordingly, the Objection was registered for processing.

13. On April 12, 2013, the Internet Corporation for Assigned Names and Numbers ("ICANN") published its Dispute Announcement pursuant to Article 10(a) of the Rules of Procedure.

14. On the same date, the ICC Centre informed the Parties that it was considering the consolidation of the present case with the case No. EXP/486/ICANN/103 (SportAccord v. Steel Edge LLC; gTLD: ".sports") in accordance with Article 12 of the Rules of Procedure. Therefore, the ICC Centre invited the Parties to provide their comments regarding the possible consolidation no later than April 16, 2013.

15. On April 15, 2013, Applicant filed its comments on the possible consolidation by e-mail to the ICC Centre, a copy of which was sent directly to Objector.

16. On April 16, 2013, Objector filed its comments on the possible consolidation by e-mail to the ICC Centre, a copy of which was sent directly to Applicant.

17. On April 22, 2013, the ICC Centre informed the Parties that it decided not to proceed with the consolidation. It further invited Applicant to file a Response to the Objection within 30 days of the ICC Centre's transmission of such letter in accordance with Article 11(b) of the Rules of Procedure.

18. On May 21, 2013, dot Sport Limited filed its Response to SportAccord's Objection.

19. On May 22, 2013, the ICC Centre acknowledged receipt of Applicant's Response. It further informed the Parties that the Response was in compliance with the Rules of Procedure.

20. On June 21, 2013, the ICC Centre appointed Mr. Jonathan P. Taylor as expert in accordance with Article 13 of the Rules of Procedure and Article 9(5)(d) of the Rules for Expertise.

21. On July 16, 2013, the ICC Centre acknowledged receipt of Applicant's objection to Mr. Taylor's appointment.

22. On July 25, 2013, the ICC Centre informed the Parties that it had decided not to confirm the appointment of Mr. Taylor as Expert in the present case and, there-

fore, it would proceed with the appointment of another Expert.

23. On July 29, 2013, the Chairman of the Standing Committee of the ICC Centre appointed Prof. Dr. Guido Santiago Tawil as Expert in accordance with Article 7 of the ICC Rules for Expertise and Article 3(3) of its Appendix I. On July 30, 2013, the ICC Centre notified the Parties of the Expert's appointment. It further sent the Parties the Expert's *curriculum vitae* as well as his Declaration of Acceptance and Availability, Statement of Impartiality and Independence.

24. On August 2, 2013, the ICC Centre reminded the Parties that the estimated costs had been paid in full by each party and confirmed the constitution of the expert panel.

25. On the same day, the electronic file was transferred by the ICC Centre to the Appointed Expert.

26. On August 5, 2013, the Appointed Expert issued Communication E-1 by means of which it informed the Parties that (i) based on their submissions and pursuant to Article 21 of the Rules of Procedure, it would render its Expert Determination, and (ii) at that stage, it did not consider necessary to request the Parties to submit any written statement in addition to the Objection and the Response, including their respective exhibits.

27. In accordance with point 6 of the ICC Practice Note on the Administration of Cases ("ICC Practice Note"), the requirement for the Expert Mission contained in Article 12(1) of the ICC Rules for Expertise has been waived.

28. Pursuant to Article 21(a) of the Rules of Procedure, the time-limit for rendering this Expert Determination expires on September 16, 2013.

29. The Expert Determination was submitted in draft form to the ICC Centre on August 23, 2013, within the 45 day time limit in accordance with Article 21(a) of the Procedure.

IV. Procedural Issues and Applicable Rules

30. SportAccord filed a "Community Objection", defined as "*a substantial opposition to the gTLD application from a significant portion of the community to which the gTLD string may be explicitly or implicitly targeted*" according to Article 3.2.1. of the ICANN Guidebook, against dot Sport Limited's application for the gTLD ".sport".

31. Pursuant to Article 5(a) of the Rules of Procedure, all submissions –including this Expert Determination– have been made in English. Further, all submissions and communications between the Parties, the Appointed Expert and the ICC Centre were filed electronically as stated in Article 6(a) of the Rules of Procedure.

32. In accordance with Article 4(d) of the Rules of Procedure, the seat of these proceedings is the location of the ICC Centre in Paris, France.

33. For the purpose of rendering this Expert Determination, the applicable rules are: the ICC Rules for Expertise, supplemented by the ICC Practice Note, the ICANN Guidebook and the Rules of Procedure.

V. Summary of the Parties' Positions

34. The issues to be addressed by the Appointed Expert shall be those resulting from the Parties' submissions and those which the Appointed Expert considers to be relevant to make a determination on the Parties' respective positions.

35. Based on the Parties' written submissions (SportAccord's Objection, dot Sport Limited Response and their respective exhibits), the main issues and claims under determination can be summarised as follows.

A. *Objector's Position*

36. SportAccord claims that it has standing to object to applications for the gTLD ".sport" on the grounds that it is an established international representative institution of the Sport Community,[1] which has been impacted by such gTLD application. Further, Objector states that it is a not-for-profit association constituted in accordance with the Swiss Civil Code and comprises several autonomous and independent international sports federations and other international organizations[2] which contribute to sport in various fields.[3]

37. Regarding the description of the basis for the Objection as established in Article 3.3.1 of the ICANN Guidebook, SportAccord states that the Sport Community

[1] According to Objector, the Sport Community is organized on local, national and international levels and is clearly delineated by way of its organizational structures and its values. See: Objection, page 6.

[2] SportAccord has 91 full members: international sports federations governing specific sports worldwide and 16 associate members: organizations which conduct activities related to the international sports federations. See: Exhibit Ap-2.

[3] Indeed, Objector claimed that *"SportAccord is the umbrella organisation for both Olympic and non-Olympic international sports federations as well as organisers of international sporting events"*. See: Objection, page 6. Article 2 of SportAccord Statutes establishes several purposes of this association which, among others, include: *"a) to promote sport at all levels, as a means to contribute to the positive development of society; b) to assist its Full Members in strengthening their position as world leaders in their respective sports… d) to increase the level of recognition of SportAccord and its Members by the Olympic Movement stakeholders as well as by other entities involved in sport… j) to coordinate and protect the common interests of its Members… k) to collaborate with organisations having as their objective the promotion of sport on a world-wide basis"*. See: Exhibit Ap-1. Objector states that its programs include, among others, *"International Federation (IF) recognition, IF relations, doping-free sport, fighting illegal betting, governance, sports' social responsibility, multi-sports games, the '.sport' initiative, the sports hub, the annual SportAccord Convention and the annual IF Forum"*. See: Objection, page 7.

is organized, delineated, of long-standing establishment and impacted by sport-related domain names. In light of this statement, Objector expresses its substantial opposition to the application, claiming representation of a significant portion of the Sport Community. It further argues that there is no evidence of community support for any of the non-community-based applications.[4]

38. According to SportAccord, the Sport Community is both targeted implicitly and explicitly by the application for the ".sport" gTLD.[5]

39. Finally, Objector elaborates on the material *"detriment"* to the rights and legitimate interests of the Sport Community –and to users in general– if dot Sport Limited's application is allowed to proceed or even finally approved.[6]

40. Based on these allegations, Objector requests that the Appointed Expert acknowledges that (i) the ".sport" gTLD string targets the Sport Community, (ii) there is a substantial opposition to such application from a significant portion of the Sport Community, and (iii) therefore, the application for the ".sport" gTLD is to be rejected.

B. *Applicant's Position*

41. Applicant rejects SportAccord's Objection. From the outset of its Response, Applicant alleges that the ".sport" gTLD is intended and designed to increase availability and access to create, produce and disseminate informative, creative and innovative sport-related content. It further alleges that mechanisms have been established to ensure that the gTLD *"operates and grows in a manner that is responsible, protects consumers and promotes consumer and industry trust and confidence"*.[7]

42. In addition, dot Sport Limited alleges that SportAccord has no standing to object on the ground that it fails to prove that it has *"an on-going relationship"* with a clearly delineated Sport Community as a whole.[8]

43. In relation to the "Community" argument, dot Sport Limited explains that the Sport Community is not *"clearly delineated"* because it is comprised of a significant number of stakeholders who do not necessarily share similar goals, values or interests. It also emphasizes that such "Community" lacks formal boundaries, which is also proved by the fact that there is a disagreement about the entities that make up such "Community".[9]

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[4] See: Objection, page 8.
[5] See: Objection, page 10.
[6] See: Objection, page 11.
[7] See: Response, page 4. In particular, Applicant claims that the objection process *"is not a substitute for Community Evaluation and was not envisaged to be a mechanism by which one applicant could gain a competitive advantage over another".*
[8] See: Response, pages 4 and 5.
[9] See: Response, page 5.

44. Further, Applicant rejects Objector's argument that the substantial opposition to the application comes from a significant portion of the Sport Community. Indeed, it is Applicant's position that Objector represents a subset of the alleged Community and does not represent the interests, goals, or values of numerous stakeholders in such "Community".[10]

45. In any event, dot Sport Limited states that *"there is not a strong association between the "Community" represented by Objector and the applied for ".sport" TLD"* string.[11]

46. Finally, concerning the material *"detriment"* to the rights and legitimate interests of the Sport Community –as alleged by Objector–, Applicant argues that SportAccord failed to prove a likelihood of material detriment. It further states that the damages alleged by SportAccord are speculative in nature and there is no evidence that such alleged detrimental outcomes would occur.[12]

47. Based on these arguments, dot Sport Limited requests the Appointed Expert to hold that SportAccord's objection is invalid and, therefore, deny the Objection.

VI. Findings of the Appointed Expert

48. In order to make its determination, the Appointed Expert will address the following issues, in accordance with the criteria listed in the ICANN Guidebook :

(1) *Does SportAccord have standing to put forward a Community Objection against the application made by dot Sport Limited?*

(2) *Is the Sport Community clearly delineated?*

(3) *Is there a substantial opposition to the application ".sport" gTLD on behalf of a significant part of the Sport Community?*

(4) *Is the Sport Community explicitly or implicitly targeted by the application ".sport" gTLD?*

(5) *Is there any material detriment to the rights or legitimate interests of the Sport Community if the application ".sport" gTLD is allowed to proceed?*

49. In the following Sections, the Appointed Expert sets out and summarises his understanding of the Parties' positions concerning each of these issues, as elaborated by the Parties in their written pleadings, followed by the Appointed Expert's own analysis and determination concerning such issues.

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[10] See: Response, page 8.
[11] See: Response, page 10.
[12] See: Response, page 11.

A. *Objector's Standing*

(1) *Does SportAccord have standing to put forward a Community Objection against the application made by dot Sport Limited?*

50. The Appointed Expert is of the view that prior to considering the grounds of the Objection, it is necessary to address this preliminary issue, namely the question of whether SportAccord has standing to put forward a "Community Objection" against the application ".sport" gTLD made by dot Sport Limited.

51. The Appointed Expert will start by deciding this preliminary question in the understanding that if the Appointed Expert finds that the Objector lacks *ius standi* to object, it will become unnecessary to enter into the analysis of the grounds of the Objection.

(i) *Positions of the Parties*

52. Applicant has challenged Objector's standing to file an objection against the application for the".sport" gTLD. In its Response, Applicant argues that Objector failed to prove that it has *"an on-going relationship"* with a *"clearly delineated Sport Community"* as a whole, failing to meet the standard established in Article 3.2.2.4 of the ICANN Guidebook.[13]

53. While dot Sport Limited recognizes that Objector is an "established institution", it affirms that SportAccord only has an on-going relationship *"with a particular subset of stakeholders"*.[14]

54. Applicant goes further and states that, in fact, there is no Sport Community since there are so many activities which can be legitimately identified as "sports". Based on this statement, dot Sport Limited reaffirms its position by stating that the alleged Sport Community is not *"clearly delineated"*, because *"just about anyone could claim to have an interest in sport"*.[15] Additionally, Applicant criticizes Objector's policies for creating obstacles to free and open participation in its activities, membership and leadership.

55. Although Objector has not dealt directly with these arguments, which were put forward once SportAccord had submitted its Objection, it claims that it has standing to object to the application for the ".sport" gTLD since it is an established international representative institution of the Sport Community, which has been impacted by the mentioned string application.

56. Objector states that it is a not-for-profit association established since 1967,

[13] See: Response, page 4.
[14] See: Response, page 5. According to Applicant, *"Objector's mission statement clearly shows that Objector only represents a particular subset of the alleged community, organized sports, failing to represent other stakeholders such as: unorganized sports…; sports equipment manufacturers and retailers; media outlets such as newspapers, TV, bloggers… Objector cannot speak for them"*.
[15] See: Response, page 5.

which has an ongoing relationship with the Sport Community due to the fact that it comprises autonomous and independent international sports federations and other international organizations.

57. In particular, SportAccord alleges that it has (i) 91 full members: international sports federations governing specific sports worldwide, and (ii) 16 associate members: organizations which conduct activities closely related to the international sports federations. In Objector's words, *"SportAccord is the umbrella organisation for both Olympic and non-Olympic international sports federations as well as organisers of international sporting events"*.[16]

58. Finally, in the Objector's view, the Sport Community is highly organized on local, national and international levels and, thus it is clearly delineated by way of its organizational structures and values.

(ii) *Considerations of the Appointed Expert*

59. Pursuant to Article 3.2.2 of the ICANN Guidebook, it is for the Appointed Expert to determine whether the Objector has standing to object.

60. In accordance with the ICANN Guidebook, objectors must satisfy certain standing requirements to have their objections considered by the expert panel. In the case of a "Community Objection", *"established institutions associated with clearly delineated communities are eligible to file a community objection. The community named by the objector must be a community strongly associated with the applied-for gTLD string in the application that is the subject of the objection…"*.[17]

61. Therefore, to qualify for standing for a "Community Objection", the Objector shall fulfill two conditions, namely that (i) it is an established institution, and (ii) it has an ongoing relationship with a clearly delineated community.

62. The ICANN Guidebook provides useful guidelines so as to determine whether these two requirements should be considered as satisfied by the Objector.

63. Regarding the first condition to be met (i.e.: *"established institution"*), Article 3.2.2.4 of the ICANN Guidebook lists some key factors which may be considered by the expert panel in making its determination. These factors are: (i) the level of global recognition of the institution, (ii) the length of time the institution has been in existence; and (iii) the public historical evidence of its existence, such as the presence of a formal charter or national or international registration, or validation by a government, inter-governmental organization, or treaty.

64. In order to evaluate its standing *"the institution must not have been estab-*

[16] See: Objection, page 6.
[17] Article 3.2.2.4 of the ICANN Guidebook.

lished solely in conjunction with the gTLD application process".[18]

65. SportAccord (previously known as "GAISF", the General Association of International Sports Federations) is a not-for-profit association established in 1967.[19] The length of time that SportAccord has been in existence –almost half a century– is sufficient, in the Appointed Expert's view, to consider Objector as a long-established institution and clearly evidences that such association was not created with the sole intention to participate in the gTLD application process.

66. Additionally, the Appointed Expert notes that Objector also meets the standard of "global recognition", as mentioned in the ICANN Guidebook, since it has a very large membership, comprising of 91 international sports federations and 16 organizations related to sports. In the Appointed Expert's opinion, this is also indicative of Objector's public historical evidence of its existence.

67. Even though Applicant has relied on a survey according to which Objector is hardly known to the majority of the public surveyed,[20] it is the Appointed Expert's view that the level of global recognition of any institution should be analysed within the context of the community that such institution is claiming to be a part of, not the public in general.

68. Although the facts described above would be enough to confirm Objector's compliance with the first condition, the Appointed Expert notes that the very same Applicant has recognized that Objector is an *"established institution"*,[21] focussing its challenge on the second condition required to file an objection (i.e.: an on-going relationship with a clearly delineated community).

69. Based on these reasons, the Appointed Expert concludes that Objector is an *"established institution"* in the terms of Article 3.2.2.4 of the ICANN Guidebook.

70. Having decided that Objector meets the first standard contained in the ICANN Guidebook, the Appointed Expert now turns to the issue of whether Objector has an on-going relationship with a clearly delineated community.

71. To make a determination on this issue, the Appointed Expert should take into account the guidelines provided in Article 3.2.2.4 of the ICANN Guidebook. To this end, such provision sets out the following elements to be considered: (i) the presence of mechanisms for participation in activities, membership, and leadership, (ii) the institutional purpose related to the benefit of the associated community, (iii) the performance of regular activities that benefit the associated community; and (iv) the level of formal boundaries around the community.

72. Referring to these factors, the ICANN Guidebook states that *"the panel will*

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[18] *See*: Article 3.2.2.4 of the ICANN Guidebook.
[19] See: Exhibit Ap-1.
[20] Response, page 8 and Annex A-1.
[21] Response, page 4.

perform a balancing of the factors listed above, as well as other relevant information, in making its determination. It is not expected that an objector must demonstrate satisfaction of each and every factor considered in order to satisfy the standing requirements".[22]

73. Applicant has challenged Objector's standing on the grounds that it only has an on-going relationship *"with a particular subset of stakeholders"* and not the community as a whole.[23]

74. In the Appointed Expert's view, Applicant's argument is not convincing. First, because even though Objector may not represent the "entire" Sport Community, it acts for a preponderant part of such community.

75. The ICANN Guidebook does not require that an "entire" community agree on an objection to an application. In fact, it would be almost impossible for an institution to represent any community as a whole. If such was the requirement, there would be no reason to provide for the possibility of community objections.

76. It is difficult to imagine which other association may claim representation of the Sport Community besides an institution that represents, as Objector does, more than a hundred well-known sports federations and institutions related to sports.

77. Furthermore, Objector's declared purposes are closely associated with the benefits of the community members it represents[24] and its regular activities are naturally intended to benefit its members.

78. In addition, the Appointed Expert notes that Objector, as an institution that represents multiple sports federations, has explicitly foreseen –through its statutes– different mechanisms for participation in activities, membership and leadership among the sport federations and organizations. For instance, SportAccord's statutes regulate in detail the procedure to become a member of the institution and participate accordingly.[25]

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[22] Article 3.2.2.4 of the ICANN Guidebook.

[23] Response, page 4.

[24] According to Objector's statutes (See: Exhibit Ap-1): *"The objectives of SportAccord are: a) to promote sport at all levels, as a means to contribute to the positive development of society; b) to assist its Full Members in strengthening their position as world leaders in their respective sports; c) to develop specific services for its Members, and provide them with assistance, training and support; d) to increase the level of recognition of SportAccord and its Members by the Olympic Movement stakeholders as well as by other entities involved in sport; e) to organise multi-sports games and actively support the organisation of multi-sports games by its Members; f) to be a modern, flexible, transparent and accountable organisation; g) to organise, at least once a year, a gathering of all of its Members, and of other stakeholders of the sport movement, preferably on the occasion of its General Assembly; h) to recognise the autonomy of its Members and their authority within their respective sports and organisation; i) to promote closer links among its Members, and between its Members and any other sport organisation; j) to coordinate and protect the common interests of its Members; k) to collaborate with organisations having as their objective the promotion of sport on a world-wide basis; l) to collect, collate and circulate information to and among its Members".*

[25] See: Exhibit Ap-1, SportAccord's Statutes, Articles 5 to 15.

79. Regarding Applicant's argument that Objector's policies create obstacles to free and open participation in its activities, membership and leadership (for instance, by excluding some sports activities, such as card games), in the Appointed Expert's view such "obstacles" are simply the conditions that any organization has to meet to become a member of the institution, as occurs in any other field.[26]

80. In analysing Objector's statutes, membership is open to *"any sport organisation… which groups together the majority of the National Federations (or organisations) throughout the world practising its sport and regularly holding international competitions…" and "any sport organisation which groups together the activities of several members… for the purpose of organising competitions"*;[27] which shows that membership, far from being closed and exclusive, is accessible to any organization which complies with these minimum standards.

81. Finally, although the issue of the existence of a "Sport Community" is related to the merits of the Objection –and will be analysed in section B–, the Appointed Expert is of the view that Objector's "community", which includes multiple organizations associated with sports, is *"clearly delineated"* for the purpose of objecting to the application for ".sport" gTLD made by dot Sport Limited.

82. Therefore, in the Appointed Expert's view, SportAccord is an established institution which has an ongoing relationship with a clearly delineated community and, consequently, has standing to object to Applicant's application in the present case.

B. *The "Sport Community"*

(2) *Is the Sport Community clearly delineated?*

83. Having decided that SportAccord has standing to object to the application for ".sport" gTLD made by dot Sport Limited, the Appointed Expert will now focus on the issue of whether the Sport Community is clearly delineated.

84. The Parties have discussed at length the independent existence of a "Sport Community" and diverging positions were advanced on this issue.

(i) *Positions of the Parties*

85. In its Objection, SportAccord defines the Sport Community as *"the community of individuals and organizations who associate themselves with Sport"*.[28] According to Objector, Sport is an activity done by individuals or teams of individuals, aiming at healthy exertion, improvement in performance, perfection of skill, fair

[26] It should be also noted that not all game cards –as claimed by Applicant– are excluded from Objector's membership. The World Bridge Federation is, for instance, a member of SportAccord.
[27] See: Exhibit Ap-1, SportAccord's Statutes, Article 6.
[28] See: Objection, page 8.

competition and desirable shared experience between practitioners as well as organizers, supporters and audience.

86. Objector's position is that the Sport Community *"is highly organized"* both at a local level (local clubs, etc.) and a higher level (Sport Community governance is exercised by regional, national, and international Sport Federations, which collaborate at the local, national and international levels in sport events or with event organizers, governments, the various bodies of the Olympic Movement, associations or federations).

87. Even though Objector states that it represents 107 International Sport Federations, individual practitioners of sport, sport spectators, sport fans and sport sponsors are also part of the Sport Community and share their values and objectives.[29]

88. Finally, Objector explains that the Sport Community *"is clearly delineated"* since it has formal lines of accountability on all levels. In Objector's view, the keyword *"delineated"* should not imply a focus on rigid edges of a community, like card-carrying membership organizations.[30]

89. Applicant rejects Objector's assertion that the Sport Community is *"clearly delineated"*. Indeed, dot Sport Limited contends that the Sport Community lacks this characteristic since *"it is comprised of a significant number of stakeholders who do not necessarily share similar goals, values or interests, thus the community lacks formal boundaries, evidenced by disagreement as to which stakeholders are considered members of the Sport community"*.[31]

90. According to Applicant, the alleged Sport Community is associated with a "generic" string (".sport") and, therefore, it cannot meet the *"clearly delineated"* criteria due to its broad definition and the nature of the generic term ("sport"), which is by definition used by a significant number of people, who do not necessarily share similar goals, values or interests.

91. Further, Applicant criticizes Objector's assertion that the Sport Community is *"highly organized"* when there is no organization, for instance, for viewers, the media or amateur sportspeople who play sport for fun in their spare time. In Applicant's view, *"there is therefore confusion as to who actually comprises the sport community. This is simply because there is no clearly delineated community"*.[32]

92. In addition, dot Sport Limited states that, according to a survey undertook by itself, there is a low level of public recognition of a Sport Community since 74% of participants surveyed did not see formal organization or registration as a requirement to participate in sports.[33]

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[29] See: Objection, page 9.
[30] See: Objection, page 9.
[31] See: Response, page 5.
[32] See: Response, page 6.
[33] See: Response, Annex 1.

93. Applicant also argues that there is no agreement among experts as to the definition of "sport", giving examples of different accepted definitions. In analyzing Objector's definition of "sport", Applicant concludes that such concept fails to recognize other community stakeholders, for example, non-federation sport organizations (such as, community recreational leagues), media outlets that cover sports, equipment producers and retailers, video game industry, etc.

94. Finally, it is dot Sport Limited's position that the Sport Community is not clearly delineated because there is no agreement as to the entities that make up the alleged community. Applicant explains that, for instance, Objector's membership criteria exclude legitimate sport activities from membership such as poker, electronic gaming and hunting.[34]

95. To conclude, Applicant states that Objector acknowledged that the Sport Community is comprised of "billions of members" and, consequently, a community comprising the majority of the human race is not clearly, or even slightly, delineated.[35]

(ii) *Considerations of the Appointed Expert*

96. The Appointed Expert has to decide whether the "Sport Community" is clearly delineated.

97. In accordance with Article 3.5.4 of the ICANN Guidebook, *"…for an objection to be successful… the objector must prove that the community expressing opposition can be regarded as a clearly delineated community"*.

98. As mentioned before, the ICANN Guidebook offers useful guidelines in order to determine whether a community is clearly delineated. *"A panel could balance a number of factors to determine this, including but not limited to: (i) the level of public recognition of the group as a community at a local and/or global level; (ii) the level of formal boundaries around the community and what persons or entities are considered to form the community; (iii) the length of time the community has been in existence; (iv) the global distribution of the community (this may not apply if the community is territorial); and (v) the number of people or entities that make up the community".*[36]

99. Having set out the factors to be considered, the ICANN Guidebook further provides that *"…if opposition by a number of people/entities is found, but the group represented by the objector is not determined to be a clearly delineated community, the objection will fail"*.

100. The concept of "community" is not defined by the ICANN Guidebook. The

[34] See: Response, page 7.
[35] See: Response, page 7.
[36] Article 3.5.4 of the ICANN Guidebook.

word “community” is broad and allows more than one interpretation. Besides the political (nationality), religious or ethnic meanings or implications that the term may have, it generally refers to a “group of people” that may be considered as a “unit” that share similar interests, goals or values.[37]

101. Furthermore, the word “sport” is also a generic term. If someone mentions the word “sport” without any specificity, it is highly probable that different listeners will imagine different aspects, ideas or own preconceptions about what the speaker does want to refer. The same occurs with other generic terms such as “health”, “law”, “government”, “commercial”, etc.

102. Nevertheless, the generic nature of these words does not constitute an obstacle for a community to identify itself with them. For instance, the word “lawyer” (or, more precisely, the “.lawyer” gTLD) may identify the community of lawyers around the world, even though it would be difficult (or impossible) to find that all lawyers share the same goals, values or interests.

103. In the case at hand, it is the Appointed Expert’s view that the community represented by Objector (international sports federations and organization) enjoys a high level of public recognition in its field and has existed for decades. Further, since it was established in 1947, it has succeeded in increasing the number of its members, rather than becoming smaller or less representative.

104. Further, regarding the *“number of… entities that make up the community”*, an aspect that the ICANN Guidebook highlights as relevant, the Appointed Expert notes that Objector is comprised of 91 well-known international sports federations and 16 organizations related to sports. If SportAccord had not obtained a high level of recognition in the sport field since it had been established, some of the well-known federations included in such association would not have remained part of it.

105. In any event, the Appointed Expert understands that this is not a case in which a single sport association or organization claims for the priority use of the “.sport” gTLD –irrespective of other federations or organization which could claim for the same right or interest–, but the whole community of sports federations and organization (or, at least, the most part of it) represented by Objector.

106. Finally, the Appointed Expert cannot accept Applicant’s argument that the Sport Community is not organized when Objector has proved that it has its own mechanism of participation, programs and organization through its statutes and government bodies. The fact that the media (which may constitute a different community) or viewers are unable to be part of this association is irrelevant to consider Objector as a delineated community. Otherwise, no community could be

[37] According to the British English Dictionary, the word “community” has three different meanings *“1) the people living in one particular area or people who are considered as a unit because of their common interests, social group, or nationality, 2) a group of animals or plants that live or grow together, 3) the general public”*. *See* British English Dictionary, Cambridge Ed., 2013.

recognized under the ICANN gTLD proceedings since it would be easy for any Applicant to find secondary or not closed-related members outside of it.

107. The "Sport Community", in the Appointed Expert's view, is a community that clearly distinguishes itself from other communities by its characteristics, objectives and values.

108. Therefore, the Appointed Expert concludes that the Sport Community is clearly delineated for the purpose of these proceedings and, consequently, Applicant's objections in this respect must also fail.

C. *The "Substantial Opposition" to the Application*

(3) *Is there a substantial opposition to the application for the ".sport" gTLD on behalf of a significant part of the Sport Community?*

109. Having decided that the Sport Community is clearly delineated, the Appointed Expert now turns to determine whether there is a substantial opposition of a significant part of the Sport Community.

(i) *Positions of the Parties*

110. Objector highlights that it expresses opposition on behalf of the 107 International Federations encompassed in such association, as listed in Appendix A-2 of the Objection. Objector has proffered more than 50 letters of opposition from different federations and also points to other individual oppositions.[38]

111. SportAccord notes that while many international sport bodies, international sport federations and specialized agencies have already expressed their opposition, there is no evidence, by contrast, of community support in favour of the application ".sport" gTLD made by dot Sport Limited.

112. According to SportAccord, *"the portion of the community expressing opposition through its representative organization is not just significant, but overwhelming"*.[39] It also argues that Applicant's application targets the most visible and highly organized segments of the Sport Community, represented by national and international sport federations.

113. Finally, Objector elaborates on the argument that although individual practitioners of the Sport Community (who do not need organization to practise sports) have not made opposition to the application, it is natural that the organized segment of such Community reacts and raises objections on behalf of their stakeholders.

114. In turn, Applicant claims that SportAccord has failed to prove "substantial

[38] See: Objection, page 9.
[39] See: Objection, page 10.

opposition" to the application, since Objector represents a subset of the alleged community and does not represent the interests, goals, or values of numerous stakeholders in the alleged community (for instance, sports excluded from membership and the other stakeholders not represented by Objector).[40]

115. Applicant insists on the "relative" low number of oppositions compared with the composition of the alleged community. In Applicant's own words, *"expressions of opposition from Objector are small compared to the large composition of the alleged 'sport' community"*.[41]

116. Further, dot Sport Limited also claims that Objector did not provide examples of support from members of the alleged community that do not comprise its membership. Based on this argument, Applicant states that Objector does not encompass all sport activities by any means.

117. Applicant also alleges that Objector organized a campaign among its members to support its Objection by using a standard template letter that requires no thought or effort to sign it.[42] Notwithstanding so, Applicant notes that only half of SportAccord's members have actually shown support to the Objection. Further, Applicant states that Objector has offered no proof that its membership as a whole signed on to the opposition.

118. Regarding the counter-argument related to individual sport practitioners (not organized) advanced by Objector, dot Sport Limited answers that such assertion *"totally ignores the fact that the sports industry includes a great number of professional organisations such as media outlets, who could easily have objected"* but did not do so.[43]

(ii) *Considerations of the Appointed Expert*

119. The Appointed Expert has to decide whether there is a substantial opposition to the application for the ".sport" gTLD on behalf of a significant part of the Sport Community.

120. To this end, the Appointed Expert will focus on Article 3.5.4 of the ICANN Guidebook, which establishes the standards to be analysed in order to make a determination on this issue.[44]

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[40] See: Response, page 8. Moreover, dot Sport Limited states that, according to the sports survey undertaken by itself, the vast majority of the public are not even aware of the existence of SportAccord.

[41] See: Response, page 8.

[42] See: Response, page 9.

[43] See: Response, page 9.

[44] According to such provision, *"a panel could balance a number of factors to determine whether there is substantial opposition, including but not limited to: (i) number of expressions of opposition relative to the composition of the community; (ii) representative nature of entities expressing opposition; (iii) level of recognized stature or weight among sources of opposition; (iv) distribution or diversity among sources of expressions of opposition, including: (a) regional (b) subsectors of community, (c) the leadership of community, (d) membership of community; (v) historical defense of the*

121. In order to determine the appropriate standard to evaluate the Objection, it should be noted that Article 3.5.4 of the ICANN Guidebook does not require that the "entire" community expresses its opposition. Rather, it requires that Objector proves a "substantial" opposition within the community it has identified itself as representing.

122. Therefore, the Appointed Expert is of the view that the argument on the "relative low number" of oppositions compared to the composition of the Sport Community, as put forward by Applicant, should be balanced with the relevance and representative nature of each opposition within the community. For instance, in the present case, the opposition made by an individual rugby player or fan will not have the same weight in order to determine if an objection represents substantial opposition as the one made by the International Rugby Board.[45]

123. In this respect, the Appointed Expert is satisfied with the evidence produced by Objector, which includes 55 letters of opposition submitted by different recognized sport federations,[46] together with other statements from different reputable sport organizations and specialized agencies, such as the International Olympic Committee (IOC), the World Anti-Doping Agency (WADA) or the United Nations Office on Sport for Development and Peace (UNOSDP).[47]

124. Aside from this, the Appointed Expert notes that Objector represents all its members in these proceedings. Indeed, in accordance with its internal organization, the fact that SportAccord's Executive Council has decided to object to dot Sport Limited's application implies that all members of the association are deemed to have agreed to such decision to object.[48]

125. Therefore, to require individual letters from all SportAccord's members –as Applicant has suggested– is simply redundant. The fact that other sport federations represented by Objector did not explicitly object to dot Sport Limited application should not be seen, in the Appointed Expert's view, as an opposition to SportAccord's claim.

126. Consequently, based on the representative nature of the Objector for the Sport Community, the relevance of the entities which have expressed their opposition (either individually or through the Objector) and the global recognition of the entities which are represented by Objector in these proceedings, the Appointed Expert concludes that there is a substantial opposition to the application ".sport" gTLD on behalf of a significant part of the Sport Community as established in Article 3.5.4 of the ICANN Guidebook.

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community in other contexts; and (vi) costs incurred by objector in expressing opposition, including other channels the objector may have used to convey opposition".

[45] *See:* Objection, Appendix A-3, tab 34.

[46] *See*: Objection, Appendix A-2.

[47] *See*: Objection, Appendix A-3.

[48] SportAccord's Statutes, Article 33.3 "*…the Council represents and commits SportAccord with regard to third parties"*. See Exhibit Ap-1.

D. *Targeting*

(4) *Is the Sport Community explicitly or implicitly targeted by the application ".sport" gTLD?*

127. The next issue to be decided by the Appointed Expert is whether the Sport Community has been explicitly or implicitly targeted by the application for the ".sport" gTLD made by Applicant.

(i) *Positions of the Parties*

128. Due to the fact that word "sport" is almost exclusively associated with organized sport, sport for leisure and sport for health, Objector states that the Sport Community is *"explicitly"* targeted by the application for the".sport" gTLD. In any event, SportAccord also argues that the ".sport" gTLD string *"implicitly"* targets the Sport Community.

129. Therefore, Objector concludes that the criterion of *"strong association"* between the Sport Community and the gTLD string ".sport" is, in its view, completely satisfied.[49]

130. Conversely, Applicant alleges that Objector failed to prove a *"strong association"* between the applied-for gTLD string and the alleged community since SportAccord does not represent the community as a whole. According to dot Sport Limited, *"whereas Applicant's use of the TLD would target the entire sports industry, Objector plans to restrict the TLD at launch to persons of their choosing, beginning with Federations and other governing sports bodies, before later opening up the TLD to persons of its choosing outside the restricted definitions, using vague and unspecified post validation procedures and unspecified eligibility requirements"*.[50]

131. Applicant considers that it has a broader target than the alleged Sport Community, and the *"strong association"* alleged by Objector is purely ancillary or derivative.

(ii) *Considerations of the Appointed Expert*

132. It is for the Appointed Expert to decide whether the Sport Community is explicitly or implicitly targeted by the application for the ".sport" gTLD.

133. Pursuant to Article 3.5.4 of the ICANN Guidebook, *"the objector must prove a strong association between the applied-for gTLD string and the community represented by the objector. Factors that could be balanced by a panel to determine this include but are not limited to: (i) Statements contained in application; (ii) other*

[49] See: Objection, page 10.
[50] See: Response, page 10.

public statements by the applicant; (iii) associations by the public".

134. In the Appointed Expert's opinion, since the community represented by Objector is the "Sport Community", it is evident that the application for ".sport" gTLD made by Applicant explicitly targets such community.

135. Having recognized that the Sport Community is clearly delineated, it cannot be denied that there is a strong (or even identical) association between the applied-for gTLD string ".sport" and the community represented by Objector.

136. Therefore, the Appointed Expert concludes that the Sport Community has been explicitly targeted by the ".sport" gTLD.

E. <u>*Detriment*</u>

(5) *Is there any material detriment to the rights or legitimate interests of the Sport Community if the application for the ".sport" gTLD is allowed to proceed?*

137. Finally, the Appointed Expert has to address the issue of whether the application for the ".sport" gTLD causes any material detriment to the rights or legitimate interests of the Sport Community.

(i) *Positions of the Parties*

138. Objector states that the ".sport" gTLD application made by dot Sport Limited lacks accountability to the Sport Community. Regarding the detriment that such application may generate, SportAccord points to ambush marketing, cybersquatting, typo-squatting, brand-jacking, misuse of sport themes for pornography, the systematic exacerbation of naming conflicts and the massive utilization of name-defensive registrations, giving examples on how each situation (in any given scenario) may affect the rights or legitimate interests of the Sport Community.[51]

139. In its Objection, SportAccord describes other possible detriments, such as the false sense of official sanction that consumers may have if an unaccountable registry operator manages such domain.[52]

140. Further, according to Objector, "*Under the United States Department of Commerce's agreement with ICANN, the Affirmation of Commitments, ICANN must demonstrate that the new gTLD program contributes, in part, to consumer trust. Delegating ".sport" to an unaccountable registry operator, which lends a false sense of official sanction to the .sport domain name space, would inevitably erode consumer trust by misleading individuals through unofficial content*".[53]

[51] See: Objection, page 11.
[52] See: Objection, page 13. SportAccord says that, for example, "Rugby.Sport" domain will lead internet users to believe that the International Rugby Board sanctions such a website.
[53] See: Objection, page 13.

141. Objector also notes that if the ".sport" gTLD application is allowed to proceed, the Sport Community would suffer a loss in its image and prestige by the misappropriated used of community-specific keywords. *"The very reason why there is a community-based objection (as opposed to a rights infringement objection) is the fact that keywords targeting a sub-community are a commons and that each member of the sub-community has the right to expect that community institutions ensure the responsible management of those keywords."*[54]

142. According to Objector, while in many cases there is no concept of individual ownership in terms of intellectual property, each community has a natural concept of collective ownership of keywords essential to it or to its sub-communities. Based on this argument, SportAccord considers that the uncontrolled or unaccountable operation of the ".sport" registry would constitute the *"tragedy of the commons"*, a material detriment which cannot be measured in monetary units.

143. Objector expands on the disruption of Sport Community efforts and achievements. It provides examples of the loss of credibility of community-based governance models and states that community-based communication policies for anti-doping, anti-drug, anti-racism, ticket scalping, illegal or undesirable gambling, etc., will be disrupted if key domain names related to them are used without adherence to those policies. This can only be avoided, in Objector's view, if the gTLD registry is directly accountable to the Sport Community.[55]

144. Further, SportAccord focuses on the actual and certain damages that the Sport Community would suffer in case the ".sport" gTLD is operated by a registry without appropriate community-based accountability. In Objector's view, not only would this situation generate an economic damage, but also a detriment of the reputation, the values and the governance of the Sport Community as a whole.[56]

145. Finally, Objector points to the loss of benefits for not operating the ".sport" TLD by the Sport Community itself, the loss of opportunity to create a community-based organizational tool and, most important, the irreversible damage caused by the forfeiture of the opportunity for the Sport Community to build the right image through the operation of the gTLD.[57]

146. Applicant contends that, in fact, Objector failed to prove a likelihood of material detriment to the rights or legitimate interests of the alleged community. In its opinion, Objector speculates that the alleged detriments would befall the alleged Sport Community should the gTLD be delegated to Applicant, but *"most of the alleged detriments are detriments inherent in the nature of the Internet and not attributable to Applicant's plans for operating the gTLD"*.[58]

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[54] See: Objection, page 14.
[55] See: Objection, page 15.
[56] See: Objection, page 17.
[57] See: Objection, page 18.
[58] See: Response, page 11.

147. Applicant claims that it has taken measures to address the detriments inherent in the nature of the Internet. *"Thus, Objector's alleged detriment seems to purely stem from the fact that Applicant would be delegated the gTLD instead of Objector"*.[59]

148. Further, it is dot Sport Limited's position that Objector proves no kind or amount of damage to the reputation of the Sport Community that would result from Applicant's operation of the applied-for gTLD string. In Applicant's words, *"Consumer trust will be a core operating principle: abusive registrations and abuse of the gTLD will result in rapid sanctions".* [60]

149. In addition, dot Sport Limited accuses Objector of not offering evidence (i) that Applicant is not acting or does not intend to act in accordance with the interests of the Sport Community or of users more widely; (ii) that Applicant's operation of the ".sport" gTLD string will interfere with the core activities of the alleged community; and (iii) much less that the Objector's core activities depend on the domain name system.[61]

150. Applicant also states that the alleged economic damage to the Sport Community has not been proved by Objector. In any case, abusive behaviour or Objector's speculative detriments, if they occur, may be easily corrected or penalized. In addition, dot Sport Limited criticizes some evidence advanced by Objector which, in its view, does not show any actual damage to the alleged Sport Community.[62]

151. To conclude, it is Applicant's position that the Objector's alleged damages are hypothetical and would not result from Applicant's operation of the applied-for gTLD string.[63]

(ii) *Considerations of the Appointed Expert*

152. The Appointed Expert has to decide on the likelihood of material detriment to the rights or legitimate interests of the Sport Community in the event that the application process ends with the adjudication of the string (".sport") to Applicant.

153. The Appointed Expert first notes that, in accordance with Article 3.5.4 of the ICANN Guidebook, *"the objector must prove that the application creates a likelihood of material detriment to the rights or legitimate interests of a significant por-*

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[59] See: Response, page 11.
[60] See: Response, page 11. Applicant further believes that there are benefits to rights and legitimate interests of the sports industry created by operation of a free and open TLD by a commercial entity. *"Given that there is no special regulated definition of the word "sport" or any restriction on the use of the word worldwide, combined with the fact that consumers understand that a domain name registration in a particular gTLD does not confer or even define special status for the holder worldwide and for every purpose, there will not be any loss of trust in the sports industry…".*
[61] See: Response, page 12.
[62] See: Response, page 13.
[63] See: Response, page 13.

tion of the community to which the string may be explicitly or implicitly targeted. An allegation of detriment that consists only of the applicant being delegated the string instead of the objector will not be sufficient for a finding of material detriment".

154. Such Article also provides the factors that could be used by an expert panel in making this determination. These elements include, but are not limited to, *"(i) nature and extent of damage to the reputation of the community represented by the objector that would result from the applicant's operation of the applied-for gTLD string; (ii) evidence that the applicant is not acting or does not intend to act in accordance with the interests of the community or of users more widely, including evidence that the applicant has not proposed or does not intend to institute effective security protection for user interests; (iii) interference with the core activities of the community that would result from the applicant's operation of the applied-for gTLD string; (iv) dependence of the community represented by the objector on the DNS for its core activities; (v) nature and extent of concrete or economic damage to the community represented by the objector that would result from the applicant's operation of the applied-for gTLD string; and (vi) level of certainty that alleged detrimental outcomes would occur"*.[64]

155. First, the Appointed Expert finds that the ICANN Guidebook does not call for "actual damage" for an objection to be accepted. It establishes a lower bar, namely a *"likelihood of material detriment"*, logical consequence of the impossibility of assessing any damage when the Applicant has yet to start operating the gTLD string.

156. Therefore, the standard that the Appointed Expert should apply to this issue is the "chance" that detriment will occur, which differs from the standard of "actual damage" invariably applied in litigation or arbitration. In other words, the standard of a *"likelihood of material detriment"* is, in the Appointed Expert's opinion, equivalent to future "possible" damage.

157. In this regard, the Appointed Expert agrees with Applicant that many detriments alleged by Objector are purely hypothetical, such as the risk of cybersquatting, ambush marketing or the misuse of sport themes for purposes foreign to sport values.

158. Notwithstanding so, the Appointed Expert is of the opinion that Objector has proved several links between potential detriments that the Sport Community may suffer and the operation of the gTLD by an unaccountable registry, such as the sense of official sanction or the disruption of some community efforts.

159. Further, the Appointed Expert shares Objector's argument that all domain registrations in a community-based ".sport" gTLD will assure sports acceptable use policies. On the other hand, this cannot be warranted by Applicant in the same way in the event that the application for the ".sport" gTLD is approved by

[64] Article 3.5.4 of ICANN Guidebook.

ICANN.

160. Regarding the economic damage that SportAccord may suffer, the Appointed Expert is of the view that although the figures and calculations on negative externalities provided by Objector may have been exaggerated,[65] the risk of economic damages which would be inflicted to Objector due to the operation of the gTLD by an unaccountable registry shows a reasonable level of certainty and could not be avoided if the application is allowed to proceed.

161. Therefore, the Appointed Expert is not in a position to accept Applicant's argument that Objector's alleged detriment only relies on the fact that Applicant would be delegated the ".sport" gTLD instead of Objector.

162. Finally, even though SportAccord has not proved that dot Sport Limited will not act (or will not intend to act) in accordance with the interests of the Sport Community, the Appointed Expert considers that this is only one factor, among others, that may be taken into account in making this determination. Conversely, the Appointed Expert sees a strong dependence of the Sport Community on such domain name.

163. For these reasons, the Appointed Expert concludes that there is a strong likelihood of material detriment to the rights or legitimate interests of the Sport Community if the application ".sport" gTLD is allowed to proceed.

VII. Decision

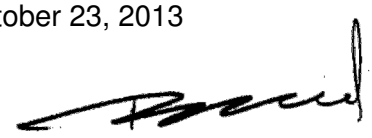
164. Having read all the submissions and evidence provided by the Parties, for the reasons set out above and in accordance with Article 21(d) of the Rules of Procedure, I hereby render the following Expert Determination:

I. The "Community Objection" which has been put forward by SportAccord in these proceedings is successful.

II. Objector SportAccord prevails.

III. The ICC Centre will refund SportAccord the advance payment of costs it made in connection with these proceedings.

Date: October 23, 2013



Signature: _____
Prof. Dr. Guido Santiago Tawil
Expert

[65] *See:* Objection, Appendix A-13.

Reconsideration Request

Union of Orthodox Jewish Congregations of America, *et al.*

Annex I

Prof. Alain Pellet, Independent Objector v. Steel Hill, LLC, EXP/407/ICANN 24 (21 Nov. 2013)

THE INTERNATIONAL CENTRE FOR EXPERTISE OF THE

INTERNATIONAL CHAMBER OF COMMERCE

CASE No. EXP/407/ICANN/24

PROF. ALAIN PELLET, INDEPENDENT OBJECTOR

(FRANCE)

vs/

STEEL HILL, LLC

(USA)

This document is an original of the Expert Determination rendered in conformity with the New gTLD Dispute Resolution Procedure as provided in Module 3 of the gTLD Applicant Guidebook from ICANN and the ICC Rules for Expertise.

EXPERT DETERMINATION – COMMUNITY OBJECTION

Professor Alain Pellet (Independent Objector) v. Steel Hill, LLC.

Case No. EXP/407/ICANN/24

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TABLE OF ABBREVIATIONS

ACC	Association of Corporate Counsel
AHA	American Hospital Association
AAMC	Association of American Medical Colleges
ALAC	The ICANN At-Large Advisory Committee
Applicant	Steel Hill, LLC
Appointed Expert	Alan L. Limbury
Centre	The International Centre for Expertise of the International Chamber of Commerce
Donuts	Donuts Inc.
GAC	ICANN's Governmental Advisory Committee
GNSO	ICANN's Generic Names Supporting Organization
gTLD	Generic Top Level Domain
Guidebook	ICANN's gTLD Applicant Guidebook
ICANN	The Internet Corporation for Assigned Names and Numbers
ICC	The International Chamber of Commerce
ICC Practice Note	The ICC Practice Note on the Administration of Cases under the New gTLD Dispute Resolution Procedure
IMIA	The International Medical Informatics Association
IO	The Independent Objector
LPI Objection	Limited Public Interest Objection
Objector	Professor Alain Pellet, the Independent Objector
PIC	Public Interest Commitments
Procedure	The New gTLD Dispute Resolution Procedure set out in the Attachment to Module 3 of the Guidebook
Rules	Rules for Expertise of the ICC
WHO	The World Health Organization

I. The Parties

A. Objector

1. The Objector is Professor Alain Pellet of 16, Contact Information Redacted Contact Information Redacted epresented by Ms. Héloise Bajer-Pellet

of Contact Information Redacted Mr. Daniel Müller of Contact Information Redacted email: Contact Information Redacted Mr. Phon van den Biesen of De Groene Bocht, Contact Information Redacted Contact Information Redacted email: Contact Information Redacted and Mr. Sam Wordsworth of Contact Information Redacted Contact Information Redacted

2. Professor Pellet is the Independent Objector ("IO") selected by The Internet Corporation for Assigned Names and Numbers ("ICANN") pursuant to Article 3.2.5 of the gTLD Applicant Guidebook ("Guidebook") to act solely in the best interests of the public who use the global Internet. His role is to file Limited Public Interest ("LPI") and Community Objections against "highly objectionable" generic Top-Level Domain ("gTLD") name Applications to which no objections have been filed.

B. Applicant

3. The Applicant is Steel Hill, LLC of Contact Information Redacted Contact Information Redacted represented by The IP & Technology Legal Group, P.C. dba New gTLD Disputes, of Contact Information Redacted United States of America, email: Contact Information Redacted

4. The Applicant is a subsidiary of Donuts Inc., ("Donuts"), whose stated goal is "to increase competition and consumer choice at the top level." Through the Applicant and other direct and indirect subsidiaries, Donuts has applied for 307 new gTLDs.

II. The Appointed Expert

5. The Appointed Expert is Alan Lawrence Limbury of Strategic Resolution, Contact Information Redacted Contact Information Redacted Contact Information Redacted

III. The applied-for gTLD string

6. <.medical>.

IV. Procedural History

7. The Applicant submitted its Application to ICANN for the new gTLD string <.medical> on June 13, 2012 (Application ID: 1-1561-23663).

8. The IO filed a Community Objection with the International Centre for Expertise of the International Chamber of Commerce ("Centre") on March 12, 2013, pursuant to Article 7 of the New gTLD Dispute Resolution Procedure set out in the Attachment to Module 3 of the Guidebook ("Procedure"), the Rules for Expertise of the ICC ("Rules") supplemented by the ICC Practice Note on the Administration of Cases under the New gTLD Dispute Resolution Procedure ("ICC Practice Note").

9. The Centre conducted an administrative review of the Objection pursuant to Article 9 of the Procedure and informed the Objector on March 29, 2013 that the Objection was in compliance with Articles 5 – 8 of the Procedure and with the Rules.

10. On April 12, 2013, ICANN published its Dispute Announcement pursuant to Article 10(a) of the Procedure and on April 15, 2013 the Centre invited the Applicant to file a Response to the Objection within 30 days, pursuant to Article 11(b) of the Procedure.

11. The Applicant's Response dated May 15, 2013 was received by the Centre on May 16, 2013. In accordance with Article 6 of the Procedure, the Response was filed within the provided time limit. On July 12, 2013 the Applicant filed an Amended Response correcting the case reference number.

12. On June 12, 2013, having provided to the Centre a Declaration of Acceptance and Statement of Independence, the Expert was appointed by the Chairman of the Standing Committee of the Centre as the sole member of the Panel in accordance with Article 13 of the Procedure and Article 9(5)(d) of the Rules.

13. ICANN (on behalf of the IO) and the Applicant subsequently paid an advance of the costs estimated by the Centre and on July 30, 2013 the Centre confirmed the constitution of the Expert Panel and transferred the file to the Expert, noting that the draft Expert Determination was due within the following 45 days.

14. On August 2, 2013 the Objector sought leave to file a Reply to parts of the Response which claimed bias in the Objector and which interpreted the requirements of the Guidebook in ways with which the Objector disagreed. Pursuant to Article 17(a) of the Procedure, the Expert granted the Objector leave to file a Reply, confined to those parts, by August 9, 2013. The Objector did so that day. Since the Objector's Reply made reference to ICANN's Governmental Advisory Committee ("GAC") Beijing communiqué of 11 April, 2013 and to the Applicant's comments thereon to the Board of ICANN, the Expert granted leave to the Applicant to respond by August 16, 2013. The Applicant filed a Rejoinder that day.

15. In accordance with Articles 5(a) and 6(a) of the Procedure, the language of the proceeding and of all submissions is English and all communications by the parties, the Expert and the Centre were submitted electronically.

16. On August 29, 2013, the Expert Determination was submitted in draft form to the Centre for scrutiny in accordance with Article 21(b) of the Procedure and Article 12(6) of the ICC Rules. The draft was submitted within the 45 day time limit in accordance with Article 21(a) of the Procedure.

V. Preliminary issues

17. The Applicant has questioned the IO's impartiality and independence and his standing to bring this Objection. These issues need to be determined before any consideration of the merits of the Objection. Article 3.2.5 of the Guidebook requires the IO to be and remain independent and, by necessary implication, impartial. Article 3.2.2 contemplates the Expert having authority to determine whether an objector has standing in any particular case. Accordingly, having given the Objector an opportunity to respond to the Applicant's submissions and the Applicant an opportunity to reply, the Expert considers that he has authority to determine these issues.

A. Impartiality and Independence of the Objector

(i) Objector's submissions

18. According to Article 3.2.5 of the Guidebook "the IO must be and remain independent and unaffiliated with any of the gTLD applicants". The IO and all his legal representatives have no link with any of the Applicants having applied for a gTLD during the current

Program. The IO considers himself to be impartial and independent as required by the Guidebook. He confirms that he is acting in no other interest but the best interests of the public who use the global Internet.

(ii) Applicant's submissions

19. According to the IO's website, he is "impartial and is unaffiliated with any particular Internet community." He also specifically reasserts his independence in the Objection itself.

20. The Objector has filed essentially identical objections, on both LPI and community grounds, against a number of medical-related gTLD Applications made by entities of Donuts, including:

<.healthcare>	LPI	Silver Glen, LLC	1-1492-32589	EXP/405/ICANN/22
<.healthcare>	Community	Silver Glen, LLC	1-1492-32589	EXP/411/ICANN/28
<.hospital>	LPI	Ruby Pike, LLC	1-1505-15195	EXP/406/ICANN/29
<.hospital>	Community	Ruby Pike, LLC	1-1505-15195	EXP/412/ICANN/23
<.medical>	LPI	Steel Hill, LLC	1-1561-23663	EXP/407/ICANN/30
<.medical>	Community	Steel Hill, LLC	1-1561-23663	EXP/413/ICANN/24
<.health>	LPI	Goose Fest, LLC	1-1489-82287	EXP/417/ICANN/34

21. Donuts' Applications represent a significant proportion of the relatively few objections filed by the IO. Almost exclusively he has attacked only Applications for health-related gTLDs but has not objected to all such Applications and has made no objection to many other strings that could be viewed as equally "sensitive" as health – *e.g.*, children, financial topics, intellectual property, gambling and education.

22. The IO has a background in health-related matters and with particular medical and policy interests. He has worked with the World Health Organization (WHO), and so acknowledges in his *curriculum vitae*. In addition, his legal assistant, Julien Boissise, has a connection to Rosa Delgado, a consultant to WHO. Ms. Delgado appears to have advocated on behalf of the International Medical Informatics Association (IMIA) in proceedings involving the ICANN At-Large Advisory Committee (ALAC), which since has brought a community objection on IMIA's behalf against Donuts' <.health> gTLD Application, ICC Case No. EXP/505/ICANN/122. Clearly, the IO has some bias that favors medical interests and opposes those who would provide a forum for such topics on the Internet. The Applicant does not suggest the he has engaged in any improper conduct. However, the Panel should consider the Objection in light of his healthcare bias.

(iii) Objector's Reply

23. In questioning the impartiality of the IO, the Applicant does not draw any procedural consequence from its allegations but suggests that the Panel should consider the Objection "in light of his healthcare bias". Although the Applicant does not suggest the IO has engaged in any improper conduct, these unfounded allegations make it necessary for the IO to reaffirm his impartiality and independence.

24. The IO has filed this objection (and all other objections) in accordance with Article 3.2.5 stating that "the IO must be and remain independent and unaffiliated with any of the gTLD applicants". So he is. He has no relationship of any kind with any of the gTLD applicants in the present round. He is acting in no interest other than the best interests of

the public who use the global Internet. This is equally true for his legal representatives as well as for his assistant, specifically and unduly targeted by the Applicant.

25. In serving as counsel and advocate before the International Court of Justice in an advisory proceeding concerning a request of the WHO, Professor Pellet acted for the French Republic, not for the WHO. This shows how artificial and absurd the Applicant's accusations are. In addition, the Applicant's allegations concerning a relationship between Mr. Boissise and Ms. Delgado on the sole basis of a non-existing LinkedIn connection equally lack any substance. The Applicant's evidence of bias is flimsy in the extreme and, in any event, it does not draw any conclusion from its (regrettable) allegations.

26. The IO is neither biased nor has favored any particular interests, including medical interests. He has filed objections concerning gTLD Applications for strings entirely unrelated to health and the healthcare sector and, in the aim of ensuring transparency, has explained on his website why he decided not to file an objection against some "controversial" Applications.

27. The Applicant's allegation that the IO has not objected to other equally "sensitive" strings also ignores the statutory limitations to which the IO is subject. According to Article 3.2.5: "In light of the public interest goal noted above, the IO shall not object to an Application unless at least one comment in opposition to the Application is made in the public sphere." Furthermore, he can only file Community objections or LPI objections that are properly regulated, excluding String Confusion Objection or Legal Rights Objection.

28. The Applicant seems to reproach the IO for having especially targeted Applications submitted by entities of Donuts. The IO has objected to Applications that he considers contrary to the public's interests and in each case has justified his reasons, which are entirely indifferent to the identity of the Applicant. These objections concern 5 out of Donuts' 307 applied-for strings and the IO has filed comparable objections to Applications for the same or identical strings submitted by entities unrelated to Donuts.

29. In conclusion, the Applicant argues that the allegations of bias lack any colourable basis, and are regrettable.

(iv) Determination

30. The Expert notes that, while making its emphatic assertions of healthcare bias, the Applicant expressly disclaims any suggestion that the IO has engaged in any improper conduct. His *curriculum vitae* makes clear that Professor Pellet did not act for WHO before the International Court of Justice but for the French Republic, as Counsel and Advocate in a 1994 case in which WHO requested an advisory opinion concerning *Legality of the use by a State of nuclear weapons in armed conflict*.

31. The asserted connection between the IO's legal assistant and a consultant to WHO is said in a declaration by Mr. Jonathon Nevett, a founder and Executive Vice President of Donuts, to be a Linked-In connection. However, no such connection appears from the links provided by Mr. Nevett, namely http://www.linkedin.com/pub/julien-boissise/5a/b43/197 and http://www.linkedin.com/pub/rosam-delgado/0/304/24. Each link depicts the person concerned and, in each case, the other person's name and image appear under the heading "People also viewed". This indicates no more than that people who viewed the Linked-In profile of one of them also viewed the Linked-In profile of the other, hardly a basis for the Applicant's assertion that there is "a connection" between

them, let alone one which could possibly give rise to any concern as to the impartiality and independence of the IO or of his legal assistant.

32. The number of Objections filed by the IO in relation to health-related gTLD Applications and Applications by Donuts is no more than a reflection of the number of Applications filed by Donuts and the number of those which are health-related.

33. There is no basis for any finding that the IO has any bias that favours medical interests. The Expert will disregard that allegation when considering this Community Objection.

B. Standing

(i) Objector's submissions

34. In accordance with Article 3.2.5 of the Guidebook, the IO is granted standing to file Community Objections "notwithstanding the regular standing requirements for such objections". He acts in the best interests of the public who use the global Internet and initiates and prosecutes the present objection in the public interest. The Guidebook further states that "[i]n light of the public interest goal noted above, the IO shall not object to an Application unless at least one comment in opposition to the Application is made in the public sphere." This condition is met.

(ii) Applicant's submissions

35. ICANN has authorized the IO to file community objections only "against 'highly objectionable' gTLD Applications to which no objection has been filed." While the Guidebook grants him standing to file community objections "notwithstanding the regular standing requirements for such objections," he nevertheless still must act on behalf of a "clearly delineated community." The community named by the objector must be "strongly associated with the applied-for gTLD string". In other words, the word "medical" must readily bring to mind some "community" recognized by that designation. Merely stating that proposition reveals its folly.

36. Clear delineation of a medical "community" hardly seems possible. The word "medical" describes a subject, not a community, which interests and affects numerous and diverse individuals and organizations not susceptible of neat classification. The entire world population has a fundamental interest in, and is impacted by, medical matters. The notion of a "community," which would allow the IO to prevent the use of a dictionary term to the exclusion of all others, defies reason. Such a scheme contravenes the open nature of the Internet and the intent of ICANN in adopting the new gTLD program. The Panel should dismiss the Objection on standing alone.

(iii) Objector's Reply

37. The IO does not represent a community even in a Community Objection. Article 3.2.5 of the Guidebook provides that "[t]he IO does not act on behalf of any particular persons or entities, but acts solely in the best interests of the public who use the global Internet". The existence of a clearly delineated community is part of the substantive standards enshrined in Article 3.5.4 and does not constitute an additional standing requirement for the IO.

38. To the contrary, Article 3.2.5 states: "The IO is granted standing to file objections on these enumerated grounds [i.e., LPI objections and Community objections], notwithstanding the regular standing requirements for such objections". The IO has

therefore *ipso facto* standing and his objection must be considered on its merits. The only limitation on the wide discretion of the IO is embodied in the last paragraph of Article 3.2.5: "In light of the public interest goal noted above, the IO shall not object to an Application unless at least one comment in opposition to the Application is made in the public sphere". This condition is fulfilled in the present case.

(iv) Determination

39. The requirements for standing of Article 3.2.2.4 of the Guidebook do not apply to the IO. To show standing, the IO does not have to act on behalf of a "clearly delineated community". Nor does he have to show, for the purpose of standing, that the word "medical" must readily bring to mind some "community" recognized by that designation. More than one comment in opposition to the Application having been made in the public sphere, two of which are identified in paragraph 63 and set out in paragraphs 139 and 140, the IO has *ipso facto* standing to bring this Community Objection, pursuant to Article 3.2.5 of the Guidebook.

VI. The Merits of the Application

40. The merits of the Objection will now be considered.

VII. The Applicant's vision for <.medical>

41. The Applicant says (omitting citations):

> "ICANN adopted its new gTLD program to increase choice and competition in domain names. Sharing and seeking to accomplish these same goals, Donuts has applied for the instant and other TLDs, to offer domains on subjects that otherwise may not have their own forums. The Applicant would make the <.medical> registry open to all consumers, creating paths of communication more expansive than the narrow use to which Objector believes the TLD should be put. Such generic TLDs bring competition to registries, which have not experienced it in a world that has known little more than <.com>, as well as the opportunity for more consumers to enjoy the benefits of such competition. A <.medical> gTLD in Applicant's hands represents one of a number of niche offerings in an expanding Internet "shopping mall." It gives users the choice of a specialty experience as an alternative to the sprawling "department store" environment of incumbent registries such as <.com>. The Objection threatens these important benefits. It would close an entire segment of the Internet to the many potential uses of a common word's multiple meanings".

VIII. The Four Tests for a Community Objection

42. According to the Guidebook, a Community Objection is warranted where there is "substantial opposition to the gTLD application from a significant portion of the community to which the gTLD string may be explicitly or implicitly targeted". In order to evaluate the merits of a Community Objection the Expert Panel shall "use appropriate general principles (standards)" as set out in Article 3.5, as well as "other relevant rules of international law in connection with the standards."

43. Article 3.5.4 of the Guidebook sets out the following four tests, all of which need to be proved by the objector for a Community Objection to be successful:

(a) the community invoked by the objector is a clearly delineated community (Community test);

(b) Community opposition to the application is substantial (Substantial opposition test);

(c) there is a strong association between the community invoked and the applied-for gTLD string (Targeting test);

(d) the application creates a likelihood of material detriment to the rights or legitimate interests of a significant portion of the community to which the string may be explicitly or implicitly targeted (Detriment test).

44. The IO says all four tests are met in the present case. The Applicant says the IO fails to prove any of them. The parties' contentions on each test are summarised below.

IX. Community test

(i) Objector's submissions

45. The term "community" refers to a group of people living in the same place or having a particular characteristic in common. The distinctive element of a community is therefore the commonality of certain characteristics. The individuals or entities composing a community can share a common territory, region or place of residence, a common language, a common religion, a common activity or sector of activity, or other characteristics, values, interests or goals which distinguish them from others.

46. The Guidebook does not determine which kind of common characteristics, values or goals are relevant to the issue whether a given group constitutes a community, nor does it establish any limits in that regard. The 2007 ICANN Final Report confirms that "community should be interpreted broadly and will include, for example, an economic sector, a cultural community, or a linguistic community."

47. One of the relevant criteria is whether the group of individuals or entities can be clearly delineated from others and whether members of the "community [are] delineated from Internet users in general" with reference to their common characteristics and particularities. The recognition of the community among its members, on the one hand, and by the general public at a global or a local level, on the other hand, depending on its actual distribution, is, in that regard, a useful factor to be taken into account.

48. The community targeted by this Application is the medical community. The professionals and institutions which constitute this community are essential in any health system. Their general work and mission, as part of the health policy in a given system, is the diagnosis and treatment, preventive or curative, of diseases. Their activities are of critical importance to the achievement of the public policy goal of public health, especially through medical treatment of ill persons and the restoration of health. They have developed their own characteristic system of moral principles that apply values and judgments to the practice of medicine, including the principles to act in the best interest of the patient, fairness and equality in the distribution of healthcare and resources, non-malfeasance, the respect for patients who have the right to be treated with dignity, and truthfulness and honesty.

49. The medical community comprises a great variety of different health professionals. Despite their variety, the medical community can be clearly delineated with regard to others by several factors. First, membership of the medical community is directly linked to the qualification to exercise a specific healthcare, medical profession. Access to such

professions is regulated and controlled by public institutions. In order to access a medical profession and the medical community, one needs to have successfully completed a specific scientific or professional education program or to get a specifically granted licence or authorization to exercise a medical profession and to deliver medical services. Membership of the community is therefore restricted and not open to the public or all Internet users.

50. Second, members of the community usually work and exercise in specific sectors of activity. This includes healthcare and medical services, pharmaceutics, but also the development of medical and alike technologies. Third, the medical community, despite the variety of actors it includes, has developed a highly specific and complex system of technical terms and phrases. This creates a clear delineation between members of the community and the general public who, usually, can hardly understand the specific language and terms used by medical community members.

51. It is therefore submitted that the medical community constitutes a clearly delineated community in the sense of the Guidebook.

(ii) Applicant's submissions

52. The Objector must show that the string itself describes a clearly delineated community. It does not. The word "medical" itself has numerous connotations. Among them: "of or pertaining to the science or practice of medicine;" "curative; medicinal; therapeutic;" and "pertaining to or giving evidence of the state of one's health." These represent matters of interest to the global public – not merely medical professionals, as the IO would limit the term. The word's broad meanings make it impossible for the Objector to show that it describes a true "community."

53. In the context of the elements enumerated in the objection standard, the Objector does not show that the public recognizes "medical" as a "community." The term does not raise "formal boundaries" that indicate who makes up the "community." And because "medical" does not describe a "community," the Objector cannot establish indicia by which to measure it, such as the number of its "members."

54. In prior correspondence with the Applicant, the IO has recognized the essential inability to "delineate" a "community" connoted by such a generic, broad and widely-encompassing dictionary word in the English language. When preliminarily considering the ability to equate the term "health" with a "community," he noted that the term "encompasses numerous stakeholders, who do not always share similar primary interests." These "include [ ] multilateral organizations" as well as "governmental agencies" and "non-governmental organizations" concerned with the delivery of medical services to the public. Medical services likewise involve for-profit entities such as pharmaceutical companies as well as medical practitioners and both ill and well patients. From such wide-ranging and divergent interests, the IO found it "quite doubtful that they represent a clearly delineated community" in the context of a <.health> TLD. The foregoing describes health *care* in equally broad terms, making its ability to define a "community" just as dubious.

55. At bottom, "medical" does not denote a "community," it represents a *subject*. The Applicant applied for the TLD name for precisely that purpose. Neither the Applicant nor the public should be constrained from discourse on a subject of such universal relevance. Upholding the Objection would stifle expression and discussion concerning this important topic. Such a result would undermine the very purpose of the new gTLD program, and contravenes the Applicant's open-Internet philosophy to benefit the public,

increase consumer choice, promote free expression and allow the Internet marketplace to function, grow and innovate. For such reasons, and because the Objector fails to carry his burden to prove a "clearly delineated community," the Objection cannot succeed.

(iii) Objector's Reply

56. The Community test is aimed at proving that the "community expressing opposition can be regarded as a clearly delineated community". None of the illustrative elements listed in the Guidebook with respect to the Community test implies that the applied for string has to "describe" a community (whatever this actually means). The Objector has to demonstrate that the community which expresses opposition to an Application is a "clearly delineated community" rather than a simple group of people or entities. It is therefore irrelevant, so far as this first test is concerned, if the string actually "describes" the community or not. Even if the Applicant's assertion – that "medical" is nothing other than a subject of interest to everybody and has a broad meaning – were true this does not imply that there cannot be a "medical community" satisfying the test of a delineated community in the sense of the Guidebook. Only the characteristics of the community have to be taken into account for this assessment, not the meaning of the string "medical", and even less the meaning of the string "health" as suggested in Applicant's Response.

57. The IO has demonstrated that the "medical community" does satisfy the Community test as described in the Guidebook. His conclusion has been reaffirmed in the Advice contained in the GAC's Beijing Communiqué, dated 11 April 2013, which has not been disputed by the Applicant in its Response to the Panel. It is indeed striking that the GAC has not only included <.medical> in its list of sensitive strings necessitating particular safeguard measures, but has also pointed to the fact that strings in the health segment, including <.medical>, are part of those strings "associated with market sectors which have clear and/or regulated entry requirements (such as: financial, gambling, professional services, environmental, health and fitness, corporate identifiers, and charity) in multiple jurisdictions." The GAC has therefore confirmed that the medical community can be clearly delineated through the regulated entry requirements and credentials which should be verified by registrars at registration and throughout the operation of a registered domain.

(iv) Applicant's Rejoinder

58. The wide-ranging "medical" term does not denote a "community" so much as a subject matter, and certainly not "uniquely or nearly uniquely" so. Thus, the Objector must but has failed to show that the string exclusively or nearly so identifies a "closely connected group of people or organizations," as opposed to the great variety of those who may have an interest in, or wish at certain times to find out or talk about, a wide range of "medical" topics. On the one hand, the Objector urges the Panel to cordon off access to a domain making use of an everyday dictionary word, while dismissing the need to demonstrate who comprises the alleged community that should have such access. The Objector cannot have it both ways.

59. The Objector's reference to GAC activities does not overcome his absence of proof. Nothing that the Objector has presented suggests that even the GAC views "medical" as denoting a "community," as opposed to simply one of many "sensitive strings." The GAC mentioned over 100 strings in its Beijing advice and its purpose was to add safeguards for those gTLDs – not to create a community such that non-community applicants would be rejected. Just as the GAC did not intend to create a community by mentioning <.diet> or <.care>, the GAC does not create a community for <.medical>.

60. The GAC's statements do not and cannot create a "community" where none exists or has been shown by the Objector. Falling well short of its burden to prove a "clearly delineated" community "targeted" by a <.medical> gTLD, the Objection cannot prevail.

X. Substantial opposition test

(i) Objector's submissions

61. In order to determine if "substantial opposition" with regard to an Application exists, the Panel is not limited to the factors listed in the Guidebook, which focus on the number of oppositions expressed or the representative nature of those having expressed opposition. A mere numerical criterion was certainly not the intent of the authors of the Guidebook. The word "substantial" cannot be defined as limited in that way. It is not only the number of oppositions which should be taken into account, but also the material content of comments and oppositions expressed by those concerned, and in particular, the importance of the rights and interests at stake. Particular importance should be paid in that regard to comments made by governments through the GAC Early Warning Procedure.

62. The very fact that the IO was granted the possibility to file "Community Objections" confirms the necessary broad meaning of the terms "substantial opposition". Indeed, the IO would not file a formal "Community objection" if a single established institution is better placed to represent the community concerned. The role of the IO is to defend the public interest and to act on behalf of the public for the defence of rights and interests of communities that lack an institution which obviously could represent the community in the present context. Article 3.2.5 of the Guidebook also indicates: "In light of the public interest goal noted above, the IO shall not object to an Application unless at least one comment in opposition to the Application is made in the public sphere." This shows that even a single comment can trigger a "Community objection" if it raises issues in relation to rights and interests of a community that can be associated with the applied-for gTLD.

63. The <.medical> Application has triggered a relatively small number of direct comments on ICANN's public comments website. The most relevant for the present purpose are the comments posted on behalf of the American Hospital Association (AHA) and the Association of American Medical Colleges (AAMC), established institutions associated with the medical community. Both represent a significant number of stakeholders of the community in the North America region.

64. Both comments voice similar concerns. They point out that the protection of the public and the users of a <.medical> TLD is an absolute imperative and that this domain name needs to be operated in the interest of public health and safety. AHA and AAMC are both concerned about the lack of safety measures and, in particular, about the lack of registrant eligibility requirements or validation procedures aiming at the prevention of abuse of the <.medical> TLD, of harm to the reputation of the medical community and of damage to healthcare systems and public health in general.

65. Thus, an important part of the invoked community has expressed concerns over the launch of a new gTLD related to the medical community. The grounds for this opposition are clearly substantial. They concern the medical community in general and, most importantly, public interest issues of considerable importance for the international community, i.e., public health and the protection of healthcare users. It is highly significant that similar concerns and oppositions have been voiced by numerous

governments and institutions, from a large variety of geographical regions, with regard to Applications for closely connected strings, and in particular <.health>.

66. For these reasons, it is submitted that the opposition against the <.medical> Application is substantial.

(ii) Applicant's submissions

67. The Objection offers virtually no evidence to show any, let alone substantial, opposition. Among no doubt countless groups around the world with medical subject-matter connections, the IO notes that two geographically limited associations – the AHA and the AAMC – posted public comments on ICANN's website voicing "similar concerns." The IO characterizes these associations as being "established institutions" that "represent a significant number of stakeholders of the community in the North America region." Yet, he proffers no evidence in support of this conclusory statement, and the statement itself admits that these organizations do not represent a significant amount of the global medical population.

68. A third public comment, from the Association of Corporate Counsel ("ACC"), "point[s] also to the additional burden on the often very limited resources of medical providers." The ACC is comprised of attorneys who are neither medical providers nor members of the community the IO purports to represent – *i.e.*, "the medical sector and its professionals." Its comments, therefore, do not bolster opposition within the purported community.

69. From only these three public comments, the IO proceeds directly to the conclusion that "a significant portion of the involved community has expressed concerns to the launch of a new gTLD related to the medical sector." How one can characterize three public comments as opposition from a significant portion of a medical "community" is puzzling at best.

70. The Objection perhaps would warrant more discussion had the IO provided the type of evidence one might expect to back his position. These would include exhibits in support of opposition, information as to how many alleged members of the purported community join the Objection, a showing of any historical "defence" mounted for the "community" invoked, mention of the distribution or diversity of opposition or evidence of costs incurred. He did not do so, notwithstanding that such information represents just what the Guidebook's elements of "substantial opposition" expressly call for.

71. The IO offers not one letter from a single member of the "community" expressing opposition to the <.medical> gTLD and he attaches not a single exhibit to make this requisite showing. "Evidence is appropriately required in all types of objection proceedings. Absent evidence, no objection should stand." *See* http://www.icann.org/en/topics/newgtlds/summary-analysis-proposed-final-Guidebook-feb11-en.pdf. The Objector falls well short of showing "substantial opposition" within the community, and the Objection should be rejected.

XI. Targeting test

(i) Objector's submissions

72. A "community objection" is warranted in the event of a strong association between the applied-for gTLD string and a specific community. In other words, the string used is or

could be clearly linked to a community the rights and interests of which are at stake. This link can be explicit or implicit. Steel Hill's Application has not been framed as a community-based TLD for the benefit of the medical community. Nevertheless, it targets explicitly this community. The Application at 18 (a) points out that the <.medical> TLD is:

> *"attractive to registrants with affinity or professional interest in promotion or treatment of human health, and the methods of delivery and payment for health care services. This includes, but is not limited to, those engaged in the treatment and prevention of disease and illness, the provision of primary and secondary care, the dissemination of health care information, and the advancement of public health."*

73. Further, as stated in Article 1.2.3.2 of the Guidebook: "All applicants should understand that a formal objection may be filed against any Application on community grounds, even if the applicant has not designated itself as community-based or declared the gTLD to be aimed at a particular community."

74. The Guidebook also confirms that a relevant factor to be taken into account in order to evaluate the Targeting test is "[a]ssociations by the public". The 2007 ICANN Final Report on the Introduction of New Generic Top-Level Domains also indicates that "implicitly targeting means that the objector makes an assumption of targeting or that the objector believes there may be confusion by users over its intended use". The test is therefore not limited to the assumptions and the intended use proposed in the Application, but is primarily concerned with the expectations of the average Internet users and their perception of and associations with the string. In the present case, the term "medical" qualifies the targeted community. As an adjective it describes things or professionals "of or relating to the science of medicine, or to the treatment of illness and injuries". The term is generally associated with activities related to the diagnosis and treatment, preventive or curative, of diseases, the medical professions and professionals which deliver these services to users of the healthcare system, as well as to institutions specific to the medical community, including medical treatment centres or medical schools.

75. According to the Applicant's own statements and the general use of the term by the public, there is a strong association between the medical community and the applied-for gTLD string.

(ii) Applicant's submissions

76. The Objector bears the burden of proving a "strong association" between the applied-for string and the so-called community it invokes. He may do so by showing (a) statements made in the Application, (b) other public statements by the Applicant, and (c) public associations between the string and the objecting "community." The Objector offers no real evidence on any of these items. Statements in the Application do not "target" *any* "community," let alone that identified by the Objector. For example, in response to item 18(a) of the Application, seeking "the mission/ purpose of your proposed gTLD," the Applicant states generally: "This TLD is attractive and useful to end-users as it better facilitates search, self-expression, information sharing and the provision of legitimate goods and services. This TLD is a generic term and its second level names will be attractive to a variety of Internet users. No entity, or group of entities, has exclusive rights to own or register second level names in this TLD."

77. The purpose of the TLD is open and the string itself is not tied to a specific community. That is the whole point of Donuts' selection of generically worded TLDs.

78. The concept of "targeting," which lies at the heart of this facet of the Objection, runs directly contrary to the Applicant's stated purpose for this TLD and the philosophy behind the operation of registries generally by the Applicant and its family of companies: making this TLD available to a broad audience of registrants is consistent with the competition goals of the New TLD expansion program and with ICANN's objective of maximizing Internet participation. Donuts believes in an open Internet and, accordingly, the Applicant indicates it will encourage inclusiveness in the registration policies for this TLD. In order to avoid harm to legitimate registrants, Donuts will not artificially deny access, on the basis of identity alone (without legal cause), to a TLD that represents a generic form of activity and expression.

79. Thus, the Applicant expressly does not "target" the string toward *any* particular community, let alone that which the Objector claims to represent. Nor does the Objector present any evidence that the *public* "strongly associates" the word "medical" with any community.

80. Rather than targeting a community, this gTLD identifies users who may have an interest in medical subject-matter, which, as described, includes essentially the entire world population – hardly a "community." The Application goes beyond that universe of end users to include those more generally interested in "self-expression, information sharing and the provision of legitimate goods and services," and notes that, as a generic term, the TLD and "its second level names will be attractive to a variety of Internet users."

81. Dictionary definitions not selected by the IO show the broad reach of the term beyond what he ascribes to it; for example, "the field concerned with the maintenance or restoration of the health of the body or mind." *See* http://dictionary.reference.com/browse/medical. This definition subsumes activities and individuals interested in physical fitness and exercise, not just medical professionals as the Objector would so limit the term. The Objector's unsubstantiated conclusions regarding the string do nothing to prove a "strong" association between it and the narrow interests for which the Objector claims he seeks protection. The Applicant argues that this should come as no surprise, given the broad meaning of the term. It simply does not support the Objector's reading or his burden to prove "strong association." As such, the Objection must fail.

(iii) Objector's Reply

82. The Applicant's interpretation of the Targeting test is flawed. The Applicant largely focuses on the very inclusive group it wants to be able to register domain names within the <.medical> gTLD, which in the understanding of the Applicant means everybody. It is not the Application that has to target a community, but the string itself. The intended use of the string by the Applicant constitutes only one element in order to assess the "strong association" between the string and a community. But it is not the only one, and certainly not the most reliable one. What matters much more is whether the general public is likely to make a strong association between the string and the defined community, and here what counts is not whether the string expressly describes a community but whether the string is sufficiently linked with the community. The Applicant's arguments concerning the lack of targeting are therefore inconclusive. This is particularly true in respect of the dictionary definitions it uses to show a broader understanding of the string "medical", simply because the definition provided by the Applicant relates to the broader concept of "healthcare" and does not appear in the explanations of the term "medical" on the same online dictionary.

(iv) Applicant's Rejoinder

83. The "strong association" or "targeting" test does not look simply at the generic association between the string and the "community" in the eyes of the public. It also expressly considers what the *Applicant* "targets," as the Guidebook factors under this element include "[s]tatements contained in the application" and "[o]ther public statements by the applicant." Thus, the Guidebook itself distinguishes "strong association" from the stringent "clearly delineated" standard.

XII. Detriment test

(i) Objector's submissions

84. The present Application for the <.medical> gTLD creates a likelihood of material detriment to the rights or legitimate interests of a significant portion of the medical community and, most importantly, to users and the public in general.

85. Material detriment can result from harm to the reputation of the community, interference with the community's core activities, or economic or other concrete damage to the community or significant portions of the community. In order to assess the likelihood of such harm or damage, the Expert Panel can take into account a variety of factors, including the dependence of the community on the domain name system for its core activities, the intended use of the gTLD as evidenced in the Application, and the importance of the rights and interests likely to be harmed for the community targeted and for the public more generally.

86. The Guidebook gives particular attention to the issue whether the Applicant is not acting or does not intend to act in accordance with the interests of the community or of users more widely, including evidence that the applicant has not proposed or does not intend to institute effective security protection for user and community interests. In such a case, it is more than likely that the rights and interests of the community will be detrimentally affected by operation of the gTLD as projected by the Applicant.

87. Membership of the medical community and the activities of the community are highly regulated. Because of the public interests at stake, access to and the activities of the medical community are subject to important safeguards, including specific licensing and monitoring requirements imposed by public authorities on qualification, as well as appropriate enforcement mechanisms. It is indeed a primary concern of governmental action and policy – indeed, the responsibility of governments – to provide the most efficient and qualified health service system to its population, including through education and selection of medical professionals.

88. Specifically imposed limits and safeguards serve the protection of the interests and rights of users of the health care system as well as the achievement of the goal of global public health, a concern shared by the entire international community. "The enjoyment of the highest attainable standard of health is one of the fundamental rights of every human being without distinction of race, religion, political belief, economic or social condition." Under Article 12 of the 1966 International Covenant on Economic, Social and Cultural Rights adopted by the General Assembly of the United Nations, States have recognized "the right of everyone to the enjoyment of the highest attainable standard of physical and mental health" and the necessity to create "conditions which would assure to all medical service and medical attention in the event of sickness." The "attainment by all peoples of the highest possible level of health" is a key objective of the WHO and its 194 Member States. In 2010, the Heads of States and Governments of the United Nations have

reiterated their commitment to this objective and committed themselves again to "accelerating progress in promoting global public health".

89. The reputation among users and the trust users put into the medical community are of utmost importance. They serve the community as such which operates in a field of considerable sensitivity and importance for its users. Bad reputation and mistrust create important barriers between users and the medical professionals and the capacities of the latter to accomplish their dedicated public interest mission.

90. In its public comment on the <.medical> Application, the AAMC has pointed to these issues. It has underlined that "[i]t is imperative that the public view <.medical> gTLD, and its hosted websites and e-mail addresses, as trustworthy and legitimate sources of health related information, products and services." The AAMC fears that "the applicant, Donuts LLC, will operate this gTLD solely to advance private commercial interests and not in the interest of public health and safety. This will inevitably erode the public's confidence in the health care system." The AHA and others have expressed similar concerns.

91. The Applicant has shown only limited readiness to address these specific needs of the medical community and the health industry in general in its management of the gTLD <.medical>.

92. Although the Applicant has recognized "the level of end-user trust potentially associated with this string" and has proposed some additional protection mechanisms – as it has done for other Applications submitted by Donuts subsidiaries – the Application has not been framed as a community-based gTLD. It is therefore clear that the Applicant will operate the gTLD in a purely commercial perspective without paying attention to the community targeted and their specific needs and interests.

93. There are two factors demonstrating that the operation of the TLD by the Applicant, as foreseen in the Application, creates a likelihood of detriment to the community.

94. First, the declared policy of Donuts with regard to registry eligibility is questionable. In the Application the Applicant explains: "We recognize some applicants seek to address harms by constraining access to the registration of second level names. However, we believe attempts to limit abuse by limiting registrant eligibility is unnecessarily restrictive and harms users by denying access to many legitimate registrants."

95. On several occasions, Donuts pointed out that "it is far better to maintain the competitive and open nature of a gTLD and use protection measures against problem behaviour if it occurs, instead of making assumptions regarding the effectiveness or practicality of pre-registration restrictions. This is the reasonably balanced environment Donuts seeks to maintain."

96. The Applicant's parent company has taken a similar position in the comments it has itself posted on the public comment website concerning the <.medical> Application, in its response to the IO's Initial Notice concerning, *inter alia*, the <.health> Application filed by Donuts' subsidiary Goose Fest, LLC, and in the Public Interest Commitments (PIC) it has submitted on 6 March 2013.

97. Safety and security measures which are only directed at remedying problems and abuses *if* and *once* they occur do not meet the specific needs and requirements of the medical community, their users and the public interest of global health. The absence of

preventive security measures assuring the integrity and the trustworthy nature of the entities represented and of the information provided under the gTLD, e.g., through stringent eligibility criteria established in collaboration with the community and its stakeholders – a possibility the Applicant's parent company clearly excludes by invoking the open nature of the Internet in general – is likely to have detrimental effects on the trust in the community and the TLD, the reputation of the community, and, most importantly, on public health. To react once abuse and damage have occurred does not correspond to the ethical principles of the medical community. Prevention of detriment and to act in the best interest of the patient are core moral values for the community.

98. Second, the security mechanisms proposed by the Applicant's parent company and aimed at reacting to abuse are unlikely to meet the specific requirements and needs of the community.

99. The Applicant has made no commitment concerning the specific content of the "Anti-Abuse Policy" described in its Application, nor has it given any information concerning the elaboration of this policy. Given the importance of the subject and the public interests at stake, consultation with all stakeholders should be conducted throughout the management and the operation of the gTLD in order to determine adequate measures for the protection of Internet users and the promotion of public health. At no point has it been suggested that the medical community or any of its stakeholders will be associated in the elaboration of this policy or its implementation. To the contrary, the Applicant has expressly reserved the right to react to abuse and to take the appropriate steps "at its sole discretion and at any time and without limitation".

100. In addition, the proposed "Anti-Abuse Policy" is in no way specifically elaborated in order to meet the specific needs of the medical community and taking into account the importance of users' protection and confidence. Section 28 of the present Application and the same section in the Application submitted by Binky Frostbite, LLC, a subsidiary of Donuts, for the gTLD <.creditcard> are entirely identical. This is also the case with Section 28 of the Application submitted by Fox Shadow, LLC, also a subsidiary of Donuts, for the gTLD string <.cleaning>. The PIC submitted by Donuts are equally a mere generic document applicable to a great number of applied-for gTLDs of a great variety. This shows how little attention Donuts actually gives to the medical community and the public interest goals to which it is connected. Obviously, a TLD string which directly targets a community with the particularities and specificities of the medical community cannot be operated in the same policy environment and under the same security conditions of TLDs like <.creditcard> or <.cleaning>. The level of user trust and user protection is without any comparison when human health, as an essential human right and development goal, comes into play.

101. A closer look to the proposed Anti-Abuse Policy also shows that it has not been developed in order to meet any specific requirements of the medical community. In particular, Donuts' propositions do not include any abuse control based on the actual content of websites in the <.medical> TLD. What is more, Donuts refuses to take responsibility for any such control. As it has pointed out in its response to the IO's Initial Notice concerning the <.health> Application, "it is highly inappropriate to attempt to invest any registry operator with the power to assess or regulate speech that uses a broadly applicable dictionary term, and this should not be a consideration in any forum of ICANN's work as a technical coordinating body. Donuts will not do so, nor should any responsible registry so attempt." However, if there is neither an eligibility control to access domain names in the <.medical> TLD, nor any *ex post* control based on content of websites in this particular name space under the Anti-Abuse policy, there is no mechanism left to guarantee and to safeguard the public interest and the community

against the risk of abusing <.medical> domain names, e.g., by fake medical professionals' websites, the promotion of non-authorized goods and services or the dissemination of false, misleading, and/or inaccurate information.

102. The management and operation policies of the <.medical> gTLD as proposed in Steel Hill's Application address insufficiently the risks of abuse. In these circumstances, it is likely to undermine consumer trust and confidence in the medical community and its members. It will cause harm to the reputation of the community and material, economic damage for their members with the direct consequence of the loss of users' confidence and trust. In addition, it is likely to cause detriment, including economic damage, to the public and users of the Internet through inappropriate, false and misleading information in a sector as essential and sensitive as human health.

(ii) Applicant's submissions

103. The Objector cannot sustain its burden to prove "likelihood" of "material detriment." That independently required factor calls for proof of the following elements: (a) the nature and extent of potential damage to the invoked "community" or its reputation from the Applicant's operation of the string; (b) evidence that the Applicant does not intend to act consistently with the interests of the invoked community; (c) interference with the core activities of the invoked community by the Applicant's operation of the string; (d) the extent to which the invoked community depends on the domain name system for core activities; and (e) the level of certainty that detrimental outcomes will occur.

104. The Objector provides no evidence to establish any of these elements. He bases the Objection entirely on rank speculation. The Objector finds it striking that the Application has not been framed as a community-based gTLD but ICANN does not require an operator to apply as a community. Virtually any generic term could potentially be argued to implicate a "community," as the Objector does here. Allowing so-called community interests to stifle expression, restrain competition and impede growth in the namespace would defeat the very purpose of the new gTLD program.

105. Nor does the choice not to seek community status constitute proof of harm. The IO conjectures that harm may occur due to what he sees as a lack of mechanisms for the proposed TLD to protect the alleged community to the extent he deems necessary. Nor can he make such a showing. The overwhelming facts convincingly show otherwise. The Applicant has expressed its affirmative intent to act in the best interests of and to protect all users, including asserted communities, and to "make this TLD a place for Internet users that is far safer than existing TLDs." It will do so with 14 protections that ICANN demands for new gTLDs (but has never required for existing gTLDs). Moreover, for this and all its Applications, Donuts goes beyond these measures to implement eight additional safeguards, including to address the exact types of concerns raised by the Objector. And, as to domains over which it anticipated some might express particular concern – including the gTLD at issue here – Donuts is taking four further steps to assuage such concerns and shield users from potential misconduct. In light of such sweeping and unprecedented undertakings, the Applicant finds it difficult to imagine what more it could do or Objector could want.

106. The Objector suggests a need for registration eligibility criteria, without proposing what they might be. Existing gTLDs have no such requirement. The term "medical" about appears nearly 100,000 times in second-level domains. The Applicant has clearly stated its opposition to such constraints on access, expression and innovation: "[A]ttempts to limit abuse by limiting registrant eligibility is unnecessarily restrictive and harms users by denying access to many legitimate registrants. Restrictions on second level domain

eligibility would prevent law-abiding individuals and organizations from participating in a space to which they are legitimately connected, and would inhibit the sort of positive innovation the Applicant intends to see in this TLD."

107. ICANN supports the same objectives. Indeed, they lie at the heart of the entire new gTLD program: "Evidence is appropriately required in all types of objection proceedings. Absent evidence, no objection should stand." The Objection would have the Panel gut these principles in deference to the self-interest of the Objector and its theoretical community. This would subvert the goals of the evaluation process and lead the namespace down a dangerous path.

108. Such censorship has no place on the Internet. The Applicant's content-neutral approach strikes the proper balance that promotes free speech and the growth of cyber media, while protecting users more thoroughly than both the current landscape and ICANN's new gTLD enhancements do.

109. The Objector fails to establish any of the Guidebook's remaining elements of detriment. He does not show interference with the "core activities" of any medical "community," or that it "depends" on the domain name system for such "activities." And he does not venture an assessment of "certainty" of harm. The Objector's fears and speculation do not satisfy its burden to prove that harm is "likely" from Applicant's operation of the truly generic TLD at issue. The Objection must fail.

110. The Applicant has every right to full consideration of its Application by ICANN. The Objector fails in every respect to meet its burden to divest the Applicant of that right. The Objection cannot succeed. The Applicant therefore respectfully urges the Panel to reject it and to direct the Objector to pay the costs reasonably incurred by the Applicant in opposing the Objection.

(iii) Objector's Reply

111. The factors listed in Article 3.5.4 of the Guidebook are only guidance and are not limitative or exclusive.

112. The Applicant asserts that the IO needs to submit "proof of harm" rather than merely to prove a "likelihood of detriment". This is to forget that during ICANN's preparations for the new gTLD program and its guiding policy, it has been proposed that "evidence of detriment to the community or to users more widely must be provided". This proposal has not been retained in the Final Report of ICANN's Generic Names Supporting Organization ("GNSO").

113. The IO has developed many elements establishing that there exists a likelihood of detriment, in particular because of the Applicant's unwillingness to propose preventive measures, to control the actual content of websites in the <.medical> TLD and to ensure controlled registration eligibility requirements. The Applicant continues to ignore the specificity of this string despite the fact that the GAC Beijing communiqué of 11 April 2013 listed the <.medical> gTLD within the "sensitive strings that merits particular safeguards" because, as had been underlined by the IO, this string is "likely to invoke a level of implied trust from consumers, and carry higher levels of risk associated with consumer harm".

114. Despite the detriment its position is likely to cause, the Applicant's ultimate parent continues to challenge most of the safeguard measures advised by the GAC, along the

same lines as in this Application. The Applicant, just like its ultimate parent, affirms its pro-open registry philosophy in its Response to IO's objection.

(iv) Applicant's Rejoinder

115. The Objector's Reply suggests that the Guidebook does not require objectors to provide evidentiary support for their arguments, as a "proposal" requiring "[e]vidence of detriment to the community" supposedly did not make it into the Implementation Guidelines of the GNSO that initiated the new gTLD program back in 2007. First, that is simply not true; the IO himself refers to the final guidelines, which state, "the objector must provide sufficient evidence to allow the Panel to determine that there would be a likelihood of detriment to the rights or legitimate interests of the community or to users more widely." Second, the multiple stakeholders who developed the Guidebook over five years emphasized that evidence is appropriately required in all types of objection proceedings. Absent evidence, no objection should stand. Third, the GNSO makes policy recommendations to the ICANN Board. The ICANN Board and stakeholders take those recommendations into account in establishing the Guidebook, but the Guidebook ultimately controls and not five year old recommendations. Indeed, the Guidebook as ultimately issued in 2012 could not state more clearly: "The objector bears the burden of proof in each case."

116. The Objector does not provide proof that "the Application" itself "creates a likelihood of material detriment to the rights or legitimate interests of a significant portion of" the alleged "medical" community. Rather, he continues to cite the Applicant's purported "unwillingness to propose preventative measures" as his primary reason for objecting. This does not discharge the Objector's burden and is false.

117. The IO misstates the record when he accuses the Applicant of "unwillingness to propose preventative measures." He completely ignores the eight protective mechanisms that the Application undertakes in addition to the fourteen steps that ICANN already requires for new gTLDs over and above what it demands of existing gTLDs, and the four further measures the Applicant will implement due to the sensitivity it acknowledges as to this particular string.

118. He also overlooks Donuts' Public Interest Commitments (PICs), which contractually bind the Applicant to employ the types of security measures that the IO claims are lacking – including, as discussed more fully in paragraphs 121-123 below, in response to recommendations that ICANN adopts from the GAC Beijing communiqué.

119. Second, the alleged lack of preventative measures does not in the abstract create a likelihood of material detriment. The Objector fails to articulate what specific detriment will likely result absent such measures, what particular measures the Applicant should employ, and how they would reduce the likelihood of whatever detriment the IO imagines might otherwise ensue.

120. Thus, the Objector fails to satisfy his burden to prove material detriment. To the contrary, the facts show the Applicant doing more than even the GAC recommends in many regards, and certainly in excess of what ICANN requires. Anything beyond that would be tantamount to saying that the Applicant may operate a <.medical> gTLD only as a community, and even the IO concedes that the Guidebook does not require that any and every gTLD string which targets a community must necessarily be applied for by a representative of the community. With no adequate proof of the essential element of material detriment, the Objection fails.

121. The Reply infers a likelihood of material detriment by contending that Applicant's ultimate parent continues to challenge most of the safeguard measures advised by the GAC. This misapprehends the GAC's role, the Applicant's policy position and the effect of its recommendations on the instant Objection. Indeed, if relevant at all, the GAC communiqué, in the context of the Guidebook standards, compels denial of the Objection. The Guidebook contemplates that the GAC may provide advice to the ICANN board to address Applications that are identified by governments to be problematic, e.g., that potentially violate national law or raise sensitivities. GAC Advice may take one of three forms: (i) that a particular Application should not proceed, which will create a strong presumption for the ICANN Board that the Application should not be approved; (ii) that the GAC has concerns about a particular string, as to which the ICANN board may enter into dialogue with the GAC to understand the scope of concerns, then decide what to do about them and provide a rationale for its decision; or (iii) that an Application should not proceed unless remediated, which will raise a strong presumption for the Board that the Application should not proceed absent such remediation.

122. The GAC's Beijing comments regarding potentially sensitive strings such as <.medical> take the second form, which does not call for rejection of the string or even create a strong presumption that such a result should occur, whether outright or absent remediation. ICANN has no obligation to adopt all or any of the Beijing recommendations regarding the subject string. Such advice, therefore, has no relevance whatsoever to a material detriment analysis.

123. The Objector further overlooks the ultimate impact the GAC's Beijing recommendations may have. ICANN in fact has accepted the protections suggested by the GAC at Beijing, and remains in dialogue with the GAC on the specific means of doing so with respect to Category 1 strings. Whatever specific measures ICANN enacts will require implementation by the Applicant in the form of a PIC, then embodied in a formal registry agreement by which the Applicant must bind itself to undertake those measures under penalty of losing the registry. Indeed, the Applicant supports much of the Beijing GAC advice. Ironically, then, the very GAC advice to which the IO points as evidence of a likelihood of material detriment instead provides for the precise protections for which the IO advocates against such perceived harm. ICANN will require the Applicant to do exactly what the IO claims it must do in order not to create a likelihood of material detriment. Thus, the only evidence of material detriment on which the Objector relies actually demonstrates just the opposite and defeats the Objection.

XIII. The parties' desired outcome

124. The IO requests the Expert Panel to hold that his objection against the Application in this case is valid. Therefore, the Expert Panel should uphold his Objection against the <.medical> Application. In addition, the IO requests that his advance payments of costs be refunded in accordance with Article 14 (e) of the Procedure.

125. The Applicant respectfully suggests that the Panel has no alternative under the Guidebook other than to reject the Objection. The Objector simply does not meet its burden to prove all four elements of a community objection, compelling its denial.

XIV. Determination

126. For this Objection to be successful, the IO must prove that there is substantial opposition to the <.medical> gTLD Application from a significant portion of the community to which the gTLD string may be explicitly or implicitly targeted.

127. The four tests laid down in the Guidebook are now considered. As mentioned in paragraph 43, the Objector must prove all four tests for the objection to prevail.

(i) Community test

128. This test requires the IO to prove that "the community expressing opposition can be regarded as a clearly delineated community". Article 3.5.4 of the Guidebook sets out a number of factors which a Panel could balance to determine this, including but not limited to:

- the level of public recognition of the group as a community at a local and/or global level;
- the level of formal boundaries around the community and what persons or entities are considered to form the community;
- the length of time the community has been in existence;
- the global distribution of the community (this may not apply if the community is territorial); and
- the number of people or entities that make up the community.

129. A community is "a social, religious, occupational, or other group sharing common characteristics or interests and perceived or perceiving itself as distinct in some respect from the larger society within which it exists": http://dictionary.reference.com/browse/community?s=t.

130. The focus of this test is on the community expressing opposition, not on the meaning of the word comprising the string. Accordingly this test does not require the string itself to describe or denote a clearly delineated community nor exclusively or nearly so to identify a closely connected group of people or organizations.

131. For the reasons put forward by the IO and set out in paragraphs 48 to 50 above, the Expert accepts as common knowledge that a clearly delineated community has developed globally over many centuries, comprising a large group of people and enterprises having in common an involvement in the provision of health care to the general public. That involvement distinguishes the group from the larger society within which it exists, both in its perception of itself and in its recognition by that larger society. There are formal boundaries around the principal participants in that community since medical practitioners, who spring to the public mind first when considering the group and who comprise a very large sector within it, are required under national laws to have formal qualifications before they may practise. Likewise with respect to nurses in many, if not all countries.

132. The expression "medical community" is apt to describe this clearly delineated community.

133. The IO has provided links to the public comments expressing opposition to the Application from two organizations representing members of the medical community, namely the AHA and the AAMC. The fact that these two organizations and their members are based in the United States of America and Canada does not detract from the worldwide nature of the medical community.

134. Accordingly, the Expert finds that the community expressing opposition can be regarded as a clearly delineated community.

135. The IO has proved that the Community test has been satisfied.

(ii) Substantial Opposition test

136. This test requires the IO to prove that opposition to the Application within the Community is substantial. Article 3.5.4 of the Guidebook sets out a number of factors that a Panel could balance to determine whether there is substantial opposition, including but not limited to:

- number of expressions of opposition relative to the composition of the community;
- the representative nature of entities expressing opposition;
- level of recognized stature or weight among sources of opposition;
- distribution or diversity among sources of expressions of opposition, including:
  - Regional
  - Subsectors of community
  - Leadership of community
  - Membership of community
- historical defense of the community in other contexts; and
- costs incurred by objector in expressing opposition, including other channels the objector may have used to convey opposition.

137. As mentioned, the IO has provided links to the public comments expressing opposition to the Application from the AHA, which has 40,000 individual members and more than 5,000 member hospitals, health systems and health care organizations; and from the AAMC, a non-profit association representing all 138 accredited US and 17 accredited Canadian medical schools; nearly 400 major teaching hospitals and health systems; and 90 academic and scientific societies. These organizations and their members represent a large number of the participants in the medical community in the United States and Canada, although they cannot be more than a small proportion of participants in the worldwide medical community.

138. The Expert accepts the IO's submission that, for the purposes of this test, the concept of substantial opposition is not confined to consideration of the number of those expressing opposition or on whose behalf opposition is expressed as a proportion of the community as a whole but may include consideration of the nature and importance of that opposition. In this regard, the Expert notes that the factors which the Expert may take into account are expressly not limited to those mentioned in Article 3.5.4. In this case the Expert finds the content of the expressions of opposition to outweigh in importance those quantitative factors.

139. In its public comments, put in evidence before the Panel by the IO by way of link to the relevant section of the ICANN website: https://gtldcomment.icann.org/comments-feedback/Applicationcomment/commentdetails/10889, AAMC set out its opposition as follows:

> (a) It is imperative that the public view <.medical> gTLD, and its hosted websites and e-mail addresses, as trustworthy and legitimate sources of health related information, products and services. AAMC believes that a private, for-profit commercial enterprise that is not connected to the health care community should not be entrusted with the responsibility of operating the <.medical> gTLD. AAMC and its members are concerned that the applicant, Donuts LLC, will operate this gTLD solely to advance private commercial interests and not in the interest of public health and safety. This will inevitably erode the public's confidence in the health care system.

(b) The health care community and the general public need to be protected from a variety of fraudulent activities. We do not believe that this Application provides for adequate protections such as registrant eligibility requirements or validation procedures designed to prevent bad actors from abusing <.medical> domain names. In the absence of such protections, AAMC is concerned with the ease with which fraudulent activity – including fake health provider websites, illegal online pharmacies, fake electronic medical records websites – could occur and result in identity theft. Further, such fraudulent activities could cause consumer confusion and damage the AAMC and our members' reputations jeopardizing the public trust we have worked to earn and maintain.

(c) AAMC and our non-profit members are not in a position to accept the financial burden of purchasing and managing domain names in the <.medical> gTLD. At this time there is no need for the new gTLD as we all operate successful websites within the current space. The delegation of <.medical> would force us to waste time and resources registering domain names to protect our names, reputations, and the public trust. The creation of <.medical> would further tax the resources of AAMC and our members and divert from efforts to heal, educate the public regarding health and wellness issues, and support research to discover cures and treatments.

(d) For these reasons AAMC believes that delegation of <.medical>, in the absence of alignment with the values of medicine, would not be in the health care community's nor the public's best interest.

140. In its public comments, put in evidence before the Expert by the IO by way of link to the relevant section of the ICANN website: https://gtldcomment.icann.org/comments-feedback/Applicationcomment/commentdetails/10943, the AHA expressed similar opposition as follows:

(a) For the reasons below, the AHA believes that the delegation of the <.medical> gTLD will be detrimental to public health and safety, and the general goals and interests of the health care community targeted by this gTLD.

(b) First, the AHA believes that a private, for-profit commercial enterprise that is not affiliated with, endorsed by, or otherwise connected to the health care community should not be entrusted with the responsibility of operating the <.medical> gTLD. It is imperative that the public view this gTLD, and the websites and email addresses hosted by domains in this gTLD, as trustworthy and legitimate sources of health related information, products and services. The AHA and its members are concerned that the applicant will operate the <.medical> gTLD pursuant to private commercial interests, and not in the interests of public health and safety. The applicant's management of the <.medical> gTLD without the participation of the targeted health care community will erode the public's confidence in the health care system.

(c) Further, both the health care community and the public it serves need to be protected from a variety of fraudulent activities. The Application for <.medical> does not provide for adequate protections. Unlike the Applications for other gTLDs that will serve highly sensitive industries (e.g., .bank), the Application for <.medical> does not include registrant eligibility requirements or validation procedures designed to ensure that <.medical> domains are not secured by bad actors. In the absence of such protections, the AHA and its members are

concerned that the applicant's procedures will both encourage and allow third parties to secure and use <.medical> domain names in the perpetration of fraudulent or other illegal activities (e.g., fake health provider websites, illicit online pharmacies, spamming, phishing attacks, identity theft, etc.), and will invite cybersquatting and other acts of trademark infringement that will cause consumer confusion, damage the AHA and its members' reputations, and otherwise cause material economic harm to the AHA's constituency.

(d) In addition, the health care community is not in a position to accept the financial burden of purchasing and managing domains in the new <.medical> gTLD, or the costs associated with enforcing its rights and protecting consumers from infringing and otherwise fraudulent activities in this gTLD. The majority of the AHA's members are not-for-profit organizations, and many are already under tremendous fiscal pressure. Accordingly, the creation of the <.medical> gTLD will further tax the resources of the AHA's members, interfering with their efforts to help the sick and infirm, and to educate the public regarding health and wellness issues.

141. Although the geographic distribution of the membership of these two organisations is limited relative to the worldwide membership of the medical community as a whole, they are nevertheless representative organizations having a wide range of members belonging to the medical community. This factor, coupled with the nature of the concerns those organizations and the IO have expressed regarding the health and safety of the general public, establishes that community opposition to the Application is substantial.

142. The IO has proved that the Substantial Opposition test has been satisfied.

(iii) Targeting test

143. This test requires the IO to prove that there is a strong association between the applied-for gTLD string and the community invoked. Article 3.5.4 of the Guidebook sets out a number of factors that a Panel could balance to determine this, including but not limited to:

- Statements contained in the Application;
- Other public statements by the Applicant;
- Associations by the public.

144. The Application contains the following statement by the Applicant:

"<.medical> is a TLD attractive to registrants with affinity or professional interest in medicine and medical products and services. This is a broad and wide-ranging worldwide group that could include, but would not be limited to, doctors, nurses, hospitals, medical practices, scientists, researchers, educators, journalists, and others. It also includes individuals, businesses, and professional organizations that support the practice of medicine, including hygienists, technicians, therapists, equipment manufacturers, suppliers, non-traditional medical practitioners, and many others".

145. Apart from the reference to journalists, this group includes those who perceive themselves and are perceived generally by society at large as members of the medical community, since they are all involved in the provision of health care. That such registrants having affinity [i.e. connection with] or professional interest in medicine and medical products and services would find the <.medical> string attractive demonstrates

that there is a strong association between the community invoked and the applied-for gTLD string.

146. The IO has proved that the Targeting test is satisfied.

(iv) Detriment test

147. This test requires the IO to prove that the Application creates a likelihood of material detriment to the rights or legitimate interests of a significant portion of the community to which the string may be explicitly or implicitly targeted. Article 3.5.4 of the Guidebook sets out a number of factors that a Panel could balance to determine this, including but not limited to:

- nature and extent of damage to the reputation of the community represented by the objector that would result from the applicant's operation of the applied-for gTLD string;
- evidence that the applicant is not acting or does not intend to act in accordance with the interests of the community or of users more widely, including evidence that the applicant has not proposed or does not intend to institute effective security protection for user interests;
- interference with the core activities of the community that would result from the applicant's operation of the applied-for gTLD string;
- dependence of the community represented by the objector on the domain name system for its core activities;
- nature and extent of concrete or economic damage to the community represented by the objector that would result from the applicant's operation of the applied-for gTLD string; and
- level of certainty that alleged detrimental outcomes would occur.

148. In considering this test, the Expert notes the Applicant's submission:

> "Applicant has the same free speech rights as the general public to conduct its affairs using ordinary words from the English language. To hold otherwise would negate such rights, impede the growth of and competition on the Internet, and set dangerous precedent that takes choice away from the many and places control in the hands of a few."

149. In this regard, although the parties have not referred to the United Nations Universal Declaration of Human Rights, the Expert notes that while Article 19 of that Declaration provides:

> *"Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers",*

that right is qualified, under Article 29(2):

> *"In the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society".*

150. In keeping with Article 29(2), under ICANN's Community Objection process, where there is proven likelihood of material detriment to the legitimate interests of a significant portion of a clearly delineated community, the right of free speech is made subject to the interests of that community. This is so even in the case of a common dictionary word such as "medical", provided that the four tests of a Community Objection are satisfied.

151. As the Applicant notes, "the entire world population has a fundamental interest in, and is impacted by, medical matters". Hence the importance universally attached to public health and safety as an element of "general welfare in a democratic society", the protection of which must prevail over the right of free speech, in accordance with Article 29(2) of the United Nations Universal Declaration of Human Rights.

152. The Expert has considered the GAC communiqué to the ICANN Board of Directors of 11 April 2013, Donuts' comments thereon to the Board and the parties' comments thereon in this proceeding. Module 3 to the Guidebook describes the procedure whereby the GAC may give advice on new gTLDs to the ICANN Board concerning a specific Application and how that advice is considered by the ICANN Board once received.

153. Module 3 makes clear that the GAC process is separate from the Community Objection process. The outcome of any GAC advice which the ICANN Board accepts will no doubt be applied in relation to any new gTLDs identified by the GAC that survive any formal objections. Accordingly, the Expert regards the GAC advice in relation to the proposed <.medical> gTLD as having no bearing on the present objection.

154. Medical practitioners constitute a significant portion of the medical community. The universally accepted public policy underlying the requirement that medical practitioners be suitably qualified before they may provide medical services, including the service of prescribing certain medicines not lawfully obtainable without prescription, is that, in the interests of public safety, the public should be protected from harm. The essence of this public policy is the prevention of harm before it occurs.

155. The protection policy of the Applicant is not in accord with this approach since it is confined to taking action after harm has been done.

156. The Application recognises "the promotion, encouragement, sale, or distribution of prescription medication without a valid prescription in violation of applicable law" as abusive use of a domain and as "an illegal, malicious, or fraudulent action". Application, 28.3.0.

157. That such conduct already occurs online to a significant degree is noted in another of the public comments to which the IO has provided a link, namely that of Charna Sherman in connection with the LPI Objection to the <.medical> string, citing the National Association of Boards of Pharmacy:

> "...some 97% of Web sites selling prescription drugs online do so illegally – many of them selling unapproved, substandard, and counterfeit medicine..."

158. The Applicant makes clear that the protection of the public that it proposes does not involve consultation with any members of the medical community but will be implemented "at its sole discretion".

159. Nor does the Applicant propose prevention of abuse by limiting registrant eligibility. Instead it will require its registrars to take action against abuse after it has occurred:

> "The Applicant would make the <.medical> registry open to all consumers..." Response, Introduction.
>
> "The purpose of the TLD is open and the string itself is not tied to a specific community. That is the whole point of Donuts' selection of generically worded TLDs." Response 3, Nevett Declaration 7.
>
> "....the Donuts approach is inclusive, and second level registrations in this TLD will be available to any responsible registrant with an affinity for this string. We will use our significant protection mechanisms to prevent and eradicate abuse, rather than attempting to do so by limiting registrant eligibility...Donuts will not limit eligibility or otherwise exclude legitimate registrants in second level names. Our primary focus will be the behaviour of registrants, not their identity." Application 18(b).
>
> "The Anti-Abuse Policy for our registry will be enacted under the Registry-Registrar Agreement, with obligations from that agreement passed on to and made binding upon all registrants, registrars, and resellers." Application 28.2.0.
>
> "Our goal is to keep malicious activity at an acceptably low level, and mitigate it actively when it occurs—we may do so by using professional blocklists of domain names. For example, professional advisors such as LegitScript (www.legitscript.com) may be used to identify and close down illegal "rogue" Internet pharmacies". Application 28.7.0.

160. All of the numerous specific protections listed in the Application are designed to address abuses after they have occurred, including "terms of use that prohibit illegal or abusive activity", and including the four additional measures proposed by the Applicant "due to the level of end-user trust potentially associated with this string". Application 28.15.0.

161. Despite the level of end-user trust which the Applicant recognises as potentially associated with this string, there is nothing in the Application from which it may be concluded that second level registrations will be limited, as the Applicant claims, to "responsible" registrants. In the absence of registrant eligibility requirements, the prospect of irresponsible registrants is not merely possible but likely. This will contribute further to the already widespread sale over the Internet of unapproved, substandard, and counterfeit medicine and to create a misplaced sense of trust on the part of Internet users in the medical qualifications of registrants of second level domains in the <.medical> space.

162. It follows from the absence of protective measures designed to prevent irresponsible registrants from engaging in the kinds of abuse described above that the Applicant is not acting or does not intend to act in accordance with the interests of the medical community nor of users more widely. The Applicant's reliance solely on anti-abuse measures designed to be taken after abuse is detected constitutes evidence that the Applicant has not proposed and does not intend to institute effective security protection for user interests, since by then the damage will have been done to the reputation of and trust in medical practitioners and other members of the medical community as well as harm to the health and safety of the public at large.

163. The Expert concludes that, in addition to members of the medical community and members of the general public having a legitimate interest in research and discussion of

medical topics and in sharing their experiences, it is likely that second level registrants in the applied-for gTLD will include innumerable persons offering medical advice without being qualified to do so and offering real or fake prescription medication without a valid prescription, thereby putting the health and safety of the general public at risk. They will be able to get away with this until the completion of whatever action is taken to stop their abuse. But there is nothing in the regime contemplated in the Application to prevent others from taking their place. To the extent to which this happens, it is likely to shake public confidence in and cause damage to the reputation of the medical community, quite apart from harm to the health and safety of the public at large.

164. By allowing access to second level registrants lacking the qualifications required of medical practitioners and other members of the medical community (i.e. legitimate suppliers of medicines and medical services), the Applicant's operation of the applied-for gTLD string is likely to interfere with the core activities of the medical community by allowing the unqualified to misrepresent themselves as qualified; by creating doubt as to whether qualified members of the medical community are in fact legitimate providers of medicines and medical services; and by creating confusion as to whether medicines obtained online are unapproved, substandard and counterfeit.

165. It is therefore likely that, as a consequence of the Applicant's operation of the applied-for gTLD string, the trust in which the medical community is presently held will be eroded to such an extent that its members will need continually to demonstrate their legitimacy.

166. Accordingly, the Application creates a likelihood of material detriment to the legitimate interests of a significant portion of the medical community to which the string is targeted.

167. The IO has proved that the Detriment test is satisfied.

XV. Finding

168. For the above reasons, the Expert finds that there is substantial opposition to the <.medical> gTLD Application from a significant portion of the community to which the gTLD string may be explicitly or implicitly targeted.

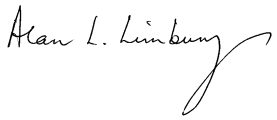
XVI. Decision

169. According to Article 21 (d) of the Procedure, I hereby render the following Expert Determination:

1. The Objection of the Independent Objector is successful, and the Independent Objector is the prevailing party.

2. The Centre shall refund the Independent Objector's advance payment of costs.

Date: November 21, 2013.



Signature:

Alan L. Limbury, Expert

Reconsideration Request

Union of Orthodox Jewish Congregations of America, *et al.*

Annex J

Int'l Banking Fed. v. Dotsecure Inc.,
EXP/389/ICANN/6 (26 Nov. 2013)

THE INTERNATIONAL CENTRE FOR EXPERTISE OF THE

INTERNATIONAL CHAMBER OF COMMERCE

CASE No. EXP/389/ICANN/6

INTERNATIONAL BANKING FEDERATION

(UK)

vs/

DOTSECURE INC.

(UAE)

This document is an original of the Expert Determination rendered in conformity with the New gTLD Dispute Resolution Procedure as provided in Module 3 of the gTLD Applicant Guidebook from ICANN and the ICC Rules for Expertise.

Expert Determination
In the Matter of the Community Objection by International Banking Federation to the ".bank" Application by Dotsecure Inc.

as of November 26, 2013

Mark Kantor
Sole Panel Member and Expert
110 Maryland Avenue, N.E.
Suite 311B
Washington, D.C., U.S.A. 20002

ICC EXP/389/ICANN/6

International Banking Federation (UK) vs/ Dotsecure Inc. (United Arab Emirates)

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This Expert Determination is made in connection with the Community Objection (collectively with annexes thereto, the "Objection") made by International Banking Federation ("IBFed" or the "Objector") to the Application (the "Application") made by Dotsecure Inc. and publicly available in November 2012 ("Dotsecure" or the "Applicant") for the generic top-level domain ("gTLD") ".bank". For the reasons set forth below, the Panel determines that the Objection should be upheld and the Application denied.

I. Introduction

1. Dotsecure, a company located at Contact Information Redacted Arab Emirates, has applied for the new gTLD ".bank". Dotsecure is a member of the corporate family of Directi Inc. ("Directi"), a company located in Mumbai, India, a subsidiary of Radix FCZ ("Radix") and an affiliate of Public Domain Registry ("PDR"). The contact for Dotsecure in these proceedings is Mr. Brijesh Harish Joshi.

2. IBFed is an association with members having its principal office at Contact Information Redacted Contact Information Redacted The contact for IBFed in these proceedings is Ms. Sally Scutt, Managing Director.

3. The establishment of new gTLDs requires the operation of a domain registry and a demonstration of technical and financial capacity for such operations and the management of registrar relationships. On 13 March 2013, IBFed filed with the International Centre for Expertise (the "Centre") of the International Chamber of Commerce ("ICC") its Objection to the Dotsecure application for ".bank". The Objection was made as a community objection under the Attachment to Module 3 of the gTLD Applicant Guidebook (the "Guidebook"), New gTLD Dispute Resolution Procedure (the "Procedure") for resolution in accordance with the Rules for Expertise (the "Rules") of the ICC supplemented by the ICC Practice Note on the Administration of Cases (the "ICC Practice Note") and Appendix III thereto.

4. Pursuant to Article 1(d) of the Procedure, the Applicant by applying for the gTLD ".bank", and the Objector by filing the Objection, have each accepted the applicable principles in the Procedure and the Rules.

5. Article 3(d) of the Procedure specifies that community objections shall be administered by the Centre.

6. Terms used in this Expert Determination and not otherwise defined herein shall have the respective defined meanings given to them in the Procedure and the Rules, as the case may be.

7. Pursuant to the Procedure, these findings "will be considered an Expert Determination and advice that ICANN [the Internet Corporation for Assigned Names and Numbers] will accept within the dispute resolution process." Guidebook, Paragraph 3.4.6.

8. Neither the Applicant nor the Objector has objected to the application of the Procedure or the Rules to make this Expert Determination.

9. The Centre conducted the administrative review of the Objection called for under Article 9 of the Procedure. By letter dated 28 March 2013, the Centre informed IBFed and Dotsecure "that the Objection is in compliance with Articles 5-8 of the Procedure and with the Rules. Accordingly the Objection has been registered for processing (Article 9(b) of the Procedures)."

10. On 14 May 2013, Dotsecure filed its Response to the Objection (collectively with annexes thereto, the "Response").

11. By letter dated 14 June 2013, the Centre advised Dotsecure and IBFed that, pursuant to Article 13 of the Procedure, Article 9(5)(d) of the Rules and Article 3(3) of Appendix I to the Rules, the Chairman of the Standing Committee had appointed the undersigned, Mark Kantor, on 12 June 2013 as the Expert in this matter and the sole member of the Panel.

12. By letter dated 3 July 2013, the Centre advised Dotsecure and IBFed that all advance payments had been received. Therefore, estimated Costs have been paid in full. Accordingly, "the Centre confirm[ed] the full constitution of the Expert Panel" and transferred the file to the undersigned Expert in accordance with the Procedure and the Rules, together with any relevant correspondence between the Centre and the parties in this matter.

13. Pursuant to the Procedure, a draft Expert Determination must be submitted to the Centre within 45 days following the Constitution of the Expert Panel, subject to extensions granted by the Centre upon a reasoned request. Procedure Article 21 (A). No such extension was requested.

14. On 3 July 2013 as well, the Panel confirmed receipt by email of the materials forwarded by the Centre. The Panel further inquired of the Applicant and Objector pursuant to Articles 17 and 19 of the Procedure whether any party was seeking permission to make Additional Written Submissions or have a hearing held in this matter.

15. By email dated 4 July 2013, Dotsecure noted that IBFed had submitted an Additional Written Submission to the ICC on 3 July 2013 replying to Dotsecure's Response. Dotsecure requested the opportunity to make an Additional Written Submission itself addressing the points made by IBFed in the Objector's July 3 Additional Written Submission. With respect to a hearing, Dotsecure stated that it "did not believe that it would serve to change or enhance any of the facts presented in our Response." If, however, the Panel believed a hearing would be required, then "Dotsecure would comply with the requirements thereof."

16. On 4 July 2013, the Panel requested the parties to confer with respect to Dotsecure's request to make an Additional Written Submission. The Panel requested as well a short Response from IBFed to that request and the question of the hearing.

17. Following extensions due to the Fourth of July holiday weekend in the United States, IBFed advised on 9 July 2013 that it had nothing further to add at the time. Accordingly, the Panel responded on the same day authorizing Dotsecure to reply to the IBFed 3 July 2013 Additional Written Submission on the following terms:

> The reply (i) should not exceed the same three pages in length of the IBFed July 3 letter, (ii) should address only matters covered in the July 3 letter not previously argued in earlier Dotsecure submissions, and (iii) should not repeat arguments previously made by Dotsecure in earlier submissions in this proceeding.

18. The Panel informed the parties at the same time (July 9) to make no further submissions in this matter unless the Panel so requested and that, in light of the views of the parties, the Panel would not hold a hearing this proceeding.

19. By letter dated 9 July 2013, Dotsecure made its Additional Written Submission in substantial conformity with the foregoing. That letter concluded the submissions in this proceeding.

20. All submissions in the Procedure were made, and the Procedure was conducted, in English. All communications by the parties and the Expert were submitted electronically. The place of these proceedings is the location of the Centre in Paris, France. See Procedure Articles 5(a),6(a) and 4(d).

21. Neither party has challenged the undersigned as Expert or raised any question as to the fulfillment by the undersigned of my duties as Expert or the qualifications, the impartiality or independence of the undersigned as Expert.

II. Applicable Standards

22. IBFed's Objection to Dotsecure's Application was filed as a community objection. A community objection, according to the Procedure and the Guidebook, refers to an objection that "there is substantial opposition to the application from a significant portion of the community to which the string [here, ".bank"] may be explicitly or implicitly targeted." Procedure, Article 2(e)(iv).

23. Article 20 of the Procedure sets out the standards to be applied by an Expert Panel with respect to each category of objections, including a community objection. Article 20 states as follows:

> Article 20. Standards
>
> (a) For each category of objection identified in Article 2(e), the panel shall apply the standards that have been defined by ICANN.
>
> (b) In addition, the panel may refer to and base its findings upon the statements and documents submitted and any rules or principles that it determines to be applicable.
>
> (c) The objector bears the burden of proving that its objection should be sustained in accordance with the applicable standards.

24. ICANN has set out standards in the Guidebook for determining whether or not the Objector has standing to make a community objection.

> ***3.2.2.4 Community objection***
>
> Established institutions associated with clearly delineated communities are eligible to file a community objection. The community named by the objector must be a community strongly associated with the applied-

for gTLD string in the application that is the subject of the objection. To qualify for standing for a community objection, the objector must prove both of the following:

It is an established institution – Factors that may be considered in making this determination include, but are not limited to:

• Level of global recognition of the institution;
• Length of time the institution has been in existence; and
• Public historical evidence of its existence, such as the presence of a formal charter or national or international registration, or validation by a government, inter-governmental organization, or treaty. The institution must not have been established solely in conjunction with the gTLD application process.

It has an ongoing relationship with a clearly delineated community – Factors that may be considered in making this determination include, but are not limited to:

• The presence of mechanisms for participation in activities, membership, and leadership;
• Institutional purpose related to the benefit of the associated community;
• Performance of regular activities that benefit the associated community; and
• The level of formal boundaries around the community.

The panel will perform a balancing of the factors listed above, as well as other relevant information, in making its determination. It is not expected that an objector must demonstrate satisfaction of each and every factor considered in order to satisfy the standing requirements.

25. In addition, ICANN has set out standards in the Guidebook for the Panel to determine whether or not a community objection will be successful.

3.5.4 Community objection

The four tests described here will enable a DRSP panel to determine whether there is substantial opposition from a significant portion of the community to which the string may be targeted. For an objection to be successful, the objector must prove that:

• The community invoked by the objector is a clearly delineated community; and
• Community opposition to the application is substantial; and
• There is a strong association between the community invoked and the applied-for gTLD string; and
• The application creates a likelihood of material detriment to the rights or legitimate interests of a significant portion of the community to which the string may be explicitly or implicitly targeted.

Each of these tests is described in further detail below.

Community – The objector must prove that the community expressing opposition can be regarded as a clearly delineated community. A panel could balance a number of factors to determine this, including but not limited to:

• The level of public recognition of the group as a community at a local and/or global level;
• The level of formal boundaries around the community and what persons or entities are considered to form the community;
• The length of time the community has been in existence;
• The global distribution of the community (this may not apply if the community is territorial); and
• The number of people or entities that make up the community.

If opposition by a number of people/entities is found, but the group represented by the objector is not determined to be a clearly delineated community, the objection will fail.

Substantial Opposition – The objector must prove substantial opposition within the community it has identified itself as representing. A panel could balance a number of factors to determine whether there is substantial opposition, including but not limited to:

- Number of expressions of opposition relative to the composition of the community;
- The representative nature of entities expressing opposition;
- Level of recognized stature or weight among sources of opposition;
- Distribution or diversity among sources of expressions of opposition, including:
    - Regional
    - Subsectors of community
    - Leadership of community
    - Membership of community
- Historical defense of the community in other contexts; and
- Costs incurred by the objector in expressing opposition, including other channels the objector may have used to convey opposition.

If some opposition within the community is determined, but it does not meet the standard of substantial opposition, the objection will fail.

Targeting – The objector must prove a strong association between the applied-for gTLD string and the community represented by the objector. Factors that could be balanced by a panel to determine this include but are not limited to:

- Statements contained in application;
- Other public statements by the applicant;
- Associations by the public.

If opposition by a community is determined, but there is no strong association between the community and the applied-for gTLD string, the objection will fail.

Detriment – The objector must prove that the application creates a likelihood of material detriment to the rights or legitimate interests of a significant portion of the community to which the string may be explicitly or implicitly targeted. An allegation of detriment that consists only of the applicant being delegated the string instead of the objector will not be sufficient for a finding of material detriment.

Factors that could be used by a panel in making this determination include but are not limited to:

- Nature and extent of damage to the reputation of the community represented by the objector that would result from the applicant's operation of the applied-for gTLD string;
- Evidence that the applicant is not acting or does not intend to act in accordance with the interests of the community or of users more widely, including evidence that the applicant has not proposed or does not intend to institute effective security protection for user interests;
- Interference with the core activities of the community that would result from the applicant's operation of the applied-for gTLD string;
- Dependence of the community represented by the objector on the DNS for its core activities;
- Nature and extent of concrete or economic damage to the community represented by the objector that would result from the applicant's operation of the applied-for gTLD string; and
- Level of certainty that alleged detrimental outcomes would occur.

If opposition by a community is determined, but there is no likelihood of material detriment to the targeted community resulting from the applicant's operation of the applied-for gTLD, the objection will fail. The objector must meet all four tests in the standard for the objection to prevail.

26. The Guidebook refers back to the ICANN Final Report Regarding the Introduction of New Generic Top-Level Domains, dated 8 August 2007 (the "Final Report"). The Final Report set out a table of Implementation Guidelines with views regarding the determination by the Panel of *inter alia* "community," "substantial opposition" and "material detriment" in connection with a community objection.

IG P* The following process, definitions and guidelines refer to Recommendation 20.

Process

Opposition must be objection based.

Determination will be made by a dispute resolution panel constituted for the purpose.

The objector must provide verifiable evidence that it is an established institution of the community (perhaps like the RSTEP pool of panelists from which a small panel would be constituted for each objection).

Guidelines

The task of the panel is the determination of substantial opposition.

a) **substantial** – in determining substantial the panel will assess the following: signification portion, community, explicitly targeting, implicitly targeting, established institution, formal existence, detriment

b) **significant portion** – in determining significant portion the panel will assess the balance between the level of objection submitted by one or more established institutions and the level of support provided in the application from one or more established institutions. The panel will assess significance proportionate to the explicit or implicit targeting.

c) **community** – community should be interpreted broadly and will include, for example, an economic sector, a cultural community, or a linguistic community. It may be a closely related community which believes it is impacted.

d) **explicitly targeting** – explicitly targeting means there is a description of the intended use of the TLD in the application.

e) i**mplicitly targeting** – implicitly targeting means that the objector makes an assumption of targeting or that the objector believes there may be confusion by users over its intended use.

f) **established institution** – an institution that has been in formal existence for at least 5 years. In exceptional cases, standing may be granted to an institution that has been in existence for fewer than 5 years.

Exceptional circumstances include but are not limited to a re-organization, merger or an inherently younger community.

The following ICANN organizations are defined as established institutions: GAC, ALAC, GNSO, ccNSO, ASO.

g) **formal existence** – formal existence may be demonstrated by appropriate public registration, public historical evidence, validation by a government, intergovernmental organization, international treaty organization or similar.

h) detriment – the objector must provide sufficient evidence to allow the panel to determine that there would be a likelihood of detriment to the rights or legitimate interests of the community or to users more widely.

27. The parties have referred in their respective submissions to the statements by the European Commission and the U.S. Federal Deposit Insurance Corporation (FDIC), among others, with specific respect to the sensitivity of the ".bank" gTLD. IBFed has relied on those statements to support its Objection, while Dotsecure has argued that reliance is misplaced.

28. The comments by supranational and national authorities do not constitute standards for purposes of ruling on community objections and are not binding on the Panel. Those comments do, however, assist the Panel in understanding the nature of community objections, determining how to assess "whether there is substantial opposition," determining how to assess the strength of "the association between the applied-for gTLD string and the community," and identifying factual elements relevant in assessing "the likelihood of material detriment to the rights or legitimate interests of a significant portion of the community to which the string may be explicitly or implicitly targeted."

29. In late November 2012, the Director of the Directorate-General for Communications Networks, Content and Technology of the European Commission wrote to ICANN and to the

applicants for 58 sensitive names, including the two applicants for ".bank." In that letter, the Director noted that those applications "could raise issues of compatibility with the existing legislation ... and/or with policy positions and objectives of the European Union."

30. Further, the Director noted that "[g]enerally speaking, all new gTLD applications should properly take into account the "GAC Principles regarding new gTLDs" of 2007, as well as the more specific concerns expressed by a number of GAC members, *inter alia* in the Communiqué of the GAC of 17 October 2012." (footnotes omitted)

31. The Director stated the Commission's desire to open a dialogue with each applicant.

32. That letter illustrates the heightened sensitivity for European policy-makers and regulators with respect to how the ".bank" string must be managed.

33. In December 2008, the FDIC stated directly to ICANN its prudential regulatory concerns that a ".bank" gTLD might potentially create additional risks of financial fraud, consumer confusion and misdirected trust in the .bank gTLD. Moreover, according to the FDIC, creation of a .bank gTLD could require the financial services industry to incur additional intellectual property protection expenses during the ongoing time of economic stress.

34. The FDIC therefore recommended *inter alia* that (i) financial sector gTLDs be subject to community-established governance rules, including measures established by financial sector regulators and (ii) applicants should demonstrate their intent and ability to comply with these governance rules in the application process.

35. The governance requirements, according to the FDIC, should include, at a minimum: (a) financial capability to carry out its governance requirement; (b) a process for ensuring intellectual property rights such as trade names; and (c) a requirement for registrant due diligence.

36. In addition, the FDIC recommended that the process and rules for objecting to any financial sector gTLD applications include the ability to object on the grounds of insufficient governance as proposed by the application as well as a process for financial regulatory objection.

37. The FDIC further recommended an additional process to permit financial sector gTLD ownership to be revocable or transferable at any time in the future when the represented community or regulatory body determines and shows that the sponsored gTLD has not satisfied its governance requirements.

38. In operative part of its December 2008 letter, the FDIC comments emphasized the central role of industry and regulatory body endorsements in connection with a financial services gTLD such as ".bank".

> Regulatory Concerns
>
> Through its deposit insurer and regulatory roles, the FDIC is a community leader for the US financial sector on the Internet and is at the forefront of issues related to consumer confidence in the banking systems, including Internet banking. While the FDIC has historically encouraged industry-led technical innovations,

and prefers an industry-led effort to establish standards and guidance for the safe and sound implementation of those innovative technologies, we are very concerned that new gTLDs could potentially create new rounds of financial fraud, consumer confusion, misdirected trust in a gTLD, and could force trade name protection costs onto the financial industry during a period of economic stress. As such, we encourage ICANN to include industry representatives such as financial trade associations (e.g., American Bankers Association, Financial Services Roundtable, Independent Community Bankers, etc.) in its deliberations regarding the value of financial sector specific gTLDs.

The FDIC is also concerned that financial sector gTLDs could potentially impact consumer trust and confidence in Internet banking, and the banking system in general, if such gTLDs are misused. Financial sector gTLDs such as ".bank" could intuitively, and mistakenly, imply industry (including regulatory) endorsement to the public. The draft application processes does not provide sufficient requirement that such industry endorsement exists. Without sufficient industry endorsement, and an integrated governance requirement for financial sector gTLDs, we believe that a financial sector gTLD could be detrimental to consumers and undermine established confidence in Internet banking.

Recommendations

With respect to the proposed gTLD Guidebook, the FDIC believes more consideration should be given to the regulated environment of the financial sector and the potential impact that a financial sector gTLD could have on the financial industry and consumers. To remedy these concerns, the FDIC recommends a separate and distinct application process for financial sector gTLDs. Specifically, we offer the following suggestions for a financial sector gTLD process:

1) The draft Guidebook permits gTLD applications as either "open" applications or "community-based" applications. The FDIC recommends that a financial sector gTLD be implemented from a top down approach to ensure that no unsponsored gTLDs are issued, and that if issued, such gTLDs are managed within an industry and regulatory framework. Furthermore, the FDIC recommends that the financial sector gTLDs process not permit "open applications" and that any applications include explicit endorsement of the financial industry community including regulatory bodies.

2) The FDIC recommends that financial sector gTLDs be subject to community-established governance rules, including various laws, regulations, guidance and policy established by the financial sector regulators. Additionally, applicants should demonstrate their intent and ability to comply with these governance rules in the application process. The governance requirement should include, at a minimum:

a. Financial capability to carry out its governance requirements
b. A process for ensuring intellectual property rights such as trade names
c. A requirement for registrant due diligence

3) The draft Guidebook provides a process for objecting to applications. The FDIC recommends that the process and rules for objecting to any financial sector gTLD applications include the ability to object on the grounds of insufficient governance as proposed by the application as well as a process for financial regulatory objection.

4) The FDIC recommends an additional process to permit financial sector gTLD ownership to be revocable or transferable at any time in the future when the represented community or regulatory body determines and shows that the sponsored gTLD has not satisfied its governance requirements.

39. ICANN did not wholesale adopt these FDIC recommendations into the final version of the Guidebook. The policy concerns stated by the FDIC remain relevant, however, to the determination of "substantial opposition," "strong association" and "material detriment."

40. In November 2009, the Canadian Office of the Superintendent of Financial Institutions in Canada ("OSFI") informed ICANN as to possible problems under the Canadian Bank Act that would be faced by applicants for a ".bank" gTLD. According to OSFI, all persons and entities are prohibited by the Bank Act and regulations thereunder from using in Canada the word "bank" to indicate or describe a financial service other than banks regulated by OSFI. Accordingly, OSFI advised ICANN that any entity found using a ".bank" gTLD in violation of the Bank Act would be required to abandon the domain name regardless of associated costs or expenses incurred.

41. Senior Director Evanoff of OSFI wrote to ICANN in the following terms.

> By means of this letter OSFI would like to inform you of the importance of this initiative to OSFI and that there are issues that any prospective applicant for a ".bank" gTLD will need to consider. In particular, as a general rule, Canada's *Bank Act* prohibits any person, other than a bank that is regulated by OSFI, to use the word "bank" to indicate or describe a financial services business in Canada. The objective of this provision is to protect the Canadian public from incorrectly assuming they are dealing with a Canadian bank that is subject to the *Bank Act* and OSFI's regulatory oversight. At the same time the provision contributes to the public's confidence in Canada's financial system by protecting the integrity of the word "bank" as a word that is generally reserved for entities that are regulated and supervised as a bank in Canada.
>
> As such, and consistent with OSFI's role to promote and administer a safe and sound regulatory framework, a person that OSFI find to be in contravention of the prohibition above would be asked to relinquish the ".bank" gTLD irrespective of associated cost or inconvenience for that person. We note that a contravention of the prohibition would constitute a criminal offense.

42. This comment from the Canadian regulatory authorities underscores the difficulties a holder of the ".bank" gTLD would face if it were not embedded inside the banking community. Those difficulties would in turn affect the availability and reliability of service for users of the top-level domain, difficulties that would be compounded if the holder of the gTLD was not familiar with bank regulatory compliance requirements in all global financial centers and elsewhere.

43. In making this Expert Determination, the Panel has applied the foregoing ICANN standards and taken account of the principles underlying the substantive concerns expressed by national regulatory authorities to the extent the Panel considered them applicable and appropriate. Procedure, Article 20.

III. Standing and Merits

44. In this Section of the Expert Determination, the Panel summarizes the positions of the parties as set out in the Objection, the Response and related correspondence. This summary is made for the convenience of the reader and does not purport to be exhaustive. The Panel has carefully reviewed the Objection (including all annexes), the Response (including all annexes), the Additional Written Submissions, other correspondence from the parties, the Procedure, the Rules, the Guidebook and any other rules or principles that I have determined to be applicable. The absence in this Expert Determination of any specific reference to any particular information, document or provision is not to be taken as an indication that the Panel has failed in any way to consider fully the submissions of the parties or the standards, principles and rules applicable under the Procedure.

A. Standing

45. Dotsecure asserts that IBFed does not have standing to pursue a community objection. Pursuant to Article 20 of the Procedure, IBFed has the burden of proving it has standing to assert a community objection. IBFed must prove, among other matters, that it is an "established institution," that there is a "clearly delineated community" corresponding to the "global banking community" and that IBFed has an "ongoing relationship" with such a community. Recognizing that it has the burden of proof, IBFed initially set forth its position regarding standing in its Objection. IBFed detailed in the Objection its background, the identity of its members, and its interaction with national and international bank regulatory authorities on behalf of its members.

> The IBFed was formed in March 2004 to represent the combined views of a group of national banking associations. IBFed's membership list is available on its website and includes the following: American Bankers Association, Australian Bankers' Association, Canadian Bankers Association, European Banking Federation, Japanese Bankers Association, China Banking Association, Febraban, Indian Banks Association, Korea Federation of Banks, Association of Russian Banks, and the Banking Association of South Africa. The IBFed's members collectively represent more than 18,000 banks with 275,000 branches, including around 700 of the world's top 1000 banks which alone manage worldwide assets of over $31 trillion. This worldwide reach enables the IBFed to function as the key international forum for considering legislative, regulatory and other issues of interest to the global banking industry. See Annex A for the list of IBFed objectives from its Memorandum and Articles of Association.
>
> Guided by these objectives, the IBFed's advocacy on behalf of the global banking community has created strong relationships with inter-governmental organisations (e.g., G20, the Basel Committee on Banking Supervision, the Financial Stability Board, the International Accounting Standards Board, the International Organisation of Securities Commissions, and the Financial Action Task Force on Money Laundering). By way of example, the IBFed works closely with the inter-governmental Financial Action Task Force to promote national and international policies to combat money laundering and to prevent the financing of terrorism. The reform agenda extends across the entire regulatory landscape and encompasses all the main international standard setters and involves the regulatory and supervisory authorities of all the G20 countries.
>
> The primary mechanism the IBFed utilizes in the advocacy efforts is a series of working groups including, but not limited to, Consumer Affairs, Financial Crime, Financial Markets and Value Transfer Networks that can be accessed on its website.

46. In support of its argument that IBFed has an ongoing relationship with a clearly delineated global banking community, IBFed also pointed to a number of annexes to the Objection as further demonstrations that IBFed satisfies the standing requirements to pursue a community objection. Those annexes include *inter alia* statements of support for IBFed's formal opposition by the community against Dotsecure's application (Annex D) and statements of opposition filed against Dotsecure's application submitted to ICANN's public forum (Annex E).

47. Dotsecure argues in its Response that IBFed has failed to sustain that proof, as follows.

48. With respect to IBFed's assertion that it is an "established institution," Dotsecure responds that IBFed is an "association of associations" that has only one full-time employee, an individual who is associated as well with the British Bankers Association (BBA). IBFed's financial statements for Fiscal Year 2011 state that the Federation "relies on staff seconded by BBA" to carry out its work. Moreover, IBFed utilizes BBA premises rather than holding its own premises.

49. Dotsecure further argues that IBFed does not have an "ongoing relationship" with a "clearly delineated" community known as the "global banking community." Dotsecure principally argues that no such community can be found and that the purported community is not "clearly delineated." By reference to dictionary definitions and references to Guidebook Module 4 (p. 4-11), Dotsecure asserts that the purported community lacks coherence and the purported members lack awareness of the community. Websites of the world's largest banks, and Google searches generally, do not show the phrase "banking community." Rather, banking websites and public perceptions, reports Dotsecure, refer to a "banking industry," a "banking sector" or similar phrases. Similar phrases, but not the phrase "banking community," are found in IBFed letters to regulatory authorities. Nor do the IBFed charter documents employ the phrase "banking community."

50. Moreover, says Dotsecure, regulation and supervision in many countries of the world contain "variations" in bank definitions and in the nature of the regulatory regime.

51. Additionally, Dotsecure argues that IBFed misstates in its submissions the impact of the history of the GAC and ICANN, including the Beijing communiqué. For Dotsecure, that correspondence and the New gTLD Program Committee's ("NGPC") positions may be relevant for scoring a community priority, but are "not relevant to this Objection at all."

52. Dotsecure further claims that, even if IBFed is an "established institution," IBFed has not provided evidence of a direct relationship with the 36,000+ organizations that carry on banking worldwide sufficient to satisfy the requirement of an "ongoing relationship" with the community. All of IBFed's relationships are with other representative associations, its members.

53. Dotsecure also objects to the persuasiveness of IBFed's showing of "substantial opposition" by members of the community, by counting the number of opposition letters and comparing that number to the total number of banks in the world.

54. Dotsecure additionally argues that IBFed has failed to show a "strong association" between the community and the string ".bank." In that regard, Dotsecure notes that the word "bank" has several other meanings and connotations, such as the bank in a poker game or a piggybank. Even a cursory review of the Oxford English Dictionary demonstrates that most words in the English language have multiple meanings. The proposed requirement that a "strong association" between a community and a term such as "bank" can exist only if there is just one possible meaning of that term is unrealistic. That approach is not required by the Guidebook, nor are the GAC-ICANN exchanges and the NGPC comments to the contrary.

55. IBFed has argued that the nature of the national and international regulatory framework supports the position that a "clearly delineated global banking community" exists. Dotsecure seeks to rebut that position by asserting that the multiplicity of regulatory regimes for the banking community shows otherwise. Dotsecure further argues that the regulatory controls on the use of the word "bank" in business activities is no different in substance than the prohibition of the use of the term "Limited" except for certain companies. In this regard, Dotsecure overstates the matter. Bank regulatory agencies and securities regulatory agencies seek to coordinate policy both formally (e.g., the Basle process) and informally (e.g., through central bank cooperation facilitated

by the BIS). Dotsecure's counter-examples of a "community of listed companies" and regulatory restrictions on the use of the word "Limited" are exaggerations rather than helpful comparisons.

56. Although not directly tied to any particular standing requirement in the Guidebook, Dotsecure draws the attention of the Panel to the role IBFed may have in connection with the ".bank" application by fTLD, a company affiliated with IBFed member the American Bankers Association. Dotsecure asserts this relationship shows a clear conflict of interest. This Panel, however, is not assessing the fTLD application or the motivations of an objector. Rather, the Panel is tasked with objectively reviewing the standing of the objector and the merits of the Objection. Dotsecure's conflict allegation is not relevant to those tasks.

57. In its 3 July Additional Written Statement replying to Dotsecure's Response, IBFed argued that:

> In its response, Dotsecure seeks to undermine the credibility, standing and relevance of the IBFed. In the global banking community the IBFed's operations are analogous to ICANN's operations within the Internet community in that both rely extensively, particularly as it relates to policy development, on a network of volunteer subject matter experts and industry professionals. The IBFed reaffirms that its work in the areas of Consumer Affairs, Financial Crimes, Financial Markets, Financial Reporting, and Prudential Regulation is undertaken by a vast network of professionals from the global banking community. These IBFed working groups are comprised on average of between forty and fifty individuals from across IBFed's membership. The IBFed will allow its body of work to speak for itself in response to the spurious allegations that it lacks standing to bring this action.
>
> Dotsecure also insinuates that the IBFed's decision to file the community objection against its application was motivated by the American Bankers Association (ABA), a participant in fTLD Registry Services, LLC (fTLD), a competing applicant for the .bank gTLD. The ABA is but one member of IBFed's broad, global membership. The decision by IBFed's Board to file a community objection against Dotsecure was based on a desire to protect the financial community that the association serves. The ABA's association with fTLD was properly disclosed to the IBFed Board as part of its due diligence prior to voting on the resolution to file the Objection to Dotsecure.
>
> The IBFed stands ready to provide any additional documentation that Mr. Kantor may need to ascertain the true facts for this proceeding. Specifically, the IBFed would respectfully like to highlight the following areas where additional facts may provide clarification for Mr. Kantor's consideration:
>
> - According to Section 3.2.2.4 of the Applicant Guidebook, standing is determined based upon a panelist's balancing of the factors as well as other relevant information. This fact would render Dotsecure's self-serving numerical tabulations irrelevant to the panel.
>
> - ICANN's Governmental Advisory Committee's (GAC) continuing advice/guidance to ICANN Board per ICANN's bylaws is germane with respect to what constitutes a community per Section 3.5.4 of the Applicant Guidebook, see also GAC's Beijing Communiqué https://gacweb.icann.org/download/attachments/27132037/Beijing%20Communique%20april2013_Final.pdf?version=1&modificationDate=1365666376000&api=v2 ("Community Support for Applicants").
>
> - Rather than interpreting the plain meaning of the guidance set forth in ICANN's Applicant Guidebook to assess if the global banking community is a clearly delineated community, Dotsecure attempts to dissect the individual words with self-serving definitions. IBFed encourages Mr. Kantor to look to the Applicant Guidebook in how ICANN references the "Internet Community" as well as statements referencing the same by Bhavin Turakhia, founder and CEO of Directi Group, Dotsecure's parent company.

- Substantial opposition is based upon Mr. Kantor's weighing of non-exhaustive subjective factors enumerated in the Applicant Guidebook, not a mere numerical compilation in which the representative nature of the commenters, the geographic diversity of the commenters and their historic defense of the community are dismissed.

- Objector must merely prove that there is a "strong association between the applied-for gTLD string and the community represented by the objector" to prove implicit/explicit targeting.

58. In its 9 July 2013 Additional Written Submission in reply, Dotsecure responded to IBFed's 3 July 2013 submission. The substance of that response as it relates to standing has been summarized above in paragraphs 45-56.

59. After reviewing the positions of the parties as to standing, the Panel has determined that IBFed has the requisite standing to pursue a community objection.

i. Analogy to ICANN

60. As an initial matter, the Panel notes that IBFed has argued in its 3 July 2013 Additional Written Submission that its operations are analogous to the operations of ICANN in the Internet community, particularly as those operations relate to policy development. That argument is unpersuasive – ICANN is fundamentally a different organization, and has different types of members and responsibilities, from a professional and trade association such as IBFed. Nevertheless, the other facts identified in this Section of the Expert Determination point convincingly to the existence of a global banking community and to IBFed's ongoing relationship with that community.

ii. Established Organization

61. Turning first to the requirement that the Objector be an "established organization," the Panel is satisfied that IBFed is an established organization for purposes of making a community objection.

62. The ICANN Guidebook points the Applicant and the Panel to several non-exhaustive factors that weigh in the balance, including the level of global recognition of IBFed, the length of time IBFed has existed and the presence of charter documents showing continued existence. IBFed easily satisfies these requirements.

63. The Implementation Guidelines table in the ICANN Final Report states that an "established institution" is "an institution that has been in formal existence for at least 5 years."

64. IBFed has existed, established working groups, undertaken substantive representative tasks and generated reports and position papers on behalf of its banking community membership since 2004. The Objection sets out undisputed information about these activities of IBFed, which are corroborated by a very large number of exhibits as well as by publicly available on IBFed's website. There is, of course, also no dispute between the parties that IBFed has charter documents dating back to its initial organization as a legal entity (appended as Annex A to the Objection).

65. Each member of IBFed (other than associate members) is entitled to a representative on the Board of Directors of the Federation. The chief executive officer of the banking trade association in who's premised the Federation's Secretariat is located is an *ex officio* member of the Board as well. Through its membership and through almost a decade of dialogue with regulatory authorities and policy makers, IBFed has been recognized as a representative by both banking institutions and national and international regulators.

66. Dotsecure's argument to the contrary is based on the structure of IBFed as an "association of associations" and its use of seconded staff and member representatives to conduct its work rather than *inter alia* employing a stand-alone staff and its own premises. That argument is not persuasive. The argument, however, would deny any association staffed by its members from status as an established institution, a situation that does not correspond in the Panel's experience to the manner in which many representative trade and industry associations are operated. The Guidebook does not limit representative status only to organizations that have stand-alone staffs and premises, and large budgets.

67. A trade association may rely on seconded staff and member representatives to conduct its work, just as many government bodies and subsidiary companies do. Additionally, the fact that IBFed as an "association of associations" does not prevent it from being an established organization.

68. That latter criticism by Dotsecure also relates to other factors in the standing formula - the existence of a clearly delineated community and whether IBFed has an ongoing relationship with that community. The Panel addresses those elements of standing below.

iii. Clearly Delineated Global Banking Community

69. The Panel is also satisfied that a clearly delineated global banking community exists.

70. The Final Report recommends that "community should be interpreted broadly." Without disputing that interpretive principle, the Panel does not need, in light of the characteristics of the global banking community, to rely upon that tool of interpretation to conclude that the global banking community is clearly delineated and that Dotsecure's Application for the string ".bank" explicitly and implicitly targets members of that community and its clients.

71. The Panel begins by noting that the dispute between the parties with respect to the GAC-ICANN exchange is not dispositive of this issue. Nor is the NGPC response. There is nothing talismanic under the Guidebook with respect to the word "community." Banks and their associations can, and do, convey the same idea by means of other phrases, such as "banking sector" and "banking industry." The concept of a community is functional – it is not a magic term that must be used by community participants as a condition to fulfilling the requirements of a "community" for purposes of a community objection.

72. IBFed points in its Objection to a number of factors that support this conclusion.

- Common regulatory framework and operating principles at a local and global level

- Regulatory restrictions on the use of the word "Bank" at local and national levels

- Various ISO standards related to the banking community

- The existence of international organizations as forums for coordination of regulatory measures for the global banking community, including the Financial Stability Council and the Basel Committee on Banking Supervision

- The longevity and global scope of the banking community

73. Of considerable persuasive import in that regard, governments around the world consider that a global banking community exists. The formal boundaries of the banking community are set by a coordinated national regulatory environment identifying which institutions are entitled to take deposits from the public and may employ the term "bank" in their corporate name. Those parameters conform to most of the institutions who are members of the national trade associations making up the membership of IBFed.

74. Governments seek to coordinate their regulatory measures with respect to banks to assure harmonization of regulation in an interconnected world where deposit-taking, payments systems, extending credit, making loans and other financings, underwriting, other bank products and services, and customers and counterparties cross borders continuously. Bank regulatory agencies worldwide coordinate their regulation of banking institutions that take deposits and make loans through, *inter alia*, the Financial Stability Board and the Basel Committee on Banking Supervision.

75. The size and composition of the global banking community, unsurprisingly, has changed over time. Nevertheless, an extensive community of banks globally has existed at least since bank regulatory authorities were established and began to cooperate to regulate commercial banks more than a century ago and inter-bank deposit and similar markets arose to address the funding needs of banks.

76. Legislatures too treat banking as a clearly delineated community – for example, the United States Senate has a "Banking Committee" that is the principal forum for that body to consider legislation and provide oversight relating to inter alia bank regulatory measures and markets.

77. Most recently, those various public bodies and their members have harmonized capital adequacy requirements for commercial banks in response to the recent financial crisis. The capital adequacy rules for commercial banks are different in many respects from the capital adequacy rules for other financial institutions, thereby demonstrating that the competent government authorities consider deposit-taking banks to be a clearly delineated separate component of the financial system.

78. Other international organizations also specifically address banking as a distinct sector. Illustratively, the Annex on Financial Services to the WTO General Agreement on Trade in

Services (GATS) singles out banking and related financial services as a special sector of financial services distinct from insurance services.

79. Significantly, commercial banking organizations have themselves organized into their own national trade associations to coordinate their responses to public policy and regulatory measures at the national and international levels (many of the most influential of which are members of IBFed and sit on its Board of Directors) and through international associations such as IBFed itself.

80. The existence of inter-bank deposit and funding markets, such as the London inter-bank market, illustrates the existence of a global banking community as a business matter, not just as a regulatory matter. Similarly, the Abu Dhabi Interbank Offered Rate ("ADIBOR") is the average interest rate at which term deposits are offered between prime banks in the UAE wholesale inter-bank market.

81. Dotsecure argues, in connection with comments by the GAC, that "ICANN does not consider .bank to constitute a community directly." Dotsecure refers to Annexes 2.1, 2.2 and 2.3 of its Response as support for this argument.

82. Those Annexes merely show, instead, that ICANN views the dispute resolution process as the proper forum to resolve disputes as to the existence and identity of a community.

83. As Dotsecure itself points out in Annex 2.2, the GAC specifically referred to ".bank" in its comments as a string "subject to national regulation" that "should also be considered a "community-based" string" and that "*a priori* characterisation of strings is inherently problematic."

84. Further, Dotsecure itself stated in Annex 2.3 that" [i]n the final version of the AGB, ICANN identified .bank as a "sensitive string" that might get a GAC Early Warning." Indeed, ICANN expressly quoted the GAC concern in footnote 1 to Module 1 of the Guidebook, including the reference to ".bank".

85. ICANN's responses cannot reasonably be construed as expressing skepticism by ICANN regarding the existence of a clearly delineated global banking community.

86. Moreover, denying the existence of a global banking community in the aftermath of the recent financial crisis is an unpersuasive exercise of linguistic distinctions in the face of commercial and regulatory reality.

iv. Ongoing Relationship

87. IBFed has an "ongoing relationship" with the global banking community. IBFed's membership of national trade associations demonstrates that ongoing relationship.

88. IBFed's founding members are:

American Bankers Association
Australian Bankers' Association
Canadian Bankers Association
European Banking Federation
Japanese Bankers Association
Banking Association of South Africa

89. IBFed's associate members are:

China Banking Association
Febraban
Indian Banks Association
Korea Federation of Banks
Association of Russian Banks

90. Mr. Wim Mijs, Chief Executive Officer of the Dutch Banking Association and Chairman of the Executive Committee of the European Banking Federation ("EBF"), serves as IBFed chairman. The Managing Director of IBFed, Ms. Sally Scutt, is Deputy Chief Executive of the British Bankers' Association ("BBA"). The Dutch Banking Association and the BBA are yet two more broad-based representative banking voices that thus participate in the work of IBFed.

91. Collectively, according to IBFed, the national associations with membership in IBFed "represent more than 18,000 banks with 275,000 branches, including around 700 of the world's top 1000 banks which alone manage worldwide assets of over $31 trillion."

92. The fact that IBFed is an "association of associations," rather than having individual banks as direct members, in no way undermines the relationship. Each of the national banking associations that is a direct member of IBFed itself has very large numbers of individual banking organizations as members. Those individual banks look to their representative associations to participate in policy and regulatory developments in a coordinated fashion on their behalf.

93. Dotsecure appears to argue that, for IBFed to have an "ongoing relationship," it must itself be in privity with the 36,000+ banking enterprises in the world. That argument misconceives the nature of the requisite relationship. A representative association may maintain a relationship by means of intermediary associations, as is the case for IBFed. Dotsecure seeks into introduce an artificial requirement that any relationship between an association and the enterprises within a community must be direct, one-on-one and exhaustive before that relationship will be recognized as an "ongoing relationship" for purposes of the Guidebook. That purported requirement cannot be found in the Guidebook. In any event, it is unrealistic – such a limitation, if it existed, would disqualify a very great number of well-respected professional, trade and industry associations from satisfying the "ongoing relationship" Procedure requirement to the detriment of the purpose of the community objection process.

94. IBFed's working group efforts, newsletters, reports, public comments, meetings with policymakers and regulators and the like show, individually and cumulatively, that IBFed's institutional purposes are efforts intended for the benefit of the global banking community.

95. IBFed maintains working groups, staffed by representatives of its member organizations, for a broad range of activities comprising principal business and regulatory concerns of its banking constituents; financial markets, financial reporting, prudential regulation, regulatory reform, value transfer networks, consumer affairs and financial crimes. Here again, reliance on seconded staff and member representatives to undertake the work of coordinating positions across national boundaries and communicating those positions to policy-makers and regulators does not undermine the relationship – rather it reinforces the relationship.

96. Those IBFed working groups, and their substantive responsibilities, demonstrate persuasively that IBFed has an ongoing relationship with a clearly delineated global banking community.

97. Dotsecure's position also fails to take account of the direct lobbying and policy efforts of IBFed with national and international financial services regulatory bodies. Government regulatory bodies comprise part of the global banking community just like private sector participants.

v. Substantial Opposition

98. Although the Guidebook makes the "substantial opposition" requirement a merits test, Dotsecure has raised the issue with respect to both standing and merits. IBFed has put forth formidable evidence of "substantial opposition" to Dotsecure's application. Dotsecure's critique of the opposition relies to a considerable extent on a formalistic counting of opposition letters compared with the total number of banks worldwide in the global banking community. That kind of quantitative measurement ignores the representative nature of IBFed itself as an association, the endorsement of IBFed's Objection by its members, who themselves are broad representative associations and the function of representative associations as voices for their members and their community. The professional world is simply not organized on the mass membership basis that Dotsecure sees as a requirement for a showing of "substantial opposition." Rather, many arenas of trade and commerce, including financial services, rely on representative associations for that purpose. The Guidebook does not refuse to recognize that means of organizing voices in a community. Here, the representative nature of IBFed and each of its members, the recognized stature of those organizations and their geographic and cultural diversity weigh heavily in favor of proving "substantial opposition." Additionally, IBFed has provided letters from organizations and individuals who associate with the Federation, but also with organizations and individuals who are independent.

vi. ABA Sponsorship of fTLD Registry Services

99. Dotsecure points to the participation of the American Bankers Association ("ABA") on the Board of Directors of IBFed and as co-sponsor in fTLD Registry Services, the competing applicant for the ".bank" gTLD. Dotsecure argues that ABA's participation is a conflict of interest. After considering Article 20 of the Procedure and Paras. 3.2.2.4 and 3.5.4 of the Guidebook, the Panel determines that allegation relates in substance to the merits claims in the Objection rather than to the question of whether IBFed has the requisite standing to pursue a community objection. The assertion is consequently best addressed in the Section of this Expert Determination covering the merits of the Objection.

vii. Conclusions as to Standing

100. For the reasons described above, the Panel determines that IBFed has standing to pursue this community objection.

B. Merits Objection and Response

101. The Panel now turns to the substantive objections to Dotsecure's Application presented by IBFed. Pursuant to Article 20 of the Procedure, IBFed again has the burden of proving its substantive objections.

i. IBFed's Position

102. In summary, IBFed argues that, if Dotsecure is awarded the right to manage the gTLD ".bank", "there would be a material detriment to the global banking community … based upon deficiencies in Dotsecure's application, its lack of any apparent connection to or engagement with the community it has targeted and the superiority of fTLD Registry Service's community application for .bank that has been formally endorsed by IBFed and over thirty global banking community members."

103. As part of those asserted "deficiencies," IBFed urges in its Opposition, *inter alia*, as follows:

> a. The ICANN Governmental Advisory Committee (GAC) has repeatedly advocated the need for heightened safeguards in connection with potential "sensitive strings," including an express statement by the GAC that "those strings that refer to particular sectors, such as those subject to national regulation (such as **.bank**, .pharmacy) or those that describe or are targeted to a population or industry that is vulnerable to online fraud or abuse." (Emphasis added)
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> b. Additional governmental concerns regarding the sensitive nature of the .bank string expressed in December 15, 2008 correspondence from the Federal Deposit Insurance Corporation (FDIC) to ICANN. The FDIC urged that no financial sector gTLDs not sponsored by the financial community be issued.
>
> c. The collective position of IBFed and its member associations (and their member associations and institutions) is that gTLDs that have public interest implications, such as .bank and other financial-oriented gTLDs, must be operated by a trusted member of the community that understands the needs and interests of the community and the consumers served. Dotsecure is neither a member of the banking nor financial services community.
>
> d. In analysing the opposition to Dotsecure's application, the panel should also consider the extensive support within the banking community for fTLD's community-based application which is in contention with Dotsecure's application. At the time of this objection filing, more than 30 global banking associations and institutions have formally endorsed fTLD's application with new community members continuing to join.
>
> e. The strong association between the word "bank" and the global banking community. Notwithstanding the strong association between the global banking community and the applied for string (.bank), Dotsecure readily acknowledges that it has no formal ties to the banking community. A review of Dotsecure's application (Question 18) as well as other public comments made by Dotsecure leave no doubt that it intends to target a community that it has no ties to should it be awarded the .bank gTLD and IBFed opposes this.

f. Dotsecure is part of the Directi family of companies. According to the Anti-Phishing Working Group (APWG) report, "Global Phishing Survey: Trends and Domain Name Use in 1H2012," Directi accounted for the largest percentage of malicious domain name registrations of any named registrar.

g. Another concern of the IBFed is the ability of Dotsecure/Radix to provide sufficient resources to ensure the secure and stable operation of the .bank gTLD, in light of Radix's portfolio of 31 gTLD applications (including for example .CLICK, .SITE, etc.). As IBFed does not have access to Dotsecure's responses to the financial questions in their application, it is unclear whether Dotsecure is adequately resourced and whether funds are properly segregated for its 31 applications. As Directi has acknowledged in public comments in connection with its .bank application, its primary expertise is as a domain name registration authority.

h. The ability for Radix to safeguard any "sensitive string" is a paramount concern in light of a current gTLD in which the registry operator had no meaningful and on-going relationship with the community targeted by the gTLD.

i. Public Domain Registry (PDR) is another Directi entity providing domain name registrations services. Notwithstanding clear legal provisions in its registration agreement that permit the registrar "to delete, suspend, deny, cancel, modify, take ownership of or transfer" of a domain name in a wide range of instances, there have been numerous documented instances in which members of the global banking and financial services sectors have had to expend financial and legal resources to file an ICANN Uniform Domain-Name Dispute-Resolution Policy (UDRP) proceeding to combat abusive domain name registrations sponsored by PDR.

j. The failure of Directi and its controlled registrars to duly act in accordance with contractual provisions set forth in its registration agreement and proactively address cybersquatting and other abusive registration practices directed at the banking and financial services sector represents a clear and material detriment to the global banking community. Directi's decision not to act upon these contractual provisions, calls into question its ability to be a proper steward of the .bank gTLD on behalf of the global banking community.

k. It is appropriate for the ICC panel to factor into its analysis the choice of a more suitable trustee for the .bank gTLD. fTLD, created and governed by members of the global banking community, filed a community application for .bank on behalf of this community.

l. Permitting Dotsecure the potential to operate the .bank gTLD with no apparent connection to the global banking community would represent a material detriment in connection with the historic self-governance model promoted within the global banking community.

m. When a registry operator with no established ties with the targeted community operates a gTLD their primary objective is often the maximization of revenue while minimizing costs. The potential for Radix, the parent of Dotsecure, to adopt lesser standards to uniformly deploy across Radix's entire portfolio of gTLDs would be detrimental to the global banking community.

n. Because Dotsecure is not a member of the global banking community and its interests appear driven solely by the registration and hosting of domain names, Dotsecure will no doubt place its commercial interests ahead of the community's interests. This coupled with Directi's previous track record and business practices creates the likelihood for cybersquatting and a broader loss of institutional reputation within the .bank gTLD.

o. If fTLD is selected to operate the .bank gTLD, members could voluntarily elect to register and use a domain name or they could in full confidence elect not to defensively register knowing full well there will be no non-compliant/abusive registrations in the .bank name space. However, if Dotsecure is given the right to operate .bank, members of the global banking community will have no option but to defensively register their brands in .bank even if they have no intention of ever using that domain name.

104. In its 3 July Additional Written Submission, IBFed offers further comments, in reaction to Dotsecure's Response as explained below.

- With regard to likelihood of material detriment to the community, IBFed has reviewed Dotsecure's Public Interest Commitments (PIC) statement and stands by its concern regarding a likelihood of material detriment. Moreover, the distinction Dotsecure makes between its treatment of general names (i.e., some apparent form of restrictions) vs. other names (i.e., with no restrictions at all) is quite problematic for the global banking community.

- While the words in Dotsecure's application promise one thing, the actions of its sister companies demonstrate something entirely else. Directi, in an ex parte communication to the ICC dated 9-May-2013, attempts to rebut the statements made about its business practices and what it is legally entitled to do. The IBFed welcomes Mr. Kantor to review the relevant contractual provisions and reach his own conclusions. Moreover, the IBFed would encourage Mr. Kantor to review the actions, associated with a "spam-outbreak", that another Directi company, .PW registry, is currently addressing in connection with its recently re-launched .PW registry, see http://domaingang.com/domain-news/pw-registry-addresses-recent-explosion-in-spam-emails-from-pw-domains/.

- While the IBFed does acknowledge some of the "reactive" measures that Dotsecure's sister companies have undertaken in connection with abusive/malicious registrations, the global banking community finds little comfort in this approach. Harm to institutions and consumers usually happens within minutes and/or hours of malicious domain names being purchased and activated and Dotsecure has not proffered a proactive approach to mitigate this activity.

ii. Dotsecure's Position

105. Dotsecure rejects the objections made by IBFed. In summary, Dotsecure argues in its Response:

- IBFed fails to provide evidence that "community opposition to the application is substantial". We show factual evidence to prove that the opposition alleged by it is not substantial, be it in numbers, representation, stature, or expenses.
- IBFed fails to prove a "strong association" between the purported "global banking community" and the string "bank". Of primary importance is that the term "bank" has several other meanings and connotations.
- IBFed fails to show a "likelihood of material detriment" to the purported "global banking community". IBFed has made irrelevant allegations against legal entities separate from Dotsecure in an attempt to smear Dotsecure, and shift the Expert Panel's focus from Dotsecure's application content. We assert that IBFed's obvious self-interest in the fTLD the application has prevented IBFed from assessing Dotsecure's application fairly. IBFed has relied on numerous baseless assumptions and made factually incorrect statements in a desperate attempt to obstruct Dotsecure's application with the end goal of protecting its founding member's (ABA) investment in fTLD.

106. Dotsecure fleshes out these responses along the following lines in the same submission.

> IBFed makes an argument that ICANN intended for .bank to be a community string. We submit that the very quote IBFed submitted evidences otherwise. While the GAC has called for an expansion in the definition of "community" as defined in the AGB, that issue has been considered and the ICANN Board decided to NOT define community as recommended in the GAC's brief. Please see Annexure 2.1, 2.2 and 2.3 for a detailed analysis of the GAC and ICANN communications. We summarize the analysis:
>
> - ICANN does not consider .bank to constitute a community directly.

- GAC asked ICANN to consider .bank is a community string in it's GAC scorecard in Fed 2011 (Annexure 2.1).

- On 4 March 2001 ICANN's Board responded saying that they do not agree with the GAC (Annexure 2.2).

- IBFed has neglected to present all the facts in this argument in their conclusions are incomplete and inaccurate (Annexure 2.3).

- GAC clearly considers .bank is a sensitive string. We agree with this.

- GAC spent 10 months analyzing every single new gTLD application from June 2012 to April 2013 and issued 242 Early Warnings on 200 applications. However our application for .bank did not get a GAC Early Warning related to "community" or the sensitive nature of the string. This clearly demonstrates that the safeguards in our application have passed the bar of government representatives from 124 countries.

- Additionally the independent objector also has the ability to file an objection against any application on Limited Public Interest and Community Grounds, but Dotsecure received no such objection.

We also note the following AGB requirement related to Security Policy (Question 30 criteria): "Complete answer demonstrates … security measures are appropriate for the applied-for gTLD string (For example, applications for strings with unique trust implications, such as financial services-oriented strings, would be expected to provide a commensurate level of security)." We submit that our security measures are appropriate.

107. In its Response, Dotsecure explained each one of these points more fully. Dotsecure began by arguing that it proposed to put in place "a multitude of augmented security measures that not only go above and beyond ICANN's requirements, but also closely match the security measures proposed by fTLD in its application (see Annexure 6.1).

108. Further, on 13 May 2013 Dotsecure filed a PIC statement making its commitments enforceable as provided therein.

109. Dotsecure argues that IBFed's allegations against Directi "have no bearing on Dotsecure's application for .bank as well as this objection." Directi's own response is found at Annexure 6.3.

110. With respect to IBFed's assertions regarding inadequate funding of Dotsecure, the Applicant argues that IBFed "should respect that ICANN's evaluation process incorporates assessing the financial stability of applicants (questions 45 – 50) before delegating a gTLD to them." Dotsecure did not, however, persuasively and substantively address IBFed's financial resources allegations.

111. As to the assertion that Dotsecure has no relationship with the global banking community, "Dotsecure does not deny this, and would like to stress the fact that it has not broken any rules or flouted any ABG requirements by applying for .Bank. In fact, we submit that the lack of an existing relationship with the banking industry makes Dotsecure a more unbiased candidate to run the .Bank registry."

112. Dotsecure has challenged what it regards as the lack of evidence from IBFed to support IBFed's claim that Dotsecure will not properly perform its tasks operating the .bank string.

Dotsecure points to the absence of any ICANN objection as evidence that Dotsecure is competent to operate the .bank registry.

113. Regarding the role of the American Bankers Association in both IBFed and fTLD Registry Services, Dotsecure argued in its 9 July 2013 Additional Written Submission that IBFed, the ABA, the Financial Services Roundtable and cooperating institutions in the financial community are seeking to eliminate competing applications by objections. In support of this position, Dotsecure notes that the Financial Services Roundtable filed a "near-identical objection" against Dotfresh's application for the string ".insurance". Moreover, points out Dotsecure, IBFed has not filed objections to applications for several other finance-oriented strings; among them ".finance," ".financial," ".insure" and ".mutualfunds," "all of which would be considered to be part of the "financial community." Dotsecure asserts this cannot be a coincidence, since the ABA did not apply to operate any of those strings.

iii. Analysis

114. To prevail on its Objection, IBFed must prove to the Panel (a) that "substantial opposition within the community" to the Application exists, (b) the existence of a "strong association between ".bank" and the community," and (c) that the Application "creates a likelihood of material detriment to the rights or legitimate interests of the community to which ".bank" may be explicitly or implicitly targeted."

115. In addition, IBFed must also prove that the community expressing opposition can be regarded "as a clearly delineated community." The Panel has addressed this factor above in connection with reviewing the issue of IBFed's standing to pursue the community objection. The Panel incorporates the conclusion that a clearly delineated global banking community exists from that standing discussion into this analysis of the merits of the Objection.

116. As explained below, the Panel has determined that IBFed has proven each of these elements and that Dotsecure's responses are not persuasive.

a. Substantial Opposition

117. As noted above, Dotsecure seems to have raised the requirement of "substantial opposition" in the context of both standing and merits. The comments in paragraph 98 of the Standing section above apply equally to the merits analysis and are incorporated herein by reference. The Guidebook identifies a number of non-exhaustive factors a panel may balance to determine whether substantial opposition to the Application exists within the global banking community, including numbers, representative nature, stature or weight among sources of opposition, historical defense of the community and costs incurred. IBFed's objection satisfies each of these factors, other than costs incurred.

118. IBFed is itself an "association of associations." Accordingly, when IBFed speaks, it does so as the "representative body for national and international banking federations from leading financial nations around the world." See, e.g., Letter from IBFed to Board of Governors of the Federal Reserve System Re: Enhanced Prudential Standards and Early Remediation Requirements

for Foreign Banking Organizations and Foreign Nonbank Financial Companies (30 April 2013)(publicly available on IBFed's website).

119. As noted above, IBFed's member associations include leading banking trade associations from the United States, the European Union, Japan, China, India, Canada, Australia, Korea, Russia and South Africa. IBFed persuasively explains that those national associations, in turn, collect and represent the views of more than 18,000 banks, including about 700 of the world's largest 1000 banks.

120. As IBFed explained in its Objection, the Board of Directors of IBFed, representing the views of its member federations, approved in writing the presentation of the Objection and has supervised IBFed's participation in the comment process with respect to the ICANN gTLD effort. As stated above, each of the full members of the Federation appoints a representative to the Board, and thus the approval by the Board is in fact approval by each of the member national banking associations. The extent of the opposition to the Dotsecure application is expressed by that vote, even without looking further.

121. In addition, representatives of the national associations and their constituent banks have staffed IBFed's participation in that process and the development of the Objection.

122. IBFed's activities with respect to the gTLD process have been reported regularly to its members and, through them, to constituent banks, as well as to national and international bank regulatory authorities. In particular, IBFed has reported to the international banking community and bank regulatory bodies the opposition of its member national associations to the Dotsecure application as expressed by approval of the Objection and the related actions of IBFed. There is no evidence at all that any member bank of any national association, or any national bank regulatory agency, has offered any opposition to the position of IBFed in this regard. Rather, both banks and regulators have supported the national associations and IBFed in their opposition. See, e.g., Annex D to the Objection for support by banking enterprises for the Objection.

123. Those facts, by themselves, are sufficient to show that the Objection reflects substantial opposition to Dotsecure's Application within the global banking community - in numbers relative to the composition of the community, in the representative nature of IBFed's opposition and the opposition of its member associations, and in the recognized stature and weight of IBFed speaking as the voice of leading national associations in the financial centers of the world and their member banks.

124. In addition, IBFed has also annexed to the Objection letters demonstrating that substantial opposition to the Application extends well beyond the member associations of IBFed.

125. Among those statements of opposition are letters from a large United States insurance and financial services company (Nationwide Mutual Insurance Company), one of the world's largest companies, with a prominent financial services division (General Electric Company), a direct banking and payment services provider (Discover Financial Services), a "super-regional" banking corporation in the United States (Regions Financial Corporation), two major United States bank holding companies (SunTrust Banks, Inc. and KeyCorp), the Spanish Banking Association

(Asociación Española de Banca), two leading United Kingdom global banking organizations (the Royal Bank of Scotland Group PLC and Lloyds Banking Group), a Nordic regional banking corporation based in Denmark (Nykredit Bank A/S), a Nordic regional banking corporation based in Sweden (Nordea Bank Danmark A/S), the Norwegian national association for financial institutions (Finance Norway), the Federation of Finnish Financial Services (FFI) and a regional bank holding company in the United States (First Horizon National Corporation).

126. The broad worldwide membership of IBFed's Board of Directors explained above, as well as its member associations, and the representative positions of IBFed's chair (member, EBF Executive Committee) and managing director (Deputy Chief Executive, BBA) attest to the broad geographic and business distribution and diversity of this community opposition. That conclusion is reinforced by the additional opposition noted above from specific institutions in Europe and the United States, crucial global financial centers.

127. As contemplated by the ICANN Guidebook factors, IBFed has also undertaken "defense of the global banking community" in a wide variety of subject areas. Since its establishment in 2004, IBFed has represented the global banking community in reviewing, commenting and seeking to shape policy and regulatory measures in numerous areas of continuing importance to the community. IBFed maintains permanent working groups on regulatory reform, prudential regulation, financial reporting, financial markets, financial crime and consumer affairs.

128. IBFed also establishes ad hoc working groups on a case-by-case basis.

129. In connection with these activities, IBFed regularly meets and corresponds with international and national regulators and legislators, international accounting bodies, central banks and monetary authorities on behalf of its membership, as well as submitting formal comments on banking policy and regulatory proposals throughout the world. These various activities outlined in this and the preceding paragraphs illustrate the representative nature of the Federation. The opposition to Dotsecure's application expressed by IBFed is made in its representative capacity, and with full knowledge and concurrence of its members and the national associations, undertaken after broad and regular consultation.

130. The last factor identified by ICANN for balancing is "costs incurred by the objector in expressing opposition," including other channels for conveying opposition. IBFed does not offer evidence speaking to this point, although it is apparent that IBFed has spent time and resources in pursuing the Objection. The absence of proof of this factor does not weigh heavily in the balance.

131. Dotsecure criticizes IBFed for cooperating with the Financial Services Roundtable in preparing the opposition to a gTLD application for another financial services top-level domain, ".insurance". However, cooperation between organizations with common interests and attention to cost control are not, in the Panel's view, negative factors in the balance.

132. Dotsecure challenges IBFed's showing of "substantial opposition by the community" by, among other efforts, totaling up the number of opposing comments and comparing that total to the aggregate number of banks in the world. Dotsecure also criticizes several of the comments as coming from non-bank organizations. Those critiques are hyper-technical and constitute an

unpersuasive measurement of opposition, especially in light of the votes by the national associations themselves to approve the IBFed Objection.

133. Dotsecure does not acknowledge in its Response the representative nature of IBFed itself (an "association of associations"), the representative nature of the IBFed members themselves and the extremely large number banking organizations that are members of those representative associations opposing the Application, the stature, reputation and diversity of those members and the organizations contributing the officers and Board of IBFed as discussed above, or the representative nature of IBFed itself, its members, and the Spanish and Nordic banking associations stating their opposition to the Application.

134. The representative nature of the banking trade organizations stating their opposition to the Application does weigh heavily in the balance towards determining the presence of "substantial opposition."

135. Dotsecure raises the American Bankers Association's role as co-sponsor of the competing application for ".bank," fTLD Registry Services, as a criticism in connection with the determination of "substantial opposition." The ICANN Guidebook reminds us, although in connection with a different balancing factor, that "an allegation of detriment that consists only of the applicant being delegated a string instead of the objector will not be sufficient for a finding of material detriment."

136. That is true. However, it is unsurprising that a prominent trade association in the global banking community will co-sponsor an industry-related organization to manage top-level domain operations for the community and at the same time object to granting operation of the same string to a provider with no ties to that target community.

137. Indeed, one prominent bank regulator, the FDIC, has expressly recommended that gTLDs like ".bank" be "managed within an industry and regulatory framework." Further, the FDIC recommended that "any applications include explicit endorsement of the financial industry community including regulatory bodies."

138. The FDIC's recommendations are not binding on ICANN or this Panel. They nevertheless demonstrate that important bank regulatory authorities encourage sensitive financial services strings like ".bank" to be managed by organizations deeply embedded in the relevant community. Overlapping relationships are virtually inevitable in those circumstances, and do not weigh negatively in the balance for testing either "substantial opposition" or, as discussed further below, "material detriment".

139. For these reasons, the Panel concludes that IBFed has proven the existence of substantial opposition in the global banking community to the Application.

b. Strong Association

140. The Panel turns now to the evidence regarding the strong association between ".bank" and the global banking community that is explicitly or implicitly targeted by that string. Here too, the Panel is persuaded that IBFed has proven the existence of this element.

141. The ICANN Guidebook points us to three non-exhaustive factors that may be of importance in the balance: statements in the Application; other public statements by the Applicant; and assertions by the public.

142. Much of Dotsecure's argument with respect to the alleged lack of a "strong association" is predicated on their position that no global banking community exists. The Panel has rejected that position elsewhere in this Expert Determination.

143. Dotsecure also argues that the word "bank" may have many dictionary meanings, such as a piggy bank, the bank held by a card dealer, or a blood bank. Accordingly, says Dotsecure, there is no strong association of the term "bank" with the global banking community. That argument is frivolous.

144. Dotsecure is well aware of the strong association. In its own Application for the string, Dotsecure stated "our area specialty will be the global banking industry." Dotsecure further explains that its mission and purpose will be "to build a unique and trusted Internet space for banking institutions." Moreover, says Dotsecure, "the mission/purpose for .bank is to be the Global Banking TLD."

145. Dotsecure is not alone in *de facto* closely associating ".bank" with a specific banking community. Bank regulators, bank clients and the consumer public clearly associate the word "bank" with the banking community. The use of the word "bank" in a business name is strictly regulated by national bank regulatory authorities to, as the Canadian regulator OSFI stated, "protect the … public from incorrectly assuming they are dealing with a … bank that is subject to the Bank Act and [the bank regulatory body's] oversight."

146. Further, OSFI pointed out that such a regulatory measure "contributes to the public confidence in a [country's] financial system by protecting the integrity of the word "bank" as a word that is generally reserved for entities that are regulated and supervised as a bank in [the relevant country.]"

147. In Annex C to its Objection, IBFed listed five major jurisdictions in which the term "bank" is restricted by law to banks regulated and supervised by the national bank regulatory authorities; Hong Kong, Australia, Canada, India and New York. Other similar regulatory restrictions on the use of the term "bank" in commerce can be found elsewhere.

148. In the Panel's view, there is no doubt that the string ".bank" is strongly associated with the global banking community.

c. Material Detriment

149. The final element to be considered in connection with the merits of IBFed's objection is "material detriment." The Objector must prove that the Application creates a likelihood of material detriment to the rights or legitimate interests of a significant portion of the community to which the string ".bank" may be explicitly or implicitly targeted (the global banking community).

150. In light of Dotsecure's express statements in its Application that "our area specialty will be the global banking industry," that it will build a "unique and trusted space" for "banking institutions," and that its mission is to be "the Global Banking TLD," it is manifest that Dotsecure explicitly intends to target the ".bank" gTLD at participants in the global banking community and their clients. The purported technical distinction put forward by Dotsecure between the phrase "global banking community" and similar terms as used by IBFed and the phrases "global banking industry" and "global banking" as used by Dotsecure in its own Application is unpersuasive.

151. In assessing whether or not "material detriment to a significant portion of the community" exists, ICANN directs our attention to several non-exhaustive factors "that could be used by a panel in making this determination." Those factors include but are not limited to the nature and extent of damage to the reputation of the global banking community that would result from Dotsecure's operation of the ".bank" string, evidence that Dotsecure will not be acting in accordance with the interests of the global banking community or of users more widely including concerns over the institution of effective security protection for user interests, interference with the core activities of the global banking community that would result from Dotsecure's operation of the ".bank" name, dependence of the global banking community on the DNS for its core activities, the nature and extent of any concrete or economic damage to the global banking community that would result from Dotsecure's operation of ".bank", and the level of certainty that alleged detrimental outcomes would occur.

152. The Guidebook draws the Applicant's attention to the ICANN Final Report for further discussion of factors that may be relevant to this determination. In connection with the earlier discussion of standards, the Panel has quoted from the Final Report a summary chart of factors for consideration.

153. The ICANN Guidebook reminds us that an allegation of detriment that consists only of Dotsecure being delegated the string instead of IBFed (or here, fTLD Registry Services, an organization sponsored by one of the members of IBFed) will not be sufficient for a finding of material detriment.

154. As previously explained, IBFed asserts that Dotsecure's Application is deficient in a number of respects. Moreover, IBFed argues that Dotsecure's lack of any apparent connection to or engagement with the global banking community and the asserted superiority of fTLD Registry Services' application for ".bank" are decisive factors in determining "material detriment".

155. IBFed draws the attention of the Panel to the ICANN Governmental Advisory Committee (GAC) advocacy of heightened safeguards in connection with "sensitive strings," including specifically ".bank." The GAC justifies that requirement of heightened safeguards on the basis that the sensitive string is "targeted to a population or industry that is vulnerable to online fraud or abuse." Similarly, the EBF, the FDIC and OSFI, among other public authorities, have all raised

concerns over financial industry strings such as ".bank" and the potential for consumer fraud, cybersquatting and confusion in the mind of the public with respect to this highly regulated industry.

156. For these reasons, bank regulatory authorities have urged that financial services strings be managed only by institutions within the financial services regulatory framework and endorsed by financial services community and financial services regulators.

157. Dotsecure counters that IBFed has misconstrued the role of the GAC and failed to note the responses by ICANN to the GAC comments. As discussed in the preceding Section of this Expert Determination, the Panel has concluded that IBFed accurately characterized the GAC's concerns. Moreover, ICANN's responses to the GAC comments direct interested parties to, among other matters, this very type of dispute resolution process to address those concerns.

158. Neither Dotsecure nor any of its affiliates (including Directi, Radix and PDF) have any demonstrated connection or engagements with the broader financial system services community or the more specific global banking community. Indeed, Dotsecure acknowledges this fact in its Response.

> IBFed has repeatedly emphasized the fact that Dotsecure "lacks any relationship of the global banking community". Dotsecure does not deny this, and like to stress the fact that it is not broken any rules or flouted any AGB requirements by applying for .bank. In fact, we submit that the lack of an existing relationship with the banking industry makes Dotsecure a more unbiased candidate to run the .bank registry.

159. While Dotsecure may not have broken any rules or requirements in applying for the ".bank" gTLD, Dotsecure's admitted lack of an existing relationship with the banking industry is sufficient by itself to create a likelihood of material detriment to the rights or legitimate interests of a significant portion of the global banking community and users of banking services worldwide for the following reasons.

160. Dotsecure has in effect admitted that it has no real familiarity with the highly complex world of national and international banking regulation ("Dotsecure does not deny … the lack of an existing relationship"). It is extraordinarily difficult to have familiarity with that banking and bank regulatory environment when one has no relationship with the community of banks and their manifold regulatory bodies. Each country regulates its own domestic banking community heavily. Each country further regulates *inter alia* cross-border deposit-taking, finance, payments and collections and other services and products involving banking organizations located in other countries.

161. Within each country there may be several regulators of the banking community: central banking and monetary authorities such as the Bank of England and the Federal Reserve Board; general financial institution regulators (illustratively, the Prudential Regulation Authority in the United Kingdom); regulators focused specifically on commercial banks themselves (for example, the Office of the Comptroller of the Currency, the Federal Reserve Board and the FDIC regulate, respectively, national banks, state member banks and state non-member banks in the United States and the Prudential Regulation Authority regulating banks and other financial institutions in the United Kingdom; regulators with authority over the largest financial institutions giving rise to

concerns over systemic risk (the Financial Stability Oversight Council in the United States); regulators serving as receivers or liquidators for distressed banks (for example, the FDIC in the United States and the Bank of England's Special Resolution Unit in the United Kingdom); regulators focused on holding companies that may offer a variety of different financial products and services through subsidiaries, including banking (for example, bank holding company regulation by the Federal Reserve Board in the United States); consumer protection agencies such as the new Consumer Finance Protection Bureau in the United States; and regulators focused on particular transactions or activities in which banks are heavily engaged (for example, securities activities regulated by the Securities and Exchange Commission and derivatives and commodities trading activities regulated by the Commodities Futures Trading Commission in the United States and "conduct" regulation generally by the Financial Conduct Authority in the United Kingdom); and numerous law enforcement agencies concerned with financial crimes.

162. Such a complex overlapping regulatory environment exists not only in the United States and the United Kingdom, but also in every other major financial center in the world too. Additionally, for many parts of the world, such as in the European Union, national bank regulation in its many forms must co-exist with supranational bank regulation as well. Nor is supranational regulation of banks found in a unified authority either; illustratively, several constituent bodies of the European Union regulate banks and banking services.

163. Lack of experience and lack of existing relationships in that complex regulatory environment are highly likely to result in inadvertent non-compliance with bank regulatory measures, in delays in obtaining regulatory consents, in difficulties resolving overlapping requirements imposed by a multiplicity of regulators and policymakers, and in significant concerns on the part of regulatory authorities over the possibility of fraud, consumer abuse, tax evasion and money laundering, other financial crimes and improper avoidance of regulatory measures by means of the Internet. Those concerns were highlighted by bank regulatory authorities in their comments to ICANN with respect to sensitive financial services strings such as ".bank."

164. The prospects for delays, non-compliance and confusion are, in the view of the Panel, likely directly and adversely to affect the reputation of the banks that comprise the global banking community. Moreover, those prospects are most definitely not in the interest of users of the global banking system on the Internet or regulators seeking to maintain systemic stability.

165. To the extent the delays and regulatory approvals materialize, financial payments and transfers effected online through the top-level domain will necessarily be adversely affected. Those consequences will at a minimum interfere with funds transfers and settlements, a core activity of the global banking community, and thus create a substantial likelihood of material systemic risk as well as material risk to individual banks and their customers.

166. Dotsecure's admitted lack of relationships and familiarity with banking or the global community raises the level of certainty with respect to the likelihood of these injuries materializing to a high level, far too high to sustain the Application.

167. In addition to the demonstrable likelihood of material detriment resulting from Dotsecure's inadequate engagement with the banking community and regulatory bodies, IBFed criticizes the

reputation and reliability of Dotsecure and other members of the Directi family of companies, including Radix and PDR.

168. IBFed notes that, according to the October 2012 report from the Anti-Phishing Working Group, "Directi accounted for the largest percentage of malicious domain name registrations of any named registrar."

169. IBFed also asserts there are "numerous documented instances" in which financial services enterprises have filed an ICANN Uniform Domain-Name Dispute-Resolution Policy proceeding "to combat abusive domain name registrations sponsored by PDR." IBFed additionally claims that Directi and its affiliates do not "proactively address cybersquatting and other abusive registration practices directed at the banking and financial services sector."

170. Dotsecure and Directi vigorously reject these allegations. Dotsecure calls them "irrelevant allegations against legal entities separate from Dotsecure in an attempt to smear Dotsecure," "numerous baseless assumptions" and "factually incorrect statements."

171. Directi itself also challenges IBFed's claims in a letter annexed to the Response. In particular, Directi replies that the Anti-Phishing Working Group did not provide timeliness data that leads to a contrary conclusion. Further, Directi argues that those anti-phishing statistics are based on domains that lack any significant restrictions on domain name registrations (.net, .com, .org and .in). Consequently, says Directi, the purported lack of quality control lies in the structure of the domains themselves rather than in failures by Directi and its affiliated companies.

172. Directi also objects to IBFed's criticism of PDR for failing promptly to suspend abusive domain registrations. Directi states that Directi /PDR was not notified of abuse before the filing of a UDRP proceeding in any of the 70 instances identified by IBFed.

173. IBFed in addition challenges the credibility of Dotsecure's security protections, noting both the record of abusive domain practices at Directi-related registries and the absence in Dotsecure's initial Application of legally enforceable security safeguards.

174. Dotsecure again rejects these objections in its Response and Additional Written Submission. Moreover, Dotsecure filed a Public Interest Commitment ("PIC") statement on 13 May 2013 making their commitments in the Application legally enforceable. In that PIC statement, Dotsecure elected to make five specific commitments, rather than committing to the general obligation in paragraph 2 for "all commitments, statements of intent and business plans" in the Application. Response, Annex 6.2. Accordingly, only those five specific commitments are legally enforceable.

175. Finally, IBFed challenges the financial resources of Dotsecure, basing that attack on the absence of information about the financial circumstances of Dotsecure and the other members of the Directi family of companies ("it is unclear whether Dotsecure is adequately resourced and whether funds are properly segregated for its 31 applications").

176. Dotsecure responds that these allegations are unsupported and inaccurate. In addition, Dotsecure notes that ICANN itself will undertake a financial review before deciding on the

Application. Dotsecure does not offer, however, any financial information to address IBFed's allegations.

177. These are very serious allegations. If the material detriment to the community arising out of Dotsecure's lack of experience with banking was not so obvious, the Panel would have ordered a hearing to more fully develop the evidence with respect to these other claims by IBFed and Dotsecure's responses. In the circumstances, however, a hearing was not an appropriate use of time and resources of the parties and the Panel. The material detriment arising out of Dotsecure's lack of relationship and familiarity with the global banking community, banking and bank regulators is too clear.

178. IBFed further argues that the Panel should take into account the presence of the competing application by fTLD Registry Services for ".bank" as part of the balancing in which the Panel must engage. IBFed contrasts fTLD Registry Services, an organization "created and governed by members of the global banking community," with the for-profit Dotsecure.

179. The Panel notes, though, that fTLD Registry Services is also a for-profit company. Thus, the crucial difference comes back to a string manager embedded inside the global banking community as contrasted with a string manager having no ties to this highly regulated and tightly interwoven community.

180. IBFed argues that members of the global banking community will be less concerned about cybersquatting and abusive registrations if an organization sponsored by the banking community manages the string, a point that is consistent with the comments of the FDIC to ICANN. If the top-level domain is managed by a non-profit member of the global banking community rather than a for-profit outsider, says IBFed, banks will save considerable money by making fewer defensive registrations.

181. In this regard, IBFed recalls the concerns stated by U.S. bank regulator FDIC that inadequate management of the ".bank" gTLD "could force trade name protection costs onto the financial industry during a period of economic stress."

182. In contrast, Dotsecure asserts that the ABA's participation in fTLD Registry Services, while also serving as an active member of IBFed and its Board, is a "classic conflict of interest." Dotsecure further argues that its lack of relationship with the banking community is an advantage because that absence reduces the prospect for bias in operation of the top-level domain.

183. As the Panel has previously explained, the business of banking necessarily results in interwoven relationships, whether in syndicate financing, underwriting and placement activities, inter-bank deposit markets, payments and collections, or engagement with regulatory bodies through trade associations. Accordingly, the overlapping roles of the ABA, a major trade association representing the many thousands of banks in the United States banking community, do not weigh negatively in the balance.

184. However, this Panel has not been established by the ICC and ICANN to assess the merits of the fTLD Registry Services application. That is a matter outside this Panel's purview. Accordingly,

it is not appropriate for the Panel to consider whether the granting of the competing application by fTLD Registry Services would result in greater community confidence and fewer defensive registrations. The Panel leaves that question to the competent authorities at ICANN and any dispute resolution panel that may be established to consider the fTLD Registry Services application.

d. Conclusion as to Merits of Objection

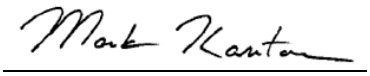
185. For the foregoing reasons, the Panel determines that granting Dotsecure's application for ".bank" would create a likelihood of material detriment to the rights and legitimate interests of a significant portion of the global banking community, the community to which Dotsecure expressly and implicitly targets string ".bank."

IV. Decision

186. For all the foregoing reasons and according to Article 21(d) of the Procedure, the Expert renders the following Expert Determination.

1. The Objection is successful.
2. IBFed is the prevailing party.
3. IBFed's advance payment of Costs shall be refunded by the Centre to IBFed.

Date: November 26, 2013

Signature: 

Mark Kantor, Expert

Reconsideration Request

Union of Orthodox Jewish Congregations of America, *et al.*

Annex K

International Chamber of Commerce,
International Centre for ADR,
Expertise Rules

INTERNATIONAL CENTRE FOR ADR | LEADING DISPUTE RESOLUTION WORLDWIDE

EXPERTISE RULES

International Chamber of Commerce
The world business organization

International Chamber of Commerce (ICC)
38, Cours Albert 1er, 75008 Paris, France

ICC will move to new headquarters in the second half of 2013.
Our new address will be posted on our website.

www.iccwbo.org

Of the various languages in which these Rules are published, the English and French versions are the only official texts.

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EXPERTISE RULES

The Rules contained in this booklet describe three distinct services offered by the International Chamber of Commerce (ICC) to persons who wish to obtain an expert opinion on an issue of a technical, legal, financial or other nature. Those services are the proposal of experts, the appointment of experts and the administration of expertise proceedings.

Each service is intended to respond to a different need. A proposal leaves the requesting party or parties free to decide whether or not to use the services of the expert proposed. An appointment is normally made on the basis of an agreement between parties and obliges them to have recourse to the person appointed. The administration of expertise proceedings covers not only the appointment of an expert but also the definition of the expert's mission, the conduct of the expert's investigations, the drawing up of the expert's report and, if the parties wish, a review of the expert's report by ICC before it is notified to the parties.

The procedures described in these Rules are administered exclusively by the ICC International Centre for Expertise, which forms part of ICC's International Centre for ADR. Created in 1976, the International Centre for Expertise has a strong track record of finding experts to fulfill specialized assignments in an international context. It enjoys the support of a standing committee, itself composed of experts, which contributes to quality assurance.

A request for the proposal of an expert may be made to the Centre at any time, with or without a prior agreement. However, parties wishing to have recourse to the Centre for the appointment of an expert or the administration of expertise proceedings are advised to include an appropriate clause in their contract. For this purpose, ICC proposes model clauses to fit different situations, which can be found at the end of this booklet.

Drafted by specialists from different legal traditions and cultures, and administered by qualified professionals, these Rules provide a structured, institutional framework ensuring transparency, efficiency and fairness while allowing users to exercise their choice over many aspects of the procedure.

For the convenience of users, the Rules are available in several languages, downloadable from the relevant ICC webpages.

ICC EXPERTISE RULES
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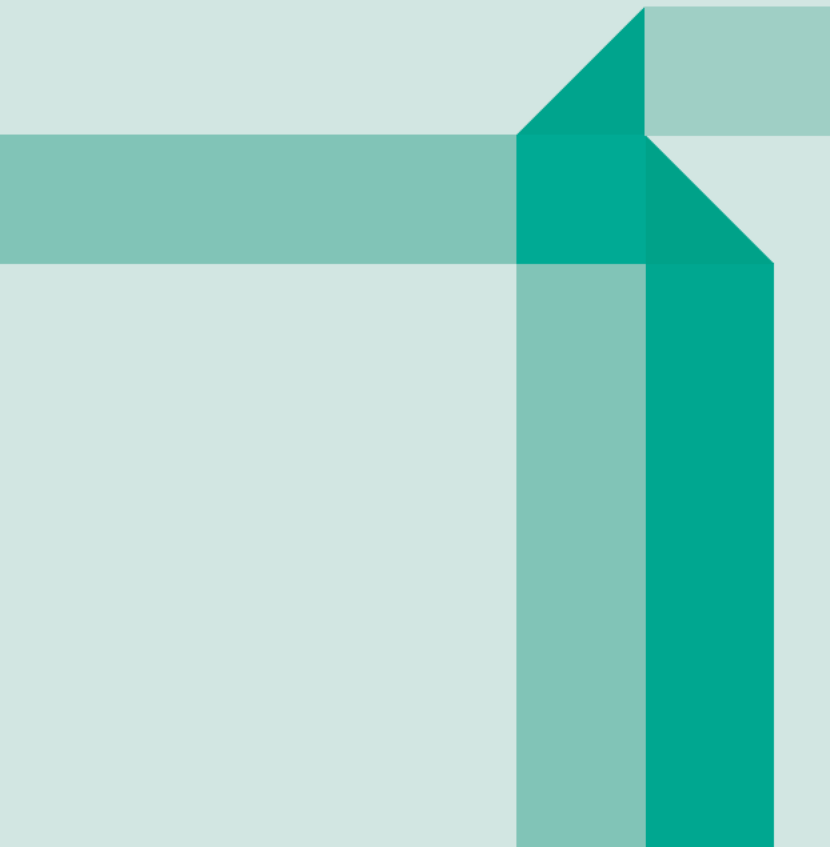
EXPERTISE RULES

Rules for Expertise of the
International Chamber of Commerce

In force as from 1 January 2003



ARTICLE 1

The International Centre for Expertise

1 The International Centre for Expertise (the "Centre") is a service centre of the International Chamber of Commerce (ICC). The Centre can perform one or more of the following functions in connection with domestic or international business matters:

A) Proposal of experts
Upon the request of any physical or legal person(s) or any court or tribunal (a "Person"), the Centre can provide the name of one or more experts in a particular field of activity, pursuant to Section II of these Rules. The Centre's role is limited to proposing the name of one or more experts. The Person requesting a proposal may then contact directly the proposed expert(s), and, as the case may be, agree with such expert(s) on the scope of the appropriate mission and fees. There is no obligation to make use of the services of an expert proposed by the Centre. The proposal of an expert may be useful in many different contexts. A person may require an expert in connection with its ongoing business activities or in connection with contractual relations. A party to an arbitration may wish to obtain the name of a potential expert witness. A court or arbitral tribunal which has decided to appoint an expert may seek a proposal from the Centre.

B) Appointment of experts
The Centre will appoint an expert, pursuant to Section III of these Rules, in situations where the parties have agreed to the appointment of an expert and have agreed to use the Centre as the appointing authority or where the Centre is otherwise satisfied that there is a sufficient basis for appointing an expert. In such cases the appointment by the Centre shall be binding on the parties. The Centre's role is limited to appointing the expert in question.

C) Administration of expertise proceedings
When the parties have agreed upon the administration of expertise proceedings by the Centre or when the Centre is otherwise satisfied that there is a sufficient basis for administering expertise proceedings, the Centre will administer the proceedings pursuant to Section IV of these Rules.

2 The Centre consists of a Standing Committee and a Secretariat which is provided by ICC. The statutes of the Standing Committee are set forth in Appendix I.

ARTICLE 2

Recourse to the Centre

1 Any Person may ask the Centre to propose one or more experts by submitting a request for proposal of experts (the "Request for Proposal") to the Centre at the ICC International Secretariat in Paris.

2 The Request for Proposal shall include:

a) the name, address, telephone and facsimile numbers and email address of each Person filing the Request for Proposal;

b) a statement that the requesting Person is seeking the proposal of an expert by the Centre;

c) a description of the field of activity of the expert to be proposed along with any desired qualifications of the expert, including but not limited to education, language skills and professional experience, and any undesired attributes of the expert;

d) a description of any matters which would disqualify a potential expert; and

e) a description of the work to be carried out by the expert and the desired time frame for completing such work.

3 Unless requested to do so by the person seeking the proposal of an expert, the Centre will not notify any other person of the filing of a Request for Proposal.

ARTICLE 3

The Expert

1 Any proposal of an expert by the Centre shall be made by the Centre either through an ICC national committee or otherwise. The Centre's role normally ends on notification of the proposal unless the Centre is asked to appoint the proposed expert and/or administer the procedure pursuant to Sections III and IV.

2 Prior to the proposal of an expert, the Centre shall consider in particular the prospective expert's qualifications relevant to the circumstances of the case, and the expert's availability, place of residence, and language skills.

3 Before a proposal, a prospective expert shall sign a statement of independence and disclose in writing to the Centre any facts or circumstances which might be of such a nature as to call into question the expert's independence in the eyes of the Person filing the Request for Proposal. The Centre shall provide such information in writing to such Person and shall fix a time limit for any comments from such Person.

ARTICLE 4

Costs for the Proposal of an Expert

1 Each Request for Proposal must be accompanied by the non-refundable amount specified in Article 1 of Appendix II. This amount represents the total cost for the proposal of one expert by the Centre. No Request for Proposal shall be processed unless accompanied by the requisite payment.

2 When the Centre is requested to propose more than one expert, the non-refundable amount accompanying the Request for Proposal and to be paid by the requesting Person is the amount specified in the preceding paragraph multiplied by the number of experts requested.

ARTICLE 5

Recourse to the Centre

1 Any request for the appointment of an expert (the "Request for Appointment") shall be submitted to the Centre at the ICC International Secretariat in Paris. Any such request shall be processed by the Centre only when it is based upon an agreement between the parties for the appointment of an expert by the Centre or when the Centre is otherwise satisfied that there is a sufficient basis for appointing an expert.

2 The date on which the Request for Appointment is received by the Centre shall, for all purposes, be deemed to be the date of the commencement of the agreed or required expertise.

3 The Request for Appointment shall include:

a) the name, address, telephone and facsimile numbers and email address of each Person filing the Request for Appointment and of any other persons involved in the expertise;

b) a statement that the requesting Person is seeking the appointment of an expert by the Centre;

c) a description of the field of activity of the expert to be appointed along with any desired qualifications of the expert, including but not limited to education, language skills and professional experience, and any undesired attributes of the expert;

d) a description of any matters which would disqualify a potential expert;

e) a description of the work to be carried out by the expert and the desired time frame for completing such work; and

f) a copy of any agreement for the appointment of an expert by the Centre and/or of any other elements which form the basis for the Request for Appointment.

4 The Centre shall promptly inform the other party or parties in writing of the Request for Appointment once the Centre has sufficient copies of the Request for Appointment and has received the non-refundable amount required under Article 8.

5 When the Request for Appointment is not made jointly by all of the parties, and/or when the parties do not agree on the qualifications of the expert, and/or when the parties do not agree on the expert's work, the Centre shall send a copy of the Request for Appointment to the other party or parties who may make observations within a time limit fixed by the Centre.

Observations received shall be communicated by the Centre to the other party or parties for comments within a time limit fixed by the Centre.

6 The Centre shall proceed with the Request for Appointment as it sees fit and will inform the parties of how it will proceed.

ARTICLE 6

Written Notifications or Communications

1 All written communications submitted to the Centre by any party to the expertise, as well as all documents annexed thereto, shall be supplied in a number of copies sufficient to provide one copy for the Centre, one copy for each party and one copy for each expert.

2 All notifications or communications from the Centre shall be made to the last address of the party or its representative for whom the same are intended, as notified by the party in question or by the other party. Such notification may be made by delivery against receipt, registered post, courier, facsimile transmission, telex, telegram or any other means of telecommunication that provides a record of the sending thereof.

3 A notification or communication shall be deemed to have been made on the day it was received by the party itself or by its representative, or would have been received if made in accordance with the preceding paragraph.

ARTICLE 7

The Expert

1 Any appointment of an expert by the Centre shall be made by the Centre either through an ICC national committee or otherwise.

2 Prior to the appointment of an expert, the Centre shall consider in particular the prospective expert's qualifications relevant to the circumstances of the case, the expert's availability, place of residence and relevant language skills, and any observations, comments or requests made by the parties. In appointing the expert the Centre shall apply any agreement of the parties related to the appointment.

3 Every expert must be independent of the parties involved in the expertise proceedings, unless otherwise agreed in writing by such parties.

4 Before an appointment, a prospective expert shall sign a statement of independence and disclose in writing to the Centre any facts or circumstances which might be of such a nature as to call into question the expert's independence in the eyes of the parties. The Centre shall provide such information to the parties in writing and fix a time limit for any comments from them.

ARTICLE 8

Costs for the Appointment of an Expert

1 Each Request for Appointment must be accompanied by the non-refundable amount specified in Article 2 of Appendix II. This amount represents the total cost for the appointment of one expert by the Centre. No Request for Appointment shall be processed unless accompanied by the requisite payment.

2 When the Centre is requested to appoint more than one expert, the non-refundable amount accompanying the Request for Appointment and to be paid by the requesting Person is the amount specified in the preceding paragraph multiplied by the number of experts requested.

3 When the Centre is requested to appoint an expert who has already been proposed by the Centre in connection with the same matter, the Centre shall charge half of the non-refundable amount specified in Article 2 of Appendix II in addition to the already paid amount specified in Article 1 of Appendix II.

ARTICLE 9

Recourse to the Centre

1 Any request for the administration of expertise proceedings (the "Request for Administration") shall be submitted to the Centre at the ICC International Secretariat in Paris. Any such request shall be processed by the Centre only when it is based upon an agreement for the administration of expertise proceedings by the Centre or when the Centre is otherwise satisfied that there is a sufficient basis for administering expertise proceedings.

2 The date on which the Request for Administration is received by the Centre shall, for all purposes, be deemed to be the date of the commencement of the expertise proceedings.

3 The Request for Administration shall include:

a) the name, address, telephone and facsimile numbers and email address of each Person filing the Request for Administration and of any other persons involved in the expertise proceedings;

b) a statement that the requesting Person is seeking the administration of expertise proceedings by the Centre;

c) a description of the field of activity of the expert along with any desired qualifications of the expert, including but not limited to education, language skills and professional experience, and any undesired attributes of the expert;

d) a description of any matters which would disqualify a potential expert;

e) a description of the work to be carried out by the expert and the desired time frame for completing such work; and

f) a copy of any agreement for the administration of expertise proceedings by the Centre and/or of any other elements which form the basis for the Request for Administration.

4 The Centre shall promptly inform the other party or parties in writing of the Request for Administration once the Centre has sufficient copies of the Request for Administration and has received the non-refundable amount required under Article 14.

5 The administration of the expertise proceedings by the Centre shall consist *inter alia* of:

a) coordination between the parties and the expert;

b) initiating the appropriate steps to encourage the expeditious completion of the expertise proceedings;

c) supervising the financial aspects of the proceedings;

d) appointment of an expert using the procedure referred to in Section III or confirmation of an expert agreed to by all of the parties;

e) review of the form of the expert's report;

f) notification of the expert's final report to the parties; and

g) notification of the termination of the expertise proceedings.

ARTICLE 10

Written Notifications or Communications

1 All written communications submitted to the Centre by any party to the expertise proceedings, as well as all documents annexed thereto, shall be supplied in a number of copies sufficient to provide one copy for the Centre, one copy for each party and one copy for each expert.

2 All notifications or communications from the Centre and the expert shall be made to the last address of the party or its representative for whom the same are intended, as notified either by the party in question or by the other party. Such notification may be made by delivery against receipt, registered post, courier, facsimile transmission, telex, telegram or any other means of telecommunication that provides a record of the sending thereof.

3 A notification or communication shall be deemed to have been made on the day it was received by the party itself or by its representative, or would have been received if made in accordance with the preceding paragraph.

ARTICLE 11

Independence of the Expert – Replacement of the Expert

1 Every expert must remain independent of the parties involved in the expertise proceedings, unless otherwise agreed in writing by such parties.

2 An expert appointed by the Centre, who has died or resigned or is unable to carry out the expert's functions, shall be replaced.

3 An expert appointed by the Centre shall be replaced upon the written request of all of the parties.

4 If any party objects that the expert does not have the necessary qualifications or is not fulfilling the expert's functions in accordance with these Rules or in a timely fashion, the Centre may replace the expert after having considered the observations of the expert and the other party or parties.

5 When an expert is to be replaced, the Centre has discretion to decide whether or not to follow the original appointing process.

ARTICLE 12

The Expert's Mission

1 The expert, after having consulted the parties, shall set out the expert's mission in a written document. That document shall not be inconsistent with anything in these Rules and shall be communicated to the parties and to the Centre. Such document shall include:

a) the names, addresses, telephone and facsimile numbers and email addresses of the parties;

b) a list of issues to be treated in the expert's report;

c) the name(s), address(es), telephone and facsimile numbers and email address(es) of the expert or experts;

d) the procedure to be followed by the expert and the place where the expertise should be conducted; and

e) a statement indicating the language in which the proceedings will be conducted.

Modifications to the expert's mission may be made by the expert, in writing, only after full consultation with the parties. Any such written modifications shall be communicated to the parties and to the Centre.

2 Upon preparing the document setting out the expert's mission, or as soon as possible thereafter, the expert, after having consulted the parties, shall prepare a provisional timetable for the conduct of the expertise proceedings. The timetable shall be communicated to the parties and to the Centre. Any subsequent modifications of the provisional timetable shall be promptly communicated to the parties and to the Centre.

3 The expert's main task is to make findings in a written expert's report within the limits set by the expert's mission after giving the parties the opportunity to be heard and/or to make written submissions. Unless otherwise agreed by all of the parties, the findings of the expert shall not be binding upon the parties.

4 Unless otherwise agreed by the parties, the expert's report shall be admissible in any judicial or arbitral proceeding in which all of the parties thereto were parties to the expertise proceedings in which such report was prepared.

5 Any information given to the expert by the Centre or any party during the course of the expertise shall be used by the expert only for the purposes of the expertise and shall be treated by the expert as confidential.

6 The expert's report shall be submitted in draft form to the Centre before it is signed. The Centre may lay down modifications only as to the form of the report. No report shall be communicated to the parties by the expert. No report shall be signed by the expert prior to the Centre's approval of such report.

7 The Centre may waive the requirements laid down in Article 12(6) if expressly requested to do so in writing by all the parties and if the Centre considers that such a waiver is appropriate under the circumstances of the case.

8 The expert's report, after it is signed by the expert, shall be sent to the Centre in as many copies as there are parties plus one for the Centre. Thereafter, the Centre shall notify the expert's report to the party or parties and declare in writing that the expertise proceedings have been terminated.

ARTICLE 13

Duties and Responsibilities of the Parties

1 The non-participation of a party in the expertise proceedings does not deprive the expert of the power to make findings and render the expert's report, provided that such party has been given the opportunity to participate.

2 In agreeing to the application of these Rules the parties undertake to provide the expert with all facilities in order to implement the expert's mission and, in particular, to make available all documents the expert may consider necessary and also to grant the expert free access to any place where the expert may be required to go for the proper completion of the expert's mission.

ARTICLE 14

Costs for the Administration of Expertise Proceedings

1 Each Request for Administration must be accompanied by the non-refundable amount specified in Article 3 of Appendix II. This amount will be credited to the requesting party's or parties' portion of the deposit pursuant to Article 14(3).

2 When the Centre is requested to administer expertise proceedings where the expert has already been proposed or appointed by the Centre in connection with the same matter, the non-refundable amount specified in Article 3 of Appendix II shall not be paid in addition to the non-refundable amounts paid for the proposal or the appointment of an expert and specified in Articles 1 and 2 of Appendix II.

3 Following the receipt of a Request for Administration, the Centre shall request the parties to pay a deposit in an amount likely to cover the administrative costs of the Centre and the fees and expenses of the expert for the expertise proceedings, as set out in Article 3, paragraphs (2) and (3), of Appendix II. The expertise proceedings shall not go forward until payment of such deposit has been received by the Centre.

4 In any case where the Centre considers that the deposit is not likely to cover the total costs of the expertise proceedings, the amount of such deposit may be subject to readjustment. When the request for the corresponding payments has not been complied with, the Centre may suspend the expertise proceedings and set a time limit, on the expiry of which the expertise proceedings may be considered withdrawn.

5 Upon termination of administered expertise proceedings, the Centre shall settle the total costs of the proceedings and shall, as the case may be, reimburse the party or parties for any excess payment or bill the party or parties for any balance required pursuant to these Rules. The balance, if any, shall be payable before the notification of the final expert's report to the party or parties.

6 All above deposits and costs shall be borne in equal shares by the parties, unless they agree otherwise in writing. However, any party shall be free to pay the unpaid balance of such deposits and costs should the other party or parties fail to pay its or their share.

ARTICLE 15

Waiver

A party which proceeds with the expertise proceedings without raising an objection to a failure to comply with any provision of these Rules, any direction given by the Centre or by the expert, or any requirement of the expert's mission, or any requirement relating to the appointment of an expert or to the conduct of the expertise proceedings, shall be deemed to have waived its right to object.

ARTICLE 16

Exclusion of Liability

Neither the experts, nor the Centre, nor ICC and its employees, nor the ICC national committees shall be liable to any person for any act or omission in connection with the expertise procedure.

ARTICLE 17

General Rule

In all matters not expressly provided for in these Rules, the Centre and the experts shall act in the spirit of these Rules.

APPENDIX I – STATUTES OF THE STANDING COMMITTEE OF THE ICC INTERNATIONAL CENTRE FOR EXPERTISE

ARTICLE 1

Composition of the Standing Committee

The Standing Committee is composed of a maximum of eleven members (a chairman, two vice-chairmen and up to eight members) appointed by ICC for a three-year renewable term.

ARTICLE 2

Meetings

A meeting of the Standing Committee shall be convened by its chairman whenever necessary.

ARTICLE 3

Function and Duties of the Standing Committee

1 The function of the Standing Committee is to assist the Secretariat in reviewing the qualifications of the experts to be proposed and/or appointed by the ICC International Centre for Expertise. The Standing Committee shall advise the Secretariat concerning all aspects of expertise to help to assure the quality of the Centre.

2 In the absence of the chairman, or otherwise at the chairman's request, one of the two vice-chairmen shall be appointed by the chairman or by the Secretariat in the absence of an appointment by the chairman to fulfil the tasks of the chairman, including taking decisions pursuant to these statutes.

3 The Secretariat shall inform the members of the Standing Committee about all Requests for Proposal and Requests for Appointment and ask the members for their advice.

The chairman of the Standing Committee shall make the final decision on the proposal or appointment of the expert.

4 In the case of a Request for Administration pursuant to Section IV:

A) the Standing Committee shall be informed of the death or resignation of an expert as well as of any objection by the party or parties or the Centre concerning an expert, or of any other matter requiring the replacement of the expert. It shall advise the Secretariat whether the objection of the party or parties pursuant to Article 11(3) or of the Centre pursuant to Article 11(4) of the Rules for Expertise is justified and make recommendations to the chairman. The chairman shall decide on the justification of any objection and/or on the manner in which the replacement will be made;

B) the chairman shall fix the expert's or experts' fees and expenses in accordance with Article 3(3) of Appendix II to the Rules for Expertise; and

C) upon the premature termination of the expertise, the chairman shall fix the costs of the expertise pursuant to Article 3(4) of Appendix II to the Rules for Expertise.

ARTICLE 4

Confidentiality

The work of the Standing Committee and the Secretariat is of a confidential nature which must be respected by everyone who participates in that work in whatever capacity.

ARTICLE 1

Costs for Proposal

The non-refundable amount for the proposal of an expert pursuant to the Rules for Expertise is US$ 2,500, provided, however, that the proposal of an expert made at the request of an arbitral tribunal acting pursuant to the ICC Rules of Arbitration shall be free of charge. The non-refundable amount is payable by the requesting Person(s). No request shall be processed unless accompanied by the requisite payment.

ARTICLE 2

Costs for Appointment

The non-refundable amount for the appointment of an expert pursuant to the Rules for Expertise is US$ 2,500. This amount is payable by the requesting Person(s). No request shall be processed unless accompanied by the requisite payment.

ARTICLE 3

Costs for Administration

1 The non-refundable amount for sole administration of the expertise proceedings pursuant to the Rules for Expertise is US$ 2,500. This amount is payable by the requesting Person(s). No request shall be processed unless accompanied by the requisite payment.

2 The administrative expenses of the Centre for the expertise proceedings shall be fixed at the Centre's discretion depending on the tasks carried out by the Centre. They shall not exceed 15% of the total expert's fees and not be less than US$ 2,500.

3 The fees of the expert shall be calculated on the basis of the time reasonably spent by the expert in the expertise proceedings, at a daily rate fixed for such proceedings by the Centre in consultation with the expert and the party or parties. Such daily rate shall be reasonable in amount and shall be determined in light of the complexity of the dispute and any other relevant circumstances. The amount of reasonable expenses of the expert shall be fixed by the Centre.

4 If an expertise terminates before the notification of the final report, the Centre shall fix the costs of the expertise at its discretion, taking into account the stage attained by the expertise proceedings and any other relevant circumstances.

5 Amounts paid to the expert do not include any possible value added taxes (VAT) or other taxes or charges and imposts applicable to the expert's fees. Parties have a duty to pay any such taxes or charges; however, the recovery of any such charges or taxes is a matter solely between the expert and the party or parties.

SUGGESTED CLAUSES

Below are suggested clauses for use by parties who wish to have recourse to ICC expertise services under the foregoing Rules.

Optional expertise

The parties may at any time, without prejudice to any other proceedings, agree to submit any dispute arising out of or in connection with clause [X] of the present contract to administered expertise proceedings in accordance with the Rules for Expertise of the International Chamber of Commerce.

Obligation to submit dispute to expertise

In the event of any dispute arising out of or in connection with clause [X] of the present contract, the parties agree to submit the matter to administered expertise proceedings in accordance with the Rules for Expertise of the International Chamber of Commerce. [The findings of the expert shall be binding upon the parties.]

Obligation to submit dispute to expertise, followed by arbitration if required

In the event of any dispute arising out of or in connection with clause [X] of the present contract, the parties agree to submit the matter, in the first instance, to administered expertise proceedings in accordance with the Rules for Expertise of the International Chamber of Commerce. If the dispute has not been resolved through such administered expertise proceedings it shall, after the Centre's notification of the termination of the expertise proceedings, be finally settled under the Rules of Arbitration of the International Chamber of Commerce by one or more arbitrators appointed in accordance with the said Rules of Arbitration.

ICC as appointing authority in party-administered expertise

In the event of any dispute arising out of or in connection with clause [X] of the present contract, the parties agree to submit the matter to an expertise as defined in clause [Y] of the present contract. The expert shall be appointed by the International Centre for Expertise in accordance with the provisions for the appointment of experts under the Rules for Expertise of the International Chamber of Commerce.

How to use these clauses

The above are suggested clauses covering different situations. Parties should use whichever corresponds to their needs. It may be necessary or desirable for them to adapt the chosen clause to their particular circumstances.

The clauses listed above should not be considered as exhaustive. Depending on the nature of their contract and their relationship, parties may have an interest in providing for other combinations of services in their dispute resolution clause. For instance, parties who opt for ICC arbitration may wish to provide for recourse to the ICC International Centre for Expertise for the proposal of an expert, if an expert opinion is required in the course of the arbitration. It may be noted that the proposal of an expert at the request of an arbitral tribunal acting under the ICC Rules of Arbitration is free of charge.

At all times, care must be taken to avoid any risk of ambiguity in the drafting of the clause. Unclear wording causes uncertainty and delay and can hinder or even compromise the dispute resolution process.

When incorporating any of the above clauses in their contracts, parties are advised to take account of any factors, such as mandatory requirements, that may affect their enforceability under applicable law.

The inclusion of one of the above clauses in a contract is likely to facilitate dispute management. However, it is also possible for parties to file requests under the ICC Rules for Expertise at any time, even after a dispute has arisen or in the course of other dispute resolution proceedings.

Translations of the above clauses and clauses providing for other procedures and combinations of procedures can be found at **<www.iccexpertise.org>**.

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Reconsideration Request

Union of Orthodox Jewish Congregations of America, *et al.*

Annex L

ICANN, New gTLD Application Change Request Process and Criteria, http://newgtlds.icann.org/en/applicants/customer-service/change-requests

NEW GTLD APPLICATION CHANGE REQUEST PROCESS AND CRITERIA

Requests for changes to applications may be submitted to the New gTLD Customer Service Center (CSC) (https://myicann.secure.force.com/) by following these 2 steps:

1. Download and complete a gTLD Application Change Request Form (/en/applicants/customer-service/change-requests/form-05sep12-en.docx) [DOCX, 632 KB].
2. Log into the CSC portal (https://myicann.secure.force.com/) with the primary contact's credentials and submit the Form.

ICANN will evaluate the requested changes against the 7 criteria below and inform the applicant whether the changes are approved or denied. ICANN will post all approved changes in a change log on the gTLD microsite. Relevant changes made to public portions of the application will be posted. Changes made to confidential portions of the application will not be posted, but only summarized to protect confidentiality of the applicant. Posting will occur once the applicant confirms that changes made are correct as requested. The change log is currently under development and will be made available soon.

Amended applications will be held for at least 30 days before passing on to the next phase in evaluation process to allow for public comment on that revised application. For example, an application in initial evaluation will not be identified as passing for at least 30 days until time for public comment enables an assessment of whether re-evaluation of the change is required.

Decision Criteria

Determination of whether changes will be approved will balance the following factors:

1. ***Explanation*** – Is a reasonable explanation provided?
2. ***Evidence that original submission was in error*** – Are there indicia to support an assertion that the change merely corrects an error?
3. ***Other third parties affected*** – Does the change affect other third parties materially?
4. ***Precedents*** – Is the change similar to others that have already been approved? Could the change lead others to request similar changes that could affect third parties or result in undesirable effects on the program?
5. ***Fairness to applicants*** – Would allowing the change be construed as fair to the general community? Would disallowing the change be construed as unfair?
6. ***Materiality*** – Would the change affect the evaluation score or require re-evaluation of some or all of the application? Would the change affect string contention or community priority consideration?
7. ***Timing*** – Does the timing interfere with the evaluation process in some way? ICANN reserves the right to require a re-evaluation of the application in the event of a material change. This could involve additional fees or evaluation in a subsequent application round. (AGB §1.2.7.)

Note that per section 1.2.7 of the Applicant Guidebook, if at any time during the evaluation process information previously submitted by an applicant becomes untrue or inaccurate, the applicant must promptly notify ICANN via submission of the appropriate forms. This includes applicant-specific information such as changes in financial position and changes in ownership or control of the applicant.

1. ICANN reserves the right to require a re-evaluation of the application in the event of a material change. This could involve additional fees or evaluation in a subsequent application round.

2. Failure to notify ICANN of any change in circumstances that would render any information provided in the application false or misleading may result in denial of the application.

Site Map

Reconsideration Request

Union of Orthodox Jewish Congregations of America, *et al.*

Annex M

ICANN Registry Agreement
(approved 20 Nov. 2013)

REGISTRY AGREEMENT

This REGISTRY AGREEMENT (this "Agreement") is entered into as of _____ (the "Effective Date") between Internet Corporation for Assigned Names and Numbers, a California nonprofit public benefit corporation ("ICANN"), and _____, a _____ ("Registry Operator").

ARTICLE 1.

DELEGATION AND OPERATION OF TOP–LEVEL DOMAIN; REPRESENTATIONS AND WARRANTIES

1.1 Domain and Designation. The Top-Level Domain to which this Agreement applies is ____ (the "TLD"). Upon the Effective Date and until the earlier of the expiration of the Term (as defined in Section 4.1) or the termination of this Agreement pursuant to Article 4, ICANN designates Registry Operator as the registry operator for the TLD, subject to the requirements and necessary approvals for delegation of the TLD and entry into the root-zone.

1.2 Technical Feasibility of String. While ICANN has encouraged and will continue to encourage universal acceptance of all top-level domain strings across the Internet, certain top-level domain strings may encounter difficulty in acceptance by ISPs and webhosters and/or validation by web applications. Registry Operator shall be responsible for ensuring to its satisfaction the technical feasibility of the TLD string prior to entering into this Agreement.

1.3 Representations and Warranties.

(a) Registry Operator represents and warrants to ICANN as follows:

(i) all material information provided and statements made in the registry TLD application, and statements made in writing during the negotiation of this Agreement, were true and correct in all material respects at the time made, and such information or statements continue to be true and correct in all material respects as of the Effective Date except as otherwise previously disclosed in writing by Registry Operator to ICANN;

(ii) Registry Operator is duly organized, validly existing and in good standing under the laws of the jurisdiction set forth in the preamble hereto, and Registry Operator has all requisite power and authority and has obtained all necessary approvals to enter into and duly execute and deliver this Agreement; and

(iii) Registry Operator has delivered to ICANN a duly executed instrument that secures the funds required to perform registry functions for the TLD in the event of the termination or expiration of this Agreement (the "Continued Operations Instrument"), and such instrument is a binding

obligation of the parties thereto, enforceable against the parties thereto in accordance with its terms.

(b) ICANN represents and warrants to Registry Operator that ICANN is a nonprofit public benefit corporation duly organized, validly existing and in good standing under the laws of the State of California, United States of America. ICANN has all requisite power and authority and has obtained all necessary corporate approvals to enter into and duly execute and deliver this Agreement.

ARTICLE 2.

COVENANTS OF REGISTRY OPERATOR

Registry Operator covenants and agrees with ICANN as follows:

2.1 Approved Services; Additional Services. Registry Operator shall be entitled to provide the Registry Services described in clauses (a) and (b) of the first paragraph of Section 2.1 in the Specification 6 attached hereto ("Specification 6") and such other Registry Services set forth on Exhibit A (collectively, the "Approved Services"). If Registry Operator desires to provide any Registry Service that is not an Approved Service or is a material modification to an Approved Service (each, an "Additional Service"), Registry Operator shall submit a request for approval of such Additional Service pursuant to the Registry Services Evaluation Policy at http://www.icann.org/en/registries/rsep/rsep.html, as such policy may be amended from time to time in accordance with the bylaws of ICANN (as amended from time to time, the "ICANN Bylaws") applicable to Consensus Policies (the "RSEP"). Registry Operator may offer Additional Services only with the written approval of ICANN, and, upon any such approval, such Additional Services shall be deemed Registry Services under this Agreement. In its reasonable discretion, ICANN may require an amendment to this Agreement reflecting the provision of any Additional Service which is approved pursuant to the RSEP, which amendment shall be in a form reasonably acceptable to the parties.

2.2 Compliance with Consensus Policies and Temporary Policies. Registry Operator shall comply with and implement all Consensus Policies and Temporary Policies found at <http://www.icann.org/general/consensus-policies.htm>, as of the Effective Date and as may in the future be developed and adopted in accordance with the ICANN Bylaws, provided such future Consensus Polices and Temporary Policies are adopted in accordance with the procedure and relate to those topics and subject to those limitations set forth in Specification 1 attached hereto ("Specification 1").

2.3 Data Escrow. Registry Operator shall comply with the registry data escrow procedures set forth in Specification 2 attached hereto ("Specification 2").

2.4 Monthly Reporting. Within twenty (20) calendar days following the end of each calendar month, Registry Operator shall deliver to ICANN reports in the format set forth in Specification 3 attached hereto ("Specification 3").

2.5 Publication of Registration Data. Registry Operator shall provide public access to registration data in accordance with Specification 4 attached hereto ("Specification 4").

2.6 Reserved Names. Except to the extent that ICANN otherwise expressly authorizes in writing, Registry Operator shall comply with the requirements set forth in Specification 5 attached hereto ("Specification 5"). Registry Operator may at any time establish or modify policies concerning Registry Operator's ability to reserve (i.e., withhold from registration or allocate to Registry Operator, but not register to third parties, delegate, use, activate in the DNS or otherwise make available) or block additional character strings within the TLD at its discretion. Except as specified in Specification 5, if Registry Operator is the registrant for any domain names in the registry TLD, such registrations must be through an ICANN accredited registrar, and will be considered Transactions (as defined in Section 6.1) for purposes of calculating the Registry-level transaction fee to be paid to ICANN by Registry Operator pursuant to Section 6.1.

2.7 Registry Interoperability and Continuity. Registry Operator shall comply with the Registry Interoperability and Continuity Specifications as set forth in Specification 6 attached hereto ("Specification 6").

2.8 Protection of Legal Rights of Third Parties. Registry Operator must specify, and comply with, the processes and procedures for launch of the TLD and initial registration-related and ongoing protection of the legal rights of third parties as set forth Specification 7 attached hereto ("Specification 7"). Registry Operator may, at its election, implement additional protections of the legal rights of third parties. Any changes or modifications to the process and procedures required by Specification 7 following the Effective Date must be approved in advance by ICANN in writing. Registry Operator must comply with all remedies imposed by ICANN pursuant to Section 2 of Specification 7, subject to Registry Operator's right to challenge such remedies as set forth in the applicable procedure described therein. Registry Operator shall take reasonable steps to investigate and respond to any reports from law enforcement and governmental and quasi-governmental agencies of illegal conduct in connection with the use of the TLD. In responding to such reports, Registry Operator will not be required to take any action in contravention of applicable law.

2.9 Registrars.

(a) All domain name registrations in the TLD must be registered through an ICANN accredited registrar; provided, that Registry Operator need not use a registrar if it registers names in its own name in order to withhold such names from delegation or use in accordance with Section 2.6. Subject to the requirements of Specification 11, Registry Operator must provide non-discriminatory access to Registry Services to all ICANN accredited registrars that enter into and are in compliance with the registry-registrar agreement for the TLD; provided that Registry Operator may establish non-discriminatory criteria for qualification to register names in the TLD that are reasonably related to the proper functioning of the TLD. Registry Operator must use a uniform non-discriminatory

agreement with all registrars authorized to register names in the TLD (the "Registry-Registrar Agreement"). Registry Operator may amend the Registry-Registrar Agreement from time to time; provided, however, that any material revisions thereto must be approved by ICANN before any such revisions become effective and binding on any registrar. Registry Operator will provide ICANN and all registrars authorized to register names in the TLD at least fifteen (15) calendar days written notice of any revisions to the Registry-Registrar Agreement before any such revisions become effective and binding on any registrar. During such period, ICANN will determine whether such proposed revisions are immaterial, potentially material or material in nature. If ICANN has not provided Registry Operator with notice of its determination within such fifteen (15) calendar-day period, ICANN shall be deemed to have determined that such proposed revisions are immaterial in nature. If ICANN determines, or is deemed to have determined under this Section 2.9(a), that such revisions are immaterial, then Registry Operator may adopt and implement such revisions. If ICANN determines such revisions are either material or potentially material, ICANN will thereafter follow its procedure regarding review and approval of changes to Registry-Registrar Agreements at <http://www.icann.org/en/resources/registries/rra-amendment-procedure>, and such revisions may not be adopted and implemented until approved by ICANN.

(b) If Registry Operator (i) becomes an Affiliate or reseller of an ICANN accredited registrar, or (ii) subcontracts the provision of any Registry Services to an ICANN accredited registrar, registrar reseller or any of their respective Affiliates, then, in either such case of (i) or (ii) above, Registry Operator will give ICANN prompt notice of the contract, transaction or other arrangement that resulted in such affiliation, reseller relationship or subcontract, as applicable, including, if requested by ICANN, copies of any contract relating thereto; provided, that ICANN will treat such contract or related documents that are appropriately marked as confidential (as required by Section 7.15) as Confidential Information of Registry Operator in accordance with Section 7.15 (except that ICANN may disclose such contract and related documents to relevant competition authorities). ICANN reserves the right, but not the obligation, to refer any such contract, related documents, transaction or other arrangement to relevant competition authorities in the event that ICANN determines that such contract, related documents, transaction or other arrangement might raise significant competition issues under applicable law. If feasible and appropriate under the circumstances, ICANN will give Registry Operator advance notice prior to making any such referral to a competition authority.

(c) For the purposes of this Agreement: (i) "Affiliate" means a person or entity that, directly or indirectly, through one or more intermediaries, or in combination with one or more other persons or entities, controls, is controlled by, or is under common control with, the person or entity specified, and (ii) "control" (including the terms "controlled by" and "under common control with") means the possession, directly or indirectly, of the power to direct or cause the direction of the management or policies of a person or entity, whether through the ownership of securities, as trustee or executor, by serving as an employee or a member of a board of directors or equivalent governing body, by contract, by credit arrangement or otherwise.

2.10 Pricing for Registry Services.

(a) With respect to initial domain name registrations, Registry Operator shall provide ICANN and each ICANN accredited registrar that has executed the registry-registrar agreement for the TLD advance written notice of any price increase (including as a result of the elimination of any refunds, rebates, discounts, product tying or other programs which had the effect of reducing the price charged to registrars, unless such refunds, rebates, discounts, product tying or other programs are of a limited duration that is clearly and conspicuously disclosed to the registrar when offered) of no less than thirty (30) calendar days. Registry Operator shall offer registrars the option to obtain initial domain name registrations for periods of one (1) to ten (10) years at the discretion of the registrar, but no greater than ten (10) years.

(b) With respect to renewal of domain name registrations, Registry Operator shall provide ICANN and each ICANN accredited registrar that has executed the registry-registrar agreement for the TLD advance written notice of any price increase (including as a result of the elimination of any refunds, rebates, discounts, product tying, Qualified Marketing Programs or other programs which had the effect of reducing the price charged to registrars) of no less than one hundred eighty (180) calendar days. Notwithstanding the foregoing sentence, with respect to renewal of domain name registrations: (i) Registry Operator need only provide thirty (30) calendar days notice of any price increase if the resulting price is less than or equal to (A) for the period beginning on the Effective Date and ending twelve (12) months following the Effective Date, the initial price charged for registrations in the TLD, or (B) for subsequent periods, a price for which Registry Operator provided a notice pursuant to the first sentence of this Section 2.10(b) within the twelve (12) month period preceding the effective date of the proposed price increase; and (ii) Registry Operator need not provide notice of any price increase for the imposition of the Variable Registry-Level Fee set forth in Section 6.3. Registry Operator shall offer registrars the option to obtain domain name registration renewals at the current price (i.e., the price in place prior to any noticed increase) for periods of one (1) to ten (10) years at the discretion of the registrar, but no greater than ten (10) years.

(c) In addition, Registry Operator must have uniform pricing for renewals of domain name registrations ("Renewal Pricing"). For the purposes of determining Renewal Pricing, the price for each domain registration renewal must be identical to the price of all other domain name registration renewals in place at the time of such renewal, and such price must take into account universal application of any refunds, rebates, discounts, product tying or other programs in place at the time of renewal. The foregoing requirements of this Section 2.10(c) shall not apply for (i) purposes of determining Renewal Pricing if the registrar has provided Registry Operator with documentation that demonstrates that the applicable registrant expressly agreed in its registration agreement with registrar to higher Renewal Pricing at the time of the initial registration of the domain name following clear and conspicuous disclosure of such Renewal Pricing to such registrant, and (ii) discounted Renewal Pricing pursuant to a Qualified Marketing Program (as defined below). The parties acknowledge that the purpose of this Section 2.10(c) is to prohibit abusive and/or discriminatory Renewal Pricing practices imposed by Registry

Operator without the written consent of the applicable registrant at the time of the initial registration of the domain and this Section 2.10(c) will be interpreted broadly to prohibit such practices. For purposes of this Section 2.10(c), a "Qualified Marketing Program" is a marketing program pursuant to which Registry Operator offers discounted Renewal Pricing, provided that each of the following criteria is satisfied: (i) the program and related discounts are offered for a period of time not to exceed one hundred eighty (180) calendar days (with consecutive substantially similar programs aggregated for purposes of determining the number of calendar days of the program), (ii) all ICANN accredited registrars are provided the same opportunity to qualify for such discounted Renewal Pricing; and (iii) the intent or effect of the program is not to exclude any particular class(es) of registrations (e.g., registrations held by large corporations) or increase the renewal price of any particular class(es) of registrations. Nothing in this Section 2.10(c) shall limit Registry Operator's obligations pursuant to Section 2.10(b).

(d) Registry Operator shall provide public query-based DNS lookup service for the TLD (that is, operate the Registry TLD zone servers) at its sole expense.

2.11 Contractual and Operational Compliance Audits.

(a) ICANN may from time to time (not to exceed twice per calendar year) conduct, or engage a third party to conduct, contractual compliance audits to assess compliance by Registry Operator with its representations and warranties contained in Article 1 of this Agreement and its covenants contained in Article 2 of this Agreement. Such audits shall be tailored to achieve the purpose of assessing compliance, and ICANN will (a) give reasonable advance notice of any such audit, which notice shall specify in reasonable detail the categories of documents, data and other information requested by ICANN, and (b) use commercially reasonable efforts to conduct such audit during regular business hours and in such a manner as to not unreasonably disrupt the operations of Registry Operator. As part of such audit and upon request by ICANN, Registry Operator shall timely provide all responsive documents, data and any other information reasonably necessary to demonstrate Registry Operator's compliance with this Agreement. Upon no less than ten (10) calendar days notice (unless otherwise agreed to by Registry Operator), ICANN may, as part of any contractual compliance audit, conduct site visits during regular business hours to assess compliance by Registry Operator with its representations and warranties contained in Article 1 of this Agreement and its covenants contained in Article 2 of this Agreement. ICANN will treat any information obtained in connection with such audits that is appropriately marked as confidential (as required by Section 7.15) as Confidential Information of Registry Operator in accordance with Section 7.15.

(b) Any audit conducted pursuant to Section 2.11(a) will be at ICANN's expense, unless (i) Registry Operator (A) controls, is controlled by, is under common control or is otherwise Affiliated with, any ICANN accredited registrar or registrar reseller or any of their respective Affiliates, or (B) has subcontracted the provision of Registry Services to an ICANN accredited registrar or registrar reseller or any of their respective Affiliates, and, in either case of (A) or (B) above, the audit relates to Registry Operator's compliance with Section 2.14, in which case Registry Operator shall reimburse ICANN for

all reasonable costs and expenses associated with the portion of the audit related to Registry Operator's compliance with Section 2.14, or (ii) the audit is related to a discrepancy in the fees paid by Registry Operator hereunder in excess of 5% in a given quarter to ICANN's detriment, in which case Registry Operator shall reimburse ICANN for all reasonable costs and expenses associated with the entirety of such audit. In either such case of (i) or (ii) above, such reimbursement will be paid together with the next Registry-Level Fee payment due following the date of transmittal of the cost statement for such audit.

(c) Notwithstanding Section 2.11(a), if Registry Operator is found not to be in compliance with its representations and warranties contained in Article 1 of this Agreement or its covenants contained in Article 2 of this Agreement in two consecutive audits conducted pursuant to this Section 2.11, ICANN may increase the number of such audits to one per calendar quarter.

(d) Registry Operator will give ICANN immediate notice of Registry Operator's knowledge of the commencement of any of the proceedings referenced in Section 4.3(d) or the occurrence of any of the matters specified in Section 4.3(f).

2.12 Continued Operations Instrument. Registry Operator shall comply with the terms and conditions relating to the Continued Operations Instrument set forth in Specification 8 attached hereto ("Specification 8").

2.13 Emergency Transition. Registry Operator agrees that, in the event that any of the emergency thresholds for registry functions set forth in Section 6 of Specification 10 is reached, ICANN may designate an emergency interim registry operator of the registry for the TLD (an "Emergency Operator") in accordance with ICANN's registry transition process (available at <http://www.icann.org/en/resources/registries/transition-processes>) (as the same may be amended from time to time, the "Registry Transition Process") until such time as Registry Operator has demonstrated to ICANN's reasonable satisfaction that it can resume operation of the registry for the TLD without the reoccurrence of such failure. Following such demonstration, Registry Operator may transition back into operation of the registry for the TLD pursuant to the procedures set out in the Registry Transition Process, provided that Registry Operator pays all reasonable costs incurred (i) by ICANN as a result of the designation of the Emergency Operator and (ii) by the Emergency Operator in connection with the operation of the registry for the TLD, which costs shall be documented in reasonable detail in records that shall be made available to Registry Operator. In the event ICANN designates an Emergency Operator pursuant to this Section 2.13 and the Registry Transition Process, Registry Operator shall provide ICANN or any such Emergency Operator with all data (including the data escrowed in accordance with Section 2.3) regarding operations of the registry for the TLD necessary to maintain operations and registry functions that may be reasonably requested by ICANN or such Emergency Operator. Registry Operator agrees that ICANN may make any changes it deems necessary to the IANA database for DNS and WHOIS records with respect to the TLD in the event that an Emergency Operator is designated pursuant to this Section 2.13. In addition, in the

event of such failure, ICANN shall retain and may enforce its rights under the Continued Operations Instrument.

2.14 Registry Code of Conduct. In connection with the operation of the registry for the TLD, Registry Operator shall comply with the Registry Code of Conduct as set forth in Specification 9 attached hereto ("Specification 9").

2.15 Cooperation with Economic Studies. If ICANN initiates or commissions an economic study on the impact or functioning of new generic top-level domains on the Internet, the DNS or related matters, Registry Operator shall reasonably cooperate with such study, including by delivering to ICANN or its designee conducting such study all data related to the operation of the TLD reasonably necessary for the purposes of such study requested by ICANN or its designee, provided, that Registry Operator may withhold (a) any internal analyses or evaluations prepared by Registry Operator with respect to such data and (b) any data to the extent that the delivery of such data would be in violation of applicable law. Any data delivered to ICANN or its designee pursuant to this Section 2.15 that is appropriately marked as confidential (as required by Section 7.15) shall be treated as Confidential Information of Registry Operator in accordance with Section 7.15, provided that, if ICANN aggregates and makes anonymous such data, ICANN or its designee may disclose such data to any third party. Following completion of an economic study for which Registry Operator has provided data, ICANN will destroy all data provided by Registry Operator that has not been aggregated and made anonymous.

2.16 Registry Performance Specifications. Registry Performance Specifications for operation of the TLD will be as set forth in Specification 10 attached hereto ("Specification 10"). Registry Operator shall comply with such Performance Specifications and, for a period of at least one (1) year, shall keep technical and operational records sufficient to evidence compliance with such specifications for each calendar year during the Term.

2.17 Additional Public Interest Commitments. Registry Operator shall comply with the public interest commitments set forth in Specification 11 attached hereto ("Specification 11").

2.18 Personal Data. Registry Operator shall (i) notify each ICANN-accredited registrar that is a party to the registry-registrar agreement for the TLD of the purposes for which data about any identified or identifiable natural person ("Personal Data") submitted to Registry Operator by such registrar is collected and used under this Agreement or otherwise and the intended recipients (or categories of recipients) of such Personal Data, and (ii) require such registrar to obtain the consent of each registrant in the TLD for such collection and use of Personal Data. Registry Operator shall take reasonable steps to protect Personal Data collected from such registrar from loss, misuse, unauthorized disclosure, alteration or destruction. Registry Operator shall not use or authorize the use of Personal Data in a way that is incompatible with the notice provided to registrars.

2.19 [*Note: For Community-Based TLDs Only*] Obligations of Registry Operator to TLD Community. Registry Operator shall establish registration policies in conformity with the application submitted with respect to the TLD for: (i) naming conventions within the TLD, (ii) requirements for registration by members of the TLD community, and (iii) use of registered domain names in conformity with the stated purpose of the community-based TLD. Registry Operator shall operate the TLD in a manner that allows the TLD community to discuss and participate in the development and modification of policies and practices for the TLD. Registry Operator shall establish procedures for the enforcement of registration policies for the TLD, and resolution of disputes concerning compliance with TLD registration policies, and shall enforce such registration policies. Registry Operator agrees to implement and be bound by the Registry Restrictions Dispute Resolution Procedure as set forth at [insert applicable URL] with respect to disputes arising pursuant to this Section 2.19. Registry Operator shall implement and comply with the community registration policies set forth on Specification 12 attached hereto.]

ARTICLE 3.

COVENANTS OF ICANN

ICANN covenants and agrees with Registry Operator as follows:

3.1 Open and Transparent. Consistent with ICANN's expressed mission and core values, ICANN shall operate in an open and transparent manner.

3.2 Equitable Treatment. ICANN shall not apply standards, policies, procedures or practices arbitrarily, unjustifiably, or inequitably and shall not single out Registry Operator for disparate treatment unless justified by substantial and reasonable cause.

3.3 TLD Nameservers. ICANN will use commercially reasonable efforts to ensure that any changes to the TLD nameserver designations submitted to ICANN by Registry Operator (in a format and with required technical elements specified by ICANN at http://www.iana.org/domains/root/ will be implemented by ICANN within seven (7) calendar days or as promptly as feasible following technical verifications.

3.4 Root-zone Information Publication. ICANN's publication of root-zone contact information for the TLD will include Registry Operator and its administrative and technical contacts. Any request to modify the contact information for the Registry Operator must be made in the format specified from time to time by ICANN at http://www.iana.org/domains/root/.

3.5 Authoritative Root Database. To the extent that ICANN is authorized to set policy with regard to an authoritative root server system (the "Authoritative Root Server System"), ICANN shall use commercially reasonable efforts to (a) ensure that the authoritative root will point to the top-level domain nameservers designated by Registry Operator for the TLD, (b) maintain a stable, secure, and authoritative publicly available database of relevant information about the TLD, in accordance with ICANN publicly

available policies and procedures, and (c) coordinate the Authoritative Root Server System so that it is operated and maintained in a stable and secure manner; provided, that ICANN shall not be in breach of this Agreement and ICANN shall have no liability in the event that any third party (including any governmental entity or internet service provider) blocks or restricts access to the TLD in any jurisdiction.

ARTICLE 4.

TERM AND TERMINATION

4.1 Term. The term of this Agreement will be ten (10) years from the Effective Date (as such term may be extended pursuant to Section 4.2, the "Term").

4.2 Renewal.

(a) This Agreement will be renewed for successive periods of ten (10) years upon the expiration of the initial Term set forth in Section 4.1 and each successive Term, unless:

(i) Following notice by ICANN to Registry Operator of a fundamental and material breach of Registry Operator's covenants set forth in Article 2 or breach of its payment obligations under Article 6 of this Agreement, which notice shall include with specificity the details of the alleged breach, and such breach has not been cured within thirty (30) calendar days of such notice, (A) an arbitrator or court of competent jurisdiction has finally determined that Registry Operator has been in fundamental and material breach of such covenant(s) or in breach of its payment obligations, and (B) Registry Operator has failed to comply with such determination and cure such breach within ten (10) calendar days or such other time period as may be determined by the arbitrator or court of competent jurisdiction; or

(ii) During the then current Term, Registry Operator shall have been found by an arbitrator (pursuant to Section 5.2 of this Agreement) or a court of competent jurisdiction on at least three (3) separate occasions to have been in (A) fundamental and material breach (whether or not cured) of Registry Operator's covenants set forth in Article 2 or (B) breach of its payment obligations under Article 6 of this Agreement.

(b) Upon the occurrence of the events set forth in Section 4.2(a) (i) or (ii), the Agreement shall terminate at the expiration of the then-current Term.

4.3 Termination by ICANN.

(a) ICANN may, upon notice to Registry Operator, terminate this Agreement if: (i) Registry Operator fails to cure (A) any fundamental and material breach of Registry Operator's representations and warranties set forth in Article 1 or covenants

set forth in Article 2, or (B) any breach of Registry Operator's payment obligations set forth in Article 6 of this Agreement, each within thirty (30) calendar days after ICANN gives Registry Operator notice of such breach, which notice will include with specificity the details of the alleged breach, (ii) an arbitrator or court of competent jurisdiction has finally determined that Registry Operator is in fundamental and material breach of such covenant(s) or in breach of its payment obligations, and (iii) Registry Operator fails to comply with such determination and cure such breach within ten (10) calendar days or such other time period as may be determined by the arbitrator or court of competent jurisdiction.

(b) ICANN may, upon notice to Registry Operator, terminate this Agreement if Registry Operator fails to complete all testing and procedures (identified by ICANN in writing to Registry Operator prior to the date hereof) for delegation of the TLD into the root zone within twelve (12) months of the Effective Date. Registry Operator may request an extension for up to additional twelve (12) months for delegation if it can demonstrate, to ICANN's reasonable satisfaction, that Registry Operator is working diligently and in good faith toward successfully completing the steps necessary for delegation of the TLD. Any fees paid by Registry Operator to ICANN prior to such termination date shall be retained by ICANN in full.

(c) ICANN may, upon notice to Registry Operator, terminate this Agreement if (i) Registry Operator fails to cure a material breach of Registry Operator's obligations set forth in Section 2.12 of this Agreement within thirty (30) calendar days of delivery of notice of such breach by ICANN, or if the Continued Operations Instrument is not in effect for greater than sixty (60) consecutive calendar days at any time following the Effective Date, (ii) an arbitrator or court of competent jurisdiction has finally determined that Registry Operator is in material breach of such covenant, and (iii) Registry Operator fails to cure such breach within ten (10) calendar days or such other time period as may be determined by the arbitrator or court of competent jurisdiction.

(d) ICANN may, upon notice to Registry Operator, terminate this Agreement if (i) Registry Operator makes an assignment for the benefit of creditors or similar act, (ii) attachment, garnishment or similar proceedings are commenced against Registry Operator, which proceedings are a material threat to Registry Operator's ability to operate the registry for the TLD, and are not dismissed within sixty (60) calendar days of their commencement, (iii) a trustee, receiver, liquidator or equivalent is appointed in place of Registry Operator or maintains control over any of Registry Operator's property, (iv) execution is levied upon any material property of Registry Operator, (v) proceedings are instituted by or against Registry Operator under any bankruptcy, insolvency, reorganization or other laws relating to the relief of debtors and such proceedings are not dismissed within sixty (60) calendar days of their commencement, or (vi) Registry Operator files for protection under the United States Bankruptcy Code, 11 U.S.C. Section 101, et seq., or a foreign equivalent or liquidates, dissolves or otherwise discontinues its operations or the operation of the TLD.

(e) ICANN may, upon thirty (30) calendar days' notice to Registry Operator, terminate this Agreement pursuant to Section 2 of Specification 7 or Sections 2 and 3 of Specification 11, subject to Registry Operator's right to challenge such termination as set forth in the applicable procedure described therein.

(f) ICANN may, upon notice to Registry Operator, terminate this Agreement if (i) Registry Operator knowingly employs any officer who is convicted of a misdemeanor related to financial activities or of any felony, or is judged by a court of competent jurisdiction to have committed fraud or breach of fiduciary duty, or is the subject of a judicial determination that ICANN reasonably deems as the substantive equivalent of any of the foregoing and such officer is not terminated within thirty (30) calendar days of Registry Operator's knowledge of the foregoing, or (ii) any member of Registry Operator's board of directors or similar governing body is convicted of a misdemeanor related to financial activities or of any felony, or is judged by a court of competent jurisdiction to have committed fraud or breach of fiduciary duty, or is the subject of a judicial determination that ICANN reasonably deems as the substantive equivalent of any of the foregoing and such member is not removed from Registry Operator's board of directors or similar governing body within thirty (30) calendar days of Registry Operator's knowledge of the foregoing.

(g) ICANN may, upon thirty (30) calendar days' notice to Registry Operator, terminate this Agreement as specified in Section 7.5.

(h) [*Applicable to intergovernmental organizations or governmental entities only.*] ICANN may terminate this Agreement pursuant to Section 7.16.

4.4 Termination by Registry Operator.

(a) Registry Operator may terminate this Agreement upon notice to ICANN if (i) ICANN fails to cure any fundamental and material breach of ICANN's covenants set forth in Article 3, within thirty (30) calendar days after Registry Operator gives ICANN notice of such breach, which notice will include with specificity the details of the alleged breach, (ii) an arbitrator or court of competent jurisdiction has finally determined that ICANN is in fundamental and material breach of such covenants, and (iii) ICANN fails to comply with such determination and cure such breach within ten (10) calendar days or such other time period as may be determined by the arbitrator or court of competent jurisdiction.

(b) Registry Operator may terminate this Agreement for any reason upon one hundred eighty (180) calendar day advance notice to ICANN.

4.5 Transition of Registry upon Termination of Agreement. Upon expiration of the Term pursuant to Section 4.1 or Section 4.2 or any termination of this Agreement pursuant to Section 4.3 or Section 4.4, Registry Operator shall provide ICANN or any successor registry operator that may be designated by ICANN for the TLD in accordance with this Section 4.5 with all data (including the data escrowed in accordance with Section 2.3) regarding operations of the registry for the TLD necessary to maintain operations and

registry functions that may be reasonably requested by ICANN or such successor registry operator. After consultation with Registry Operator, ICANN shall determine whether or not to transition operation of the TLD to a successor registry operator in its sole discretion and in conformance with the Registry Transition Process; provided, however, that (i) ICANN will take into consideration any intellectual property rights of Registry Operator (as communicated to ICANN by Registry Operator) in determining whether to transition operation of the TLD to a successor registry operator and (ii) if Registry Operator demonstrates to ICANN's reasonable satisfaction that (A) all domain name registrations in the TLD are registered to, and maintained by, Registry Operator or its Affiliates for their exclusive use, (B) Registry Operator does not sell, distribute or transfer control or use of any registrations in the TLD to any third party that is not an Affiliate of Registry Operator, and (C) transitioning operation of the TLD is not necessary to protect the public interest, then ICANN may not transition operation of the TLD to a successor registry operator upon the expiration or termination of this Agreement without the consent of Registry Operator (which shall not be unreasonably withheld, conditioned or delayed). For the avoidance of doubt, the foregoing sentence shall not prohibit ICANN from delegating the TLD pursuant to a future application process for the delegation of top-level domains, subject to any processes and objection procedures instituted by ICANN in connection with such application process intended to protect the rights of third parties. Registry Operator agrees that ICANN may make any changes it deems necessary to the IANA database for DNS and WHOIS records with respect to the TLD in the event of a transition of the TLD pursuant to this Section 4.5. In addition, ICANN or its designee shall retain and may enforce its rights under the Continued Operations Instrument for the maintenance and operation of the TLD, regardless of the reason for termination or expiration of this Agreement.

[*Alternative* ***Section 4.5 Transition of Registry upon Termination of Agreement*** *text for intergovernmental organizations or governmental entities or other special circumstances*:

"**Transition of Registry upon Termination of Agreement**. Upon expiration of the Term pursuant to Section 4.1 or Section 4.2 or any termination of this Agreement pursuant to Section 4.3 or Section 4.4, in connection with ICANN's designation of a successor registry operator for the TLD, Registry Operator and ICANN agree to consult each other and work cooperatively to facilitate and implement the transition of the TLD in accordance with this Section 4.5. After consultation with Registry Operator, ICANN shall determine whether or not to transition operation of the TLD to a successor registry operator in its sole discretion and in conformance with the Registry Transition Process. In the event ICANN determines to transition operation of the TLD to a successor registry operator, upon Registry Operator's consent (which shall not be unreasonably withheld, conditioned or delayed), Registry Operator shall provide ICANN or such successor registry operator for the TLD with any data regarding operations of the TLD necessary to maintain operations and registry functions that may be reasonably requested by ICANN or such successor registry operator in addition to data escrowed in accordance with Section 2.3 hereof. In the event that Registry Operator does not consent to provide such data, any registry data related to the TLD shall be returned to Registry Operator, unless otherwise agreed upon by the parties. Registry Operator agrees that ICANN may make any changes it deems necessary to

the IANA database for DNS and WHOIS records with respect to the TLD in the event of a transition of the TLD pursuant to this Section 4.5. In addition, ICANN or its designee shall retain and may enforce its rights under the Continued Operations Instrument, regardless of the reason for termination or expiration of this Agreement."]

4.6 Effect of Termination. Upon any expiration of the Term or termination of this Agreement, the obligations and rights of the parties hereto shall cease, provided that such expiration or termination of this Agreement shall not relieve the parties of any obligation or breach of this Agreement accruing prior to such expiration or termination, including, without limitation, all accrued payment obligations arising under Article 6. In addition, Article 5, Article 7, Section 2.12, Section 4.5, and this Section 4.6 shall survive the expiration or termination of this Agreement. For the avoidance of doubt, the rights of Registry Operator to operate the registry for the TLD shall immediately cease upon any expiration of the Term or termination of this Agreement.

ARTICLE 5.

DISPUTE RESOLUTION

5.1 Mediation. In the event of any dispute arising under or in connection with this Agreement, before either party may initiate arbitration pursuant to Section 5.2 below, ICANN and Registry Operator must attempt to resolve the dispute through mediation in accordance with the following terms and conditions:

(a) A party shall submit a dispute to mediation by written notice to the other party. The mediation shall be conducted by a single mediator selected by the parties. If the parties cannot agree on a mediator within fifteen (15) calendar days of delivery of written notice pursuant to this Section 5.1, the parties will promptly select a mutually acceptable mediation provider entity, which entity shall, as soon as practicable following such entity's selection, designate a mediator, who is a licensed attorney with general knowledge of contract law, has no ongoing business relationship with either party and, to the extent necessary to mediate the particular dispute, general knowledge of the domain name system. Any mediator must confirm in writing that he or she is not, and will not become during the term of the mediation, an employee, partner, executive officer, director, or security holder of ICANN or Registry Operator. If such confirmation is not provided by the appointed mediator, then a replacement mediator shall be appointed pursuant to this Section 5.1(a).

(b) The mediator shall conduct the mediation in accordance with the rules and procedures that he or she determines following consultation with the parties. The parties shall discuss the dispute in good faith and attempt, with the mediator's assistance, to reach an amicable resolution of the dispute. The mediation shall be treated as a settlement discussion and shall therefore be confidential and may not be used against either party in any later proceeding relating to the dispute, including any arbitration pursuant to Section 5.2. The mediator may not testify for either party in any later proceeding relating to the dispute.

(c) Each party shall bear its own costs in the mediation. The parties shall share equally the fees and expenses of the mediator. Each party shall treat information received from the other party pursuant to the mediation that is appropriately marked as confidential (as required by Section 7.15) as Confidential Information of such other party in accordance with Section 7.15.

(d) If the parties have engaged in good faith participation in the mediation but have not resolved the dispute for any reason, either party or the mediator may terminate the mediation at any time and the dispute can then proceed to arbitration pursuant to Section 5.2 below. If the parties have not resolved the dispute for any reason by the date that is ninety (90) calendar days following the date of the notice delivered pursuant to Section 5.1(a), the mediation shall automatically terminate (unless extended by agreement of the parties) and the dispute can then proceed to arbitration pursuant to Section 5.2 below.

5.2 Arbitration. Disputes arising under or in connection with this Agreement that are not resolved pursuant to Section 5.1, including requests for specific performance, will be resolved through binding arbitration conducted pursuant to the rules of the International Court of Arbitration of the International Chamber of Commerce. The arbitration will be conducted in the English language and will occur in Los Angeles County, California. Any arbitration will be in front of a single arbitrator, unless (i) ICANN is seeking punitive or exemplary damages, or operational sanctions, (ii) the parties agree in writing to a greater number of arbitrators, or (iii) the dispute arises under Section 7.6 or 7.7. In the case of clauses (i), (ii) or (iii) in the preceding sentence, the arbitration will be in front of three arbitrators with each party selecting one arbitrator and the two selected arbitrators selecting the third arbitrator. In order to expedite the arbitration and limit its cost, the arbitrator(s) shall establish page limits for the parties' filings in conjunction with the arbitration, and should the arbitrator(s) determine that a hearing is necessary, the hearing shall be limited to one (1) calendar day, provided that in any arbitration in which ICANN is seeking punitive or exemplary damages, or operational sanctions, the hearing may be extended for one (1) additional calendar day if agreed upon by the parties or ordered by the arbitrator(s) based on the arbitrator(s) independent determination or the reasonable request of one of the parties thereto. The prevailing party in the arbitration will have the right to recover its costs and reasonable attorneys' fees, which the arbitrator(s) shall include in the awards. In the event the arbitrators determine that Registry Operator has been repeatedly and willfully in fundamental and material breach of its obligations set forth in Article 2, Article 6 or Section 5.4 of this Agreement, ICANN may request the arbitrators award punitive or exemplary damages, or operational sanctions (including without limitation an order temporarily restricting Registry Operator's right to sell new registrations). Each party shall treat information received from the other party pursuant to the arbitration that is appropriately marked as confidential (as required by Section 7.15) as Confidential Information of such other party in accordance with Section 7.15. In any litigation involving ICANN concerning this Agreement, jurisdiction and exclusive venue for such litigation will be in a court located in Los Angeles County, California; however, the parties will also have the right to enforce a judgment of such a court in any court of competent jurisdiction.

[Alternative **Section 5.2 Arbitration** text for intergovernmental organizations or governmental entities or other special circumstances:

"**Arbitration**. Disputes arising under or in connection with this Agreement that are not resolved pursuant to Section 5.1, including requests for specific performance, will be resolved through binding arbitration conducted pursuant to the rules of the International Court of Arbitration of the International Chamber of Commerce. The arbitration will be conducted in the English language and will occur in Geneva, Switzerland, unless another location is mutually agreed upon by Registry Operator and ICANN. Any arbitration will be in front of a single arbitrator, unless (i) ICANN is seeking punitive or exemplary damages, or operational sanctions, (ii) the parties agree in writing to a greater number of arbitrators, or (iii) the dispute arises under Section 7.6 or 7.7. In the case of clauses (i), (ii) or (iii) in the preceding sentence, the arbitration will be in front of three arbitrators with each party selecting one arbitrator and the two selected arbitrators selecting the third arbitrator. In order to expedite the arbitration and limit its cost, the arbitrator(s) shall establish page limits for the parties' filings in conjunction with the arbitration, and should the arbitrator(s) determine that a hearing is necessary, the hearing shall be limited to one (1) calendar day, provided that in any arbitration in which ICANN is seeking punitive or exemplary damages, or operational sanctions, the hearing may be extended for one (1) additional calendar day if agreed upon by the parties or ordered by the arbitrator(s) based on the arbitrator(s) independent determination or the reasonable request of one of the parties thereto. The prevailing party in the arbitration will have the right to recover its costs and reasonable attorneys' fees, which the arbitrator(s) shall include in the awards. In the event the arbitrators determine that Registry Operator has been repeatedly and willfully in fundamental and material breach of its obligations set forth in Article 2, Article 6 or Section 5.4 of this Agreement, ICANN may request the arbitrators award punitive or exemplary damages, or operational sanctions (including without limitation an order temporarily restricting Registry Operator's right to sell new registrations). Each party shall treat information received from the other party pursuant to the arbitration that is appropriately marked as confidential (as required by Section 7.15) as Confidential Information of such other party in accordance with Section 7.15. In any litigation involving ICANN concerning this Agreement, jurisdiction and exclusive venue for such litigation will be in a court located in Geneva, Switzerland, unless another location is mutually agreed upon by Registry Operator and ICANN; however, the parties will also have the right to enforce a judgment of such a court in any court of competent jurisdiction."]

5.3 Limitation of Liability. ICANN's aggregate monetary liability for violations of this Agreement will not exceed an amount equal to the Registry-Level Fees paid by Registry Operator to ICANN within the preceding twelve-month period pursuant to this Agreement (excluding the Variable Registry-Level Fee set forth in Section 6.3, if any). Registry Operator's aggregate monetary liability to ICANN for breaches of this Agreement will be limited to an amount equal to the fees paid to ICANN during the preceding twelve-month period (excluding the Variable Registry-Level Fee set forth in Section 6.3, if any), and punitive and exemplary damages, if any, awarded in accordance with Section 5.2, except with respect to Registry Operator's indemnification obligations pursuant to Section 7.1 and Section 7.2. In no event shall either party be liable for special, punitive, exemplary

or consequential damages arising out of or in connection with this Agreement or the performance or nonperformance of obligations undertaken in this Agreement, except as provided in Section 5.2. Except as otherwise provided in this Agreement, neither party makes any warranty, express or implied, with respect to the services rendered by itself, its servants or agents, or the results obtained from their work, including, without limitation, any implied warranty of merchantability, non-infringement or fitness for a particular purpose.

5.4 Specific Performance. Registry Operator and ICANN agree that irreparable damage could occur if any of the provisions of this Agreement was not performed in accordance with its specific terms. Accordingly, the parties agree that they each shall be entitled to seek from the arbitrator or court of competent jurisdiction specific performance of the terms of this Agreement (in addition to any other remedy to which each party is entitled).

ARTICLE 6.

FEES

6.1 Registry-Level Fees.

(a) Registry Operator shall pay ICANN a registry-level fee equal to (i) the registry fixed fee of US$6,250 per calendar quarter and (ii) the registry-level transaction fee (collectively, the "Registry-Level Fees"). The registry-level transaction fee will be equal to the number of annual increments of an initial or renewal domain name registration (at one or more levels, and including renewals associated with transfers from one ICANN-accredited registrar to another, each a "Transaction"), during the applicable calendar quarter multiplied by US$0.25; provided, however that the registry-level transaction fee shall not apply until and unless more than 50,000 Transactions have occurred in the TLD during any calendar quarter or any consecutive four calendar quarter period in the aggregate (the "Transaction Threshold") and shall apply to each Transaction that occurred during each quarter in which the Transaction Threshold has been met, but shall not apply to each quarter in which the Transaction Threshold has not been met. Registry Operator's obligation to pay the quarterly registry-level fixed fee will begin on the date on which the TLD is delegated in the DNS to Registry Operator. The first quarterly payment of the registry-level fixed fee will be prorated based on the number of calendar days between the delegation date and the end of the calendar quarter in which the delegation date falls.

(b) Subject to Section 6.1(a), Registry Operator shall pay the Registry-Level Fees on a quarterly basis to an account designated by ICANN within thirty (30) calendar days following the date of the invoice provided by ICANN.

6.2 Cost Recovery for RSTEP. Requests by Registry Operator for the approval of Additional Services pursuant to Section 2.1 may be referred by ICANN to the Registry Services Technical Evaluation Panel ("RSTEP") pursuant to that process at

http://www.icann.org/en/registries/rsep/. In the event that such requests are referred to RSTEP, Registry Operator shall remit to ICANN the invoiced cost of the RSTEP review within fourteen (14) calendar days of receipt of a copy of the RSTEP invoice from ICANN, unless ICANN determines, in its sole and absolute discretion, to pay all or any portion of the invoiced cost of such RSTEP review.

6.3 Variable Registry-Level Fee.

(a) If the ICANN accredited registrars (accounting, in the aggregate, for payment of two-thirds of all registrar-level fees (or such portion of ICANN accredited registrars necessary to approve variable accreditation fees under the then-current registrar accreditation agreement), do not approve, pursuant to the terms of their registrar accreditation agreements with ICANN, the variable accreditation fees established by the ICANN Board of Directors for any ICANN fiscal year, upon delivery of notice from ICANN, Registry Operator shall pay to ICANN a variable registry-level fee, which shall be paid on a fiscal quarter basis, and shall accrue as of the beginning of the first fiscal quarter of such ICANN fiscal year (the "Variable Registry-Level Fee"). The fee will be calculated and invoiced by ICANN on a quarterly basis, and shall be paid by Registry Operator within sixty (60) calendar days with respect to the first quarter of such ICANN fiscal year and within twenty (20) calendar days with respect to each remaining quarter of such ICANN fiscal year, of receipt of the invoiced amount by ICANN. The Registry Operator may invoice and collect the Variable Registry-Level Fees from the registrars that are party to a registry-registrar agreement with Registry Operator (which agreement may specifically provide for the reimbursement of Variable Registry-Level Fees paid by Registry Operator pursuant to this Section 6.3); provided, that the fees shall be invoiced to all ICANN accredited registrars if invoiced to any. The Variable Registry-Level Fee, if collectible by ICANN, shall be an obligation of Registry Operator and shall be due and payable as provided in this Section 6.3 irrespective of Registry Operator's ability to seek and obtain reimbursement of such fee from registrars. In the event ICANN later collects variable accreditation fees for which Registry Operator has paid ICANN a Variable Registry-Level Fee, ICANN shall reimburse the Registry Operator an appropriate amount of the Variable Registry-Level Fee, as reasonably determined by ICANN. If the ICANN accredited registrars (as a group) do approve, pursuant to the terms of their registrar accreditation agreements with ICANN, the variable accreditation fees established by the ICANN Board of Directors for a fiscal year, ICANN shall not be entitled to a Variable-Level Fee hereunder for such fiscal year, irrespective of whether the ICANN accredited registrars comply with their payment obligations to ICANN during such fiscal year.

(b) The amount of the Variable Registry-Level Fee will be specified for each registrar, and may include both a per-registrar component and a transactional component. The per-registrar component of the Variable Registry-Level Fee shall be specified by ICANN in accordance with the budget adopted by the ICANN Board of Directors for each ICANN fiscal year. The transactional component of the Variable Registry-Level Fee shall be specified by ICANN in accordance with the budget adopted by the ICANN Board of Directors for each ICANN fiscal year but shall not exceed US$0.25 per

domain name registration (including renewals associated with transfers from one ICANN accredited registrar to another) per year.

6.4 Pass Through Fees. Registry Operator shall pay to ICANN (i) a one-time fee equal to US$5,000 for access to and use of the Trademark Clearinghouse as described in Specification 7 (the "RPM Access Fee") and (ii) US$0.25[1] per Sunrise Registration and Claims Registration (as such terms are used in Trademark Clearinghouse RPMs incorporated herein pursuant to Specification 7) (the "RPM Registration Fee"). The RPM Access Fee will be invoiced as of the Effective Date of this Agreement, and Registry Operator shall pay such fee to an account specified by ICANN within thirty (30) calendar days following the date of the invoice. ICANN will invoice Registry Operator quarterly for the RPM Registration Fee, which shall be due in accordance with the invoicing and payment procedure specified in Section 6.1.

6.5 Adjustments to Fees. Notwithstanding any of the fee limitations set forth in this Article 6, commencing upon the expiration of the first year of this Agreement, and upon the expiration of each year thereafter during the Term, the then-current fees set forth in Section 6.1 and Section 6.3 may be adjusted, at ICANN's discretion, by a percentage equal to the percentage change, if any, in (i) the Consumer Price Index for All Urban Consumers, U.S. City Average (1982-1984 = 100) published by the United States Department of Labor, Bureau of Labor Statistics, or any successor index (the "CPI") for the month which is one (1) month prior to the commencement of the applicable year, over (ii) the CPI published for the month which is one (1) month prior to the commencement of the immediately prior year. In the event of any such increase, ICANN shall provide notice to Registry Operator specifying the amount of such adjustment. Any fee adjustment under this Section 6.5 shall be effective as of the first day of the first calendar quarter following at least thirty (30) days after ICANN's delivery to Registry Operator of such fee adjustment notice.

6.6 Additional Fee on Late Payments. For any payments thirty (30) calendar days or more overdue under this Agreement, Registry Operator shall pay an additional fee on late payments at the rate of 1.5% per month or, if less, the maximum rate permitted by applicable law.

ARTICLE 7.

MISCELLANEOUS

7.1 Indemnification of ICANN.

(a) Registry Operator shall indemnify and defend ICANN and its directors, officers, employees, and agents (collectively, "Indemnitees") from and against any and all third-party claims, damages, liabilities, costs, and expenses, including reasonable legal fees and expenses, arising out of or relating to intellectual property ownership rights with respect to the TLD, the delegation of the TLD to Registry Operator, Registry Operator's

[1] Subject to further approvals.

operation of the registry for the TLD or Registry Operator's provision of Registry Services, provided that Registry Operator shall not be obligated to indemnify or defend any Indemnitee to the extent the claim, damage, liability, cost or expense arose: (i) due to the actions or omissions of ICANN, its subcontractors, panelists or evaluators specifically related to and occurring during the registry TLD application process (other than actions or omissions requested by or for the benefit of Registry Operator), or (ii) due to a breach by ICANN of any obligation contained in this Agreement or any willful misconduct by ICANN. This Section shall not be deemed to require Registry Operator to reimburse or otherwise indemnify ICANN for costs associated with the negotiation or execution of this Agreement, or with monitoring or management of the parties' respective obligations hereunder. Further, this Section shall not apply to any request for attorney's fees in connection with any litigation or arbitration between or among the parties, which shall be governed by Article 5 or otherwise awarded by a court of competent jurisdiction or arbitrator.

[Alternative **Section 7.1(a)** text for intergovernmental organizations or governmental entities:

"Registry Operator shall use its best efforts to cooperate with ICANN in order to ensure that ICANN does not incur any costs associated with claims, damages, liabilities, costs and expenses, including reasonable legal fees and expenses, arising out of or relating to intellectual property ownership rights with respect to the TLD, the delegation of the TLD to Registry Operator, Registry Operator's operation of the registry for the TLD or Registry Operator's provision of Registry Services, provided that Registry Operator shall not be obligated to provide such cooperation to the extent the claim, damage, liability, cost or expense arose due to a breach by ICANN of any of its obligations contained in this Agreement or any willful misconduct by ICANN. This Section shall not be deemed to require Registry Operator to reimburse or otherwise indemnify ICANN for costs associated with the negotiation or execution of this Agreement, or with monitoring or management of the parties' respective obligations hereunder. Further, this Section shall not apply to any request for attorney's fees in connection with any litigation or arbitration between or among the parties, which shall be governed by Article 5 or otherwise awarded by a court of competent jurisdiction or arbitrator."]

(b) For any claims by ICANN for indemnification whereby multiple registry operators (including Registry Operator) have engaged in the same actions or omissions that gave rise to the claim, Registry Operator's aggregate liability to indemnify ICANN with respect to such claim shall be limited to a percentage of ICANN's total claim, calculated by dividing the number of total domain names under registration with Registry Operator within the TLD (which names under registration shall be calculated consistently with Article 6 hereof for any applicable quarter) by the total number of domain names under registration within all top level domains for which the registry operators thereof are engaging in the same acts or omissions giving rise to such claim. For the purposes of reducing Registry Operator's liability under Section 7.1(a) pursuant to this Section 7.1(b), Registry Operator shall have the burden of identifying the other registry operators that are engaged in the same actions or omissions that gave rise to the claim, and demonstrating, to ICANN's reasonable satisfaction, such other registry operators' culpability for such actions

or omissions. For the avoidance of doubt, in the event that a registry operator is engaged in the same acts or omissions giving rise to the claims, but such registry operator(s) do not have the same or similar indemnification obligations to ICANN as set forth in Section 7.1(a) above, the number of domains under management by such registry operator(s) shall nonetheless be included in the calculation in the preceding sentence. [***Note: This Section 7.1(b) is inapplicable to intergovernmental organizations or governmental entities.***]

7.2 Indemnification Procedures. If any third-party claim is commenced that is indemnified under Section 7.1 above, ICANN shall provide notice thereof to Registry Operator as promptly as practicable. Registry Operator shall be entitled, if it so elects, in a notice promptly delivered to ICANN, to immediately take control of the defense and investigation of such claim and to employ and engage attorneys reasonably acceptable to ICANN to handle and defend the same, at Registry Operator's sole cost and expense, provided that in all events ICANN will be entitled to control at its sole cost and expense the litigation of issues concerning the validity or interpretation of ICANN's policies, Bylaws or conduct. ICANN shall cooperate, at Registry Operator's cost and expense, in all reasonable respects with Registry Operator and its attorneys in the investigation, trial, and defense of such claim and any appeal arising therefrom, and may, at its own cost and expense, participate, through its attorneys or otherwise, in such investigation, trial and defense of such claim and any appeal arising therefrom. No settlement of a claim that involves a remedy affecting ICANN other than the payment of money in an amount that is fully indemnified by Registry Operator will be entered into without the consent of ICANN. If Registry Operator does not assume full control over the defense of a claim subject to such defense in accordance with this Section 7.2, ICANN will have the right to defend the claim in such manner as it may deem appropriate, at the cost and expense of Registry Operator and Registry Operator shall cooperate in such defense. [***Note: This Section 7.2 is inapplicable to intergovernmental organizations or governmental entities***.]

7.3 Defined Terms. For purposes of this Agreement, unless such definitions are amended pursuant to a Consensus Policy at a future date, in which case the following definitions shall be deemed amended and restated in their entirety as set forth in such Consensus Policy, Security and Stability shall be defined as follows:

(a) For the purposes of this Agreement, an effect on "Security" shall mean (1) the unauthorized disclosure, alteration, insertion or destruction of registry data, or (2) the unauthorized access to or disclosure of information or resources on the Internet by systems operating in accordance with all applicable standards.

(b) For purposes of this Agreement, an effect on "Stability" shall refer to (1) lack of compliance with applicable relevant standards that are authoritative and published by a well-established and recognized Internet standards body, such as the relevant Standards-Track or Best Current Practice Requests for Comments ("RFCs") sponsored by the Internet Engineering Task Force; or (2) the creation of a condition that adversely affects the throughput, response time, consistency or coherence of responses to Internet servers or end systems operating in accordance with applicable relevant standards that are authoritative and published by a well-established and recognized

Internet standards body, such as the relevant Standards-Track or Best Current Practice RFCs, and relying on Registry Operator's delegated information or provisioning of services.

7.4 No Offset. All payments due under this Agreement will be made in a timely manner throughout the Term and notwithstanding the pendency of any dispute (monetary or otherwise) between Registry Operator and ICANN.

7.5 Change of Control; Assignment and Subcontracting. Except as set forth in this Section 7.5, neither party may assign any of its rights and obligations under this Agreement without the prior written approval of the other party, which approval will not be unreasonably withheld. For purposes of this Section 7.5, a direct or indirect change of control of Registry Operator or any subcontracting arrangement that relates to any Critical Function (as identified in Section 6 of Specification 10) for the TLD (a "Material Subcontracting Arrangement") shall be deemed an assignment.

(a) Registry Operator must provide no less than thirty (30) calendar days advance notice to ICANN of any assignment or Material Subcontracting Arrangement, and any agreement to assign or subcontract any portion of the operations of the TLD (whether or not a Material Subcontracting Arrangement) must mandate compliance with all covenants, obligations and agreements by Registry Operator hereunder, and Registry Operator shall continue to be bound by such covenants, obligations and agreements. Registry Operator must also provide no less than thirty (30) calendar days advance notice to ICANN prior to the consummation of any transaction anticipated to result in a direct or indirect change of control of Registry Operator.

(b) Within thirty (30) calendar days of either such notification pursuant to Section 7.5(a), ICANN may request additional information from Registry Operator establishing (i) compliance with this Agreement and (ii) that the party acquiring such control or entering into such assignment or Material Subcontracting Arrangement (in any case, the "Contracting Party") and the ultimate parent entity of the Contracting Party meets the ICANN-adopted specification or policy on registry operator criteria then in effect (including with respect to financial resources and operational and technical capabilities), in which case Registry Operator must supply the requested information within fifteen (15) calendar days.

(c) Registry Operator agrees that ICANN's consent to any assignment, change of control or Material Subcontracting Arrangement will also be subject to background checks on any proposed Contracting Party (and such Contracting Party's Affiliates).

(d) If ICANN fails to expressly provide or withhold its consent to any assignment, direct or indirect change of control of Registry Operator or any Material Subcontracting Arrangement within thirty (30) calendar days of ICANN's receipt of notice of such transaction (or, if ICANN has requested additional information from Registry Operator as set forth above, thirty (30) calendar days of the receipt of all requested written

information regarding such transaction) from Registry Operator, ICANN shall be deemed to have consented to such transaction.

(e) In connection with any such assignment, change of control or Material Subcontracting Arrangement, Registry Operator shall comply with the Registry Transition Process.

(f) Notwithstanding the foregoing, (i) any consummated change of control shall not be voidable by ICANN; provided, however, that, if ICANN reasonably determines to withhold its consent to such transaction, ICANN may terminate this Agreement pursuant to Section 4.3(g), (ii) ICANN may assign this Agreement without the consent of Registry Operator upon approval of the ICANN Board of Directors in conjunction with a reorganization, reconstitution or re-incorporation of ICANN upon such assignee's express assumption of the terms and conditions of this Agreement, (iii) Registry Operator may assign this Agreement without the consent of ICANN directly to a wholly-owned subsidiary of Registry Operator, or, if Registry Operator is a wholly-owned subsidiary, to its direct parent or to another wholly-owned subsidiary of its direct parent, upon such subsidiary's or parent's, as applicable, express assumption of the terms and conditions of this Agreement, and (iv) ICANN shall be deemed to have consented to any assignment, Material Subcontracting Arrangement or change of control transaction in which the Contracting Party is an existing operator of a generic top-level domain pursuant to a registry agreement between such Contracting Party and ICANN (provided that such Contracting Party is then in compliance with the terms and conditions of such registry agreement in all material respects), unless ICANN provides to Registry Operator a written objection to such transaction within ten (10) calendar days of ICANN's receipt of notice of such transaction pursuant to this Section 7.5. Notwithstanding Section 7.5(a), in the event an assignment is made pursuant to clauses (ii) or (iii) of this Section 7.5(f), the assigning party will provide the other party with prompt notice following any such assignment.

7.6 Amendments and Waivers.

(a) If the ICANN Board of Directors determines that an amendment to this Agreement (including to the Specifications referred to herein) and all other registry agreements between ICANN and the Applicable Registry Operators (the "Applicable Registry Agreements") is desirable (each, a "Special Amendment"), ICANN may adopt a Special Amendment pursuant to the requirements of and process set forth in this Section 7.6; provided that a Special Amendment may not be a Restricted Amendment.

(b) Prior to submitting a Special Amendment for Registry Operator Approval, ICANN shall first consult in good faith with the Working Group regarding the form and substance of such Special Amendment. The duration of such consultation shall be reasonably determined by ICANN based on the substance of the Special Amendment. Following such consultation, ICANN may propose the adoption of a Special Amendment by publicly posting such amendment on its website for no less than thirty (30) calendar days (the "Posting Period") and providing notice of such proposed amendment to the Applicable Registry Operators in accordance with Section 7.9. ICANN will consider the public

comments submitted on a Special Amendment during the Posting Period (including comments submitted by the Applicable Registry Operators).

(c) If, within one hundred eighty (180) calendar days following the expiration of the Posting Period (the "Approval Period"), the ICANN Board of Directors approves a Special Amendment (which may be in a form different than submitted for public comment, but must address the subject matter of the Special Amendment posted for public comment, as modified to reflect and/or address input from the Working Group and public comments), ICANN shall provide notice of, and submit, such Special Amendment for approval or disapproval by the Applicable Registry Operators. If, during the sixty (60) calendar day period following the date ICANN provides such notice to the Applicable Registry Operators, such Special Amendment receives Registry Operator Approval, such Special Amendment shall be deemed approved (an "Approved Amendment") by the Applicable Registry Operators, and shall be effective and deemed an amendment to this Agreement on the date that is sixty (60) calendar days following the date ICANN provided notice of the approval of such Approved Amendment to Registry Operator (the "Amendment Effective Date"). In the event that a Special Amendment does not receive Registry Operator Approval, the Special Amendment shall be deemed not approved by the Applicable Registry Operators (a "Rejected Amendment"). A Rejected Amendment will have no effect on the terms and conditions of this Agreement, except as set forth below.

(d) If the ICANN Board of Directors reasonably determines that a Rejected Amendment falls within the subject matter categories set forth in Section 1.2 of Specification 1, the ICANN Board of Directors may adopt a resolution (the date such resolution is adopted is referred to herein as the "Resolution Adoption Date") requesting an Issue Report (as such term is defined in ICANN's Bylaws) by the Generic Names Supporting Organization (the "GNSO") regarding the substance of such Rejected Amendment. The policy development process undertaken by the GNSO pursuant to such requested Issue Report is referred to herein as a "PDP." If such PDP results in a Final Report supported by a GNSO Supermajority (as defined in ICANN's Bylaws) that either (i) recommends adoption of the Rejected Amendment as Consensus Policy or (ii) recommends against adoption of the Rejected Amendment as Consensus Policy, and, in the case of (i) above, the Board adopts such Consensus Policy, Registry Operator shall comply with its obligations pursuant to Section 2.2 of this Agreement. In either case, ICANN will abandon the Rejected Amendment and it will have no effect on the terms and conditions of this Agreement. Notwithstanding the foregoing provisions of this Section 7.6(d), the ICANN Board of Directors shall not be required to initiate a PDP with respect to a Rejected Amendment if, at any time in the twelve (12) month period preceding the submission of such Rejected Amendment for Registry Operator Approval pursuant to Section 7.6(c), the subject matter of such Rejected Amendment was the subject of a concluded or otherwise abandoned or terminated PDP that did not result in a GNSO Supermajority recommendation.

(e) If (a) a Rejected Amendment does not fall within the subject matter categories set forth in Section 1.2 of Specification 1, (b) the subject matter of a Rejected Amendment was, at any time in the twelve (12) month period preceding the submission of such Rejected Amendment for Registry Operator Approval pursuant to Section 7.6(c), the

subject of a concluded or otherwise abandoned or terminated PDP that did not result in a GNSO Supermajority recommendation, or (c) a PDP does not result in a Final Report supported by a GNSO Supermajority that either (A) recommends adoption of the Rejected Amendment as Consensus Policy or (B) recommends against adoption of the Rejected Amendment as Consensus Policy (or such PDP has otherwise been abandoned or terminated for any reason), then, in any such case, such Rejected Amendment may still be adopted and become effective in the manner described below. In order for the Rejected Amendment to be adopted, the following requirements must be satisfied:

(i) the subject matter of the Rejected Amendment must be within the scope of ICANN's mission and consistent with a balanced application of its core values (as described in ICANN's Bylaws);

(ii) the Rejected Amendment must be justified by a Substantial and Compelling Reason in the Public Interest, must be likely to promote such interest, taking into account competing public and private interests that are likely to be affected by the Rejected Amendment, and must be narrowly tailored and no broader than reasonably necessary to address such Substantial and Compelling Reason in the Public Interest;

(iii) to the extent the Rejected Amendment prohibits or requires conduct or activities, imposes material costs on the Applicable Registry Operators, and/or materially reduces public access to domain name services, the Rejected Amendment must be the least restrictive means reasonably available to address the Substantial and Compelling Reason in the Public Interest;

(iv) the ICANN Board of Directors must submit the Rejected Amendment, along with a written explanation of the reasoning related to its determination that the Rejected Amendment meets the requirements set out in subclauses (i) through (iii) above, for public comment for a period of no less than thirty (30) calendar days; and

(v) following such public comment period, the ICANN Board of Directors must (a) engage in consultation (or direct ICANN management to engage in consultation) with the Working Group, subject matter experts, members of the GNSO, relevant advisory committees and other interested stakeholders with respect to such Rejected Amendment for a period of no less than sixty (60) calendar days; and (b) following such consultation, reapprove the Rejected Amendment (which may be in a form different than submitted for Registry Operator Approval, but must address the subject matter of the Rejected Amendment, as modified to reflect and/or address input from the Working Group and public comments) by the affirmative vote of at least two-thirds of the members of the ICANN Board of Directors eligible to vote on such matter, taking into account any ICANN policy affecting such

eligibility, including ICANN's Conflict of Interest Policy (a "Board Amendment").

Such Board Amendment shall, subject to Section 7.6(f), be deemed an Approved Amendment, and shall be effective and deemed an amendment to this Agreement on the date that is sixty (60) calendar days following the date ICANN provided notice of the approval of such Board Amendment to Registry Operator (which effective date shall be deemed the Amendment Effective Date hereunder). Notwithstanding the foregoing, a Board Amendment may not amend the registry fees charged by ICANN hereunder, or amend this Section 7.6.

(f) Notwithstanding the provisions of Section 7.6(e), a Board Amendment shall not be deemed an Approved Amendment if, during the thirty (30) calendar day period following the approval by the ICANN Board of Directors of the Board Amendment, the Working Group, on the behalf of the Applicable Registry Operators, submits to the ICANN Board of Directors an alternative to the Board Amendment (an "Alternative Amendment") that meets the following requirements:

(i) sets forth the precise text proposed by the Working Group to amend this Agreement in lieu of the Board Amendment;

(ii) addresses the Substantial and Compelling Reason in the Public Interest identified by the ICANN Board of Directors as the justification for the Board Amendment; and

(iii) compared to the Board Amendment is: (a) more narrowly tailored to address such Substantial and Compelling Reason in the Public Interest, and (b) to the extent the Alternative Amendment prohibits or requires conduct or activities, imposes material costs on Affected Registry Operators, or materially reduces access to domain name services, is a less restrictive means to address the Substantial and Compelling Reason in the Public Interest.

Any proposed amendment that does not meet the requirements of subclauses (i) through (iii) in the immediately preceding sentence shall not be considered an Alternative Amendment hereunder and therefore shall not supersede or delay the effectiveness of the Board Amendment. If, following the submission of the Alternative Amendment to the ICANN Board of Directors, the Alternative Amendment receives Registry Operator Approval, the Alternative Amendment shall supersede the Board Amendment and shall be deemed an Approved Amendment hereunder (and shall be effective and deemed an amendment to this Agreement on the date that is sixty (60) calendar days following the date ICANN provided notice of the approval of such Alternative Amendment to Registry Operator, which effective date shall deemed the Amendment Effective Date hereunder), unless, within a period of sixty (60) calendar days following the date that the Working Group notifies the ICANN Board of Directors of Registry Operator Approval of such Alternative Amendment (during which time ICANN shall engage with the Working Group

with respect to the Alternative Amendment), the ICANN Board of Directors by the affirmative vote of at least two-thirds of the members of the ICANN Board of Directors eligible to vote on such matter, taking into account any ICANN policy affecting such eligibility, including ICANN's Conflict of Interest Policy, rejects the Alternative Amendment. If (A) the Alternative Amendment does not receive Registry Operator Approval within thirty (30) calendar days of submission of such Alternative Amendment to the Applicable Registry Operators (and the Working Group shall notify ICANN of the date of such submission), or (B) the ICANN Board of Directors rejects the Alternative Amendment by such two-thirds vote, the Board Amendment (and not the Alternative Amendment) shall be effective and deemed an amendment to this Agreement on the date that is sixty (60) calendar days following the date ICANN provided notice to Registry Operator (which effective date shall deemed the Amendment Effective Date hereunder). If the ICANN Board of Directors rejects an Alternative Amendment, the board shall publish a written rationale setting forth its analysis of the criteria set forth in Sections 7.6(f)(i) through 7.6(f)(iii). The ability of the ICANN Board of Directors to reject an Alternative Amendment hereunder does not relieve the Board of the obligation to ensure that any Board Amendment meets the criteria set forth in Section 7.6(e)(i) through 7.6(e)(v).

(g) In the event that Registry Operator believes an Approved Amendment does not meet the substantive requirements set out in this Section 7.6 or has been adopted in contravention of any of the procedural provisions of this Section 7.6, Registry Operator may challenge the adoption of such Special Amendment pursuant to the dispute resolution provisions set forth in Article 5, except that such arbitration shall be conducted by a three-person arbitration panel. Any such challenge must be brought within sixty (60) calendar days following the date ICANN provided notice to Registry Operator of the Approved Amendment, and ICANN may consolidate all challenges brought by registry operators (including Registry Operator) into a single proceeding. The Approved Amendment will be deemed not to have amended this Agreement during the pendency of the dispute resolution process.

(h) Registry Operator may apply in writing to ICANN for an exemption from the Approved Amendment (each such request submitted by Registry Operator hereunder, an "Exemption Request") during the thirty (30) calendar day period following the date ICANN provided notice to Registry Operator of such Approved Amendment. Each Exemption Request will set forth the basis for such request and provide detailed support for an exemption from the Approved Amendment. An Exemption Request may also include a detailed description and support for any alternatives to, or a variation of, the Approved Amendment proposed by such Registry Operator. An Exemption Request may only be granted upon a clear and convincing showing by Registry Operator that compliance with the Approved Amendment conflicts with applicable laws or would have a material adverse effect on the long-term financial condition or results of operations of Registry Operator. No Exemption Request will be granted if ICANN determines, in its reasonable discretion, that granting such Exemption Request would be materially harmful to registrants or result in the denial of a direct benefit to registrants. Within ninety (90) calendar days of ICANN's receipt of an Exemption Request, ICANN shall either approve (which approval may be conditioned or consist of alternatives to or a variation of the Approved Amendment) or

deny the Exemption Request in writing, during which time the Approved Amendment will not amend this Agreement. If the Exemption Request is approved by ICANN, the Approved Amendment will not amend this Agreement; provided, that any conditions, alternatives or variations of the Approved Amendment required by ICANN shall be effective and, to the extent applicable, will amend this Agreement as of the Amendment Effective Date. If such Exemption Request is denied by ICANN, the Approved Amendment will amend this Agreement as of the Amendment Effective Date (or, if such date has passed, such Approved Amendment shall be deemed effective immediately on the date of such denial), provided that Registry Operator may, within thirty (30) calendar days following receipt of ICANN's determination, appeal ICANN's decision to deny the Exemption Request pursuant to the dispute resolution procedures set forth in Article 5. The Approved Amendment will be deemed not to have amended this Agreement during the pendency of the dispute resolution process. For avoidance of doubt, only Exemption Requests submitted by Registry Operator that are approved by ICANN pursuant to this Section 7.6(j), agreed to by ICANN following mediation pursuant to Section 5.1 or through an arbitration decision pursuant to Section 5.2 shall exempt Registry Operator from any Approved Amendment, and no Exemption Request granted to any other Applicable Registry Operator (whether by ICANN or through arbitration) shall have any effect under this Agreement or exempt Registry Operator from any Approved Amendment.

(i) Except as set forth in this Section 7.6, Section 7.7 and as otherwise set forth in this Agreement and the Specifications hereto, no amendment, supplement or modification of this Agreement or any provision hereof shall be binding unless executed in writing by both parties, and nothing in this Section 7.6 or Section 7.7 shall restrict ICANN and Registry Operator from entering into bilateral amendments and modifications to this Agreement negotiated solely between the two parties. No waiver of any provision of this Agreement shall be binding unless evidenced by a writing signed by the party waiving compliance with such provision. No waiver of any of the provisions of this Agreement or failure to enforce any of the provisions hereof shall be deemed or shall constitute a waiver of any other provision hereof, nor shall any such waiver constitute a continuing waiver unless otherwise expressly provided. For the avoidance of doubt, nothing in this Sections 7.6 or 7.7 shall be deemed to limit Registry Operator's obligation to comply with Section 2.2.

(j) For purposes of this Section 7.6, the following terms shall have the following meanings:

(i) "Applicable Registry Operators" means, collectively, the registry operators of top-level domains party to a registry agreement that contains a provision similar to this Section 7.6, including Registry Operator.

(ii) "Registry Operator Approval" means the receipt of each of the following: (A) the affirmative approval of the Applicable Registry Operators whose payments to ICANN accounted for two-thirds of the total amount of fees (converted to U.S. dollars, if applicable, at the prevailing exchange rate published the prior day in the U.S. Edition of the Wall Street Journal for the

date such calculation is made by ICANN) paid to ICANN by all the Applicable Registry Operators during the immediately previous calendar year pursuant to the Applicable Registry Agreements, and (B) the affirmative approval of a majority of the Applicable Registry Operators at the time such approval is obtained. For the avoidance of doubt, with respect to clause (B), each Applicable Registry Operator shall have one vote for each top-level domain operated by such Registry Operator pursuant to an Applicable Registry Agreement.

(iii) "Restricted Amendment" means the following: (A) an amendment of Specification 1, (B) except to the extent addressed in Section 2.10 hereof, an amendment that specifies the price charged by Registry Operator to registrars for domain name registrations, (C) an amendment to the definition of Registry Services as set forth in the first paragraph of Section 2.1 of Specification 6, or (D) an amendment to the length of the Term.

(iv) "Substantial and Compelling Reason in the Public Interest" means a reason that is justified by an important, specific, and articulated public interest goal that is within ICANN's mission and consistent with a balanced application of ICANN's core values as defined in ICANN's Bylaws.

(v) "Working Group" means representatives of the Applicable Registry Operators and other members of the community that the Registry Stakeholders Group appoints, from time to time, to serve as a working group to consult on amendments to the Applicable Registry Agreements (excluding bilateral amendments pursuant to Section 7.6(i)).

(k) Notwithstanding anything in this Section 7.6 to the contrary, (i) if Registry Operator provides evidence to ICANN's reasonable satisfaction that the Approved Amendment would materially increase the cost of providing Registry Services, then ICANN will allow up to one-hundred eighty (180) calendar days for Approved Amendment to become effective with respect to Registry Operator, and (ii) no Approved Amendment adopted pursuant to Section 7.6 shall become effective with respect to Registry Operator if Registry Operator provides ICANN with an irrevocable notice of termination pursuant to Section 4.4(b).

7.7 Negotiation Process.

(a) If either the Chief Executive Officer of ICANN ("CEO") or the Chairperson of the Registry Stakeholder Group ("Chair") desires to discuss any revision(s) to this Agreement, the CEO or Chair, as applicable, shall provide written notice to the other person, which shall set forth in reasonable detail the proposed revisions to this Agreement (a "Negotiation Notice"). Notwithstanding the foregoing, neither the CEO nor the Chair may (i) propose revisions to this Agreement that modify any Consensus Policy then existing, (ii) propose revisions to this Agreement pursuant to this Section 7.7 on or before June 30,

2014, or (iii) propose revisions or submit a Negotiation Notice more than once during any twelve (12) month period beginning on July 1, 2014.

(b) Following receipt of the Negotiation Notice by either the CEO or the Chair, ICANN and the Working Group (as defined in Section 7.6) shall consult in good faith negotiations regarding the form and substance of the proposed revisions to this Agreement, which shall be in the form of a proposed amendment to this Agreement (the "Proposed Revisions"), for a period of at least ninety (90) calendar days (unless a resolution is earlier reached) and attempt to reach a mutually acceptable agreement relating to the Proposed Revisions (the "Discussion Period").

(c) If, following the conclusion of the Discussion Period, an agreement is reached on the Proposed Revisions, ICANN shall post the mutually agreed Proposed Revisions on its website for public comment for no less than thirty (30) calendar days (the "Posting Period") and provide notice of such revisions to all Applicable Registry Operators in accordance with Section 7.9. ICANN and the Working Group will consider the public comments submitted on the Proposed Revisions during the Posting Period (including comments submitted by the Applicable Registry Operators). Following the conclusion of the Posting Period, the Proposed Revisions shall be submitted for Registry Operator Approval (as defined in Section 7.6) and approval by the ICANN Board of Directors. If such approvals are obtained, the Proposed Revisions shall be deemed an Approved Amendment (as defined in Section 7.6) by the Applicable Registry Operators and ICANN, and shall be effective and deemed an amendment to this Agreement upon sixty (60) calendar days notice from ICANN to Registry Operator.

(d) If, following the conclusion of the Discussion Period, an agreement is not reached between ICANN and the Working Group on the Proposed Revisions, either the CEO or the Chair may provide the other person written notice (the "Mediation Notice") requiring each party to attempt to resolve the disagreements related to the Proposed Revisions through impartial, facilitative (non-evaluative) mediation in accordance with the terms and conditions set forth below. In the event that a Mediation Notice is provided, ICANN and the Working Group shall, within fifteen (15) calendar days thereof, simultaneously post the text of their desired version of the Proposed Revisions and a position paper with respect thereto on ICANN's website.

(i) The mediation shall be conducted by a single mediator selected by the parties. If the parties cannot agree on a mediator within fifteen (15) calendar days following receipt by the CEO or Chair, as applicable, of the Mediation Notice, the parties will promptly select a mutually acceptable mediation provider entity, which entity shall, as soon as practicable following such entity's selection, designate a mediator, who is a licensed attorney with general knowledge of contract law, who has no ongoing business relationship with either party and, to the extent necessary to mediate the particular dispute, general knowledge of the domain name system. Any mediator must confirm in writing that he or she is not, and will not become during the term of the mediation, an employee, partner, executive officer, director, or security

holder of ICANN or an Applicable Registry Operator. If such confirmation is not provided by the appointed mediator, then a replacement mediator shall be appointed pursuant to this Section 7.7(d)(i).

(ii) The mediator shall conduct the mediation in accordance with the rules and procedures for facilitative mediation that he or she determines following consultation with the parties. The parties shall discuss the dispute in good faith and attempt, with the mediator's assistance, to reach an amicable resolution of the dispute.

(iii) Each party shall bear its own costs in the mediation. The parties shall share equally the fees and expenses of the mediator.

(iv) If an agreement is reached during the mediation, ICANN shall post the mutually agreed Proposed Revisions on its website for the Posting Period and provide notice to all Applicable Registry Operators in accordance with Section 7.9. ICANN and the Working Group will consider the public comments submitted on the agreed Proposed Revisions during the Posting Period (including comments submitted by the Applicable Registry Operators). Following the conclusion of the Posting Period, the Proposed Revisions shall be submitted for Registry Operator Approval and approval by the ICANN Board of Directors. If such approvals are obtained, the Proposed Revisions shall be deemed an Approved Amendment (as defined in Section 7.6) by the Applicable Registry Operators and ICANN, and shall be effective and deemed an amendment to this Agreement upon sixty (60) calendar days notice from ICANN to Registry Operator.

(v) If the parties have not resolved the dispute for any reason by the date that is ninety (90) calendar days following receipt by the CEO or Chair, as applicable, of the Mediation Notice, the mediation shall automatically terminate (unless extended by agreement of the parties). The mediator shall deliver to the parties a definition of the issues that could be considered in future arbitration, if invoked. Those issues are subject to the limitations set forth in Section 7.7(e)(ii) below.

(e) If, following mediation, ICANN and the Working Group have not reached an agreement on the Proposed Revisions, either the CEO or the Chair may provide the other person written notice (an "Arbitration Notice") requiring ICANN and the Applicable Registry Operators to resolve the dispute through binding arbitration in accordance with the arbitration provisions of Section 5.2, subject to the requirements and limitations of this Section 7.7(e).

(i) If an Arbitration Notice is sent, the mediator's definition of issues, along with the Proposed Revisions (be those from ICANN, the Working Group or both) shall be posted for public comment on ICANN's website for a period of no less than thirty (30) calendar days. ICANN and the

Working Group will consider the public comments submitted on the Proposed Revisions during the Posting Period (including comments submitted by the Applicable Registry Operators), and information regarding such comments and consideration shall be provided to a three (3) person arbitrator panel. Each party may modify its Proposed Revisions before and after the Posting Period. The arbitration proceeding may not commence prior to the closing of such public comment period, and ICANN may consolidate all challenges brought by registry operators (including Registry Operator) into a single proceeding. Except as set forth in this Section 7.7, the arbitration shall be conducted pursuant to Section 5.2.

(ii) No dispute regarding the Proposed Revisions may be submitted for arbitration to the extent the subject matter of the Proposed Revisions (i) relates to Consensus Policy, (ii) falls within the subject matter categories set forth in Section 1.2 of Specification 1, or (iii) seeks to amend any of the following provisions or Specifications of this Agreement: Articles 1, 3 and 6; Sections 2.1, 2.2, 2.5, 2.7, 2.9, 2.10, 2.16, 2.17, 2.19, 4.1, 4.2, 7.3, 7.6, 7.7, 7.8, 7.10, 7.11, 7.12, 7.13, 7.14, 7.16; Section 2.8 and Specification 7 (but only to the extent such Proposed Revisions seek to implement an RPM not contemplated by Sections 2.8 and Specification 7); Exhibit A; and Specifications 1, 4, 6, 10 and 11.

(iii) The mediator will brief the arbitrator panel regarding ICANN and the Working Group's respective proposals relating to the Proposed Revisions.

(iv) No amendment to this Agreement relating to the Proposed Revisions may be submitted for arbitration by either the Working Group or ICANN, unless, in the case of the Working Group, the proposed amendment has received Registry Operator Approval and, in the case of ICANN, the proposed amendment has been approved by the ICANN Board of Directors.

(v) In order for the arbitrator panel to approve either ICANN or the Working Group's proposed amendment relating to the Proposed Revisions, the arbitrator panel must conclude that such proposed amendment is consistent with a balanced application of ICANN's core values (as described in ICANN's Bylaws) and reasonable in light of the balancing of the costs and benefits to the business interests of the Applicable Registry Operators and ICANN (as applicable), and the public benefit sought to be achieved by the Proposed Revisions as set forth in such amendment. If the arbitrator panel concludes that either ICANN or the Working Group's proposed amendment relating to the Proposed Revisions meets the foregoing standard, such amendment shall be effective and deemed an amendment to this Agreement upon sixty (60) calendar days notice from ICANN to Registry Operator and deemed an Approved Amendment hereunder.

(f) With respect to an Approved Amendment relating to an amendment proposed by ICANN, Registry may apply in writing to ICANN for an exemption from such amendment pursuant to the provisions of Section 7.6.

(g) Notwithstanding anything in this Section 7.7 to the contrary, (a) if Registry Operator provides evidence to ICANN's reasonable satisfaction that the Approved Amendment would materially increase the cost of providing Registry Services, then ICANN will allow up to one-hundred eighty (180) calendar days for the Approved Amendment to become effective with respect to Registry Operator, and (b) no Approved Amendment adopted pursuant to Section 7.7 shall become effective with respect to Registry Operator if Registry Operator provides ICANN with an irrevocable notice of termination pursuant to Section 4.4(b).

7.8 No Third-Party Beneficiaries. This Agreement will not be construed to create any obligation by either ICANN or Registry Operator to any non-party to this Agreement, including any registrar or registered name holder.

7.9 General Notices. Except for notices pursuant to Sections 7.6 and 7.7, all notices to be given under or in relation to this Agreement will be given either (i) in writing at the address of the appropriate party as set forth below or (ii) via facsimile or electronic mail as provided below, unless that party has given a notice of change of postal or email address, or facsimile number, as provided in this Agreement. All notices under Sections 7.6 and 7.7 shall be given by both posting of the applicable information on ICANN's web site and transmission of such information to Registry Operator by electronic mail. Any change in the contact information for notice below will be given by the party within thirty (30) calendar days of such change. Other than notices under Sections 7.6 or 7.7, any notice required by this Agreement will be deemed to have been properly given (i) if in paper form, when delivered in person or via courier service with confirmation of receipt or (ii) if via facsimile or by electronic mail, upon confirmation of receipt by the recipient's facsimile machine or email server, provided that such notice via facsimile or electronic mail shall be followed by a copy sent by regular postal mail service within three (3) calendar days. Any notice required by Sections 7.6 or 7.7 will be deemed to have been given when electronically posted on ICANN's website and upon confirmation of receipt by the email server. In the event other means of notice become practically achievable, such as notice via a secure website, the parties will work together to implement such notice means under this Agreement.

If to ICANN, addressed to:
Internet Corporation for Assigned Names and Numbers
12025 Waterfront Drive, Suite 300
Los Angeles, CA 90094-2536
USA
Telephone: +1-310-301-5800
Facsimile: +1-310-823-8649
Attention: President and CEO

With a Required Copy to: General Counsel
Email: (As specified from time to time.)

If to Registry Operator, addressed to:
[_____]
[_____]
[_____]

Telephone:
With a Required Copy to:
Email: (As specified from time to time.)

7.10 Entire Agreement. This Agreement (including those specifications and documents incorporated by reference to URL locations which form a part of it) constitutes the entire agreement of the parties hereto pertaining to the operation of the TLD and supersedes all prior agreements, understandings, negotiations and discussions, whether oral or written, between the parties on that subject.

7.11 English Language Controls. Notwithstanding any translated version of this Agreement and/or specifications that may be provided to Registry Operator, the English language version of this Agreement and all referenced specifications are the official versions that bind the parties hereto. In the event of any conflict or discrepancy between any translated version of this Agreement and the English language version, the English language version controls. Notices, designations, determinations, and specifications made under this Agreement shall be in the English language.

7.12 Ownership Rights. Nothing contained in this Agreement shall be construed as (a) establishing or granting to Registry Operator any property ownership rights or interests of Registry Operator in the TLD or the letters, words, symbols or other characters making up the TLD string, or (b) affecting any existing intellectual property or ownership rights of Registry Operator.

7.13 Severability; Conflicts with Laws. This Agreement shall be deemed severable; the invalidity or unenforceability of any term or provision of this Agreement shall not affect the validity or enforceability of the balance of this Agreement or of any other term hereof, which shall remain in full force and effect. If any of the provisions hereof are determined to be invalid or unenforceable, the parties shall negotiate in good faith to modify this Agreement so as to effect the original intent of the parties as closely as possible. ICANN and the Working Group will mutually cooperate to develop an ICANN procedure for ICANN's review and consideration of alleged conflicts between applicable laws and non-WHOIS related provisions of this Agreement. Until such procedure is developed and implemented by ICANN, ICANN will review and consider alleged conflicts between applicable laws and non-WHOIS related provisions of this Agreement in a manner similar to ICANN's Procedure For Handling WHOIS Conflicts with Privacy Law.

7.14 Court Orders. ICANN will respect any order from a court of competent jurisdiction, including any orders from any jurisdiction where the consent or non-objection of the government was a requirement for the delegation of the TLD. Notwithstanding any other provision of this Agreement, ICANN's implementation of any such order will not be a breach of this Agreement

7.15 Confidentiality

(a) Subject to Section 7.15(c), during the Term and for a period of three (3) years thereafter, each party shall, and shall cause its and its Affiliates' officers, directors, employees and agents to, keep confidential and not publish or otherwise disclose to any third party, directly or indirectly, any information that is, and the disclosing party has marked as, or has otherwise designated in writing to the receiving party as, "confidential trade secret," "confidential commercial information" or "confidential financial information" (collectively, "Confidential Information"), except to the extent such disclosure is permitted by the terms of this Agreement.

(b) The confidentiality obligations under Section 7.15(a) shall not apply to any Confidential Information that (i) is or hereafter becomes part of the public domain by public use, publication, general knowledge or the like through no fault of the receiving party in breach of this Agreement, (ii) can be demonstrated by documentation or other competent proof to have been in the receiving party's possession prior to disclosure by the disclosing party without any obligation of confidentiality with respect to such information, (iii) is subsequently received by the receiving party from a third party who is not bound by any obligation of confidentiality with respect to such information, (iv) has been published by a third party or otherwise enters the public domain through no fault of the receiving party, or (v) can be demonstrated by documentation or other competent evidence to have been independently developed by or for the receiving party without reference to the disclosing party's Confidential Information.

(c) Each party shall have the right to disclose Confidential Information to the extent that such disclosure is (i) made in response to a valid order of a court of competent jurisdiction or, if in the reasonable opinion of the receiving party's legal counsel, such disclosure is otherwise required by applicable law; provided, however, that the receiving party shall first have given notice to the disclosing party and given the disclosing party a reasonable opportunity to quash such order or to obtain a protective order or confidential treatment order requiring that the Confidential Information that is the subject of such order or other applicable law be held in confidence by such court or other third party recipient, unless the receiving party is not permitted to provide such notice under such order or applicable law, or (ii) made by the receiving party or any of its Affiliates to its or their attorneys, auditors, advisors, consultants, contractors or other third parties for use by such person or entity as may be necessary or useful in connection with the performance of the activities under this Agreement, provided that such third party is bound by confidentiality obligations at least as stringent as those set forth herein, either by written agreement or through professional responsibility standards.

[*Note: The following section is applicable to intergovernmental organizations or governmental entities only.*]

7.16 Special Provision Relating to Intergovernmental Organizations or Governmental Entities.

(a) ICANN acknowledges that Registry Operator is an entity subject to public international law, including international treaties applicable to Registry Operator (such public international law and treaties, collectively hereinafter the "Applicable Laws"). Nothing in this Agreement and its related specifications shall be construed or interpreted to require Registry Operator to violate Applicable Laws or prevent compliance therewith. The Parties agree that Registry Operator's compliance with Applicable Laws shall not constitute a breach of this Agreement.

(b) In the event Registry Operator reasonably determines that any provision of this Agreement and its related specifications, or any decisions or policies of ICANN referred to in this Agreement, including but not limited to Temporary Policies and Consensus Policies (such provisions, specifications and policies, collectively hereinafter, "ICANN Requirements"), may conflict with or violate Applicable Law (hereinafter, a "Potential Conflict"), Registry Operator shall provide detailed notice (a "Notice") of such Potential Conflict to ICANN as early as possible and, in the case of a Potential Conflict with a proposed Consensus Policy, no later than the end of any public comment period on such proposed Consensus Policy. In the event Registry Operator determines that there is Potential Conflict between a proposed Applicable Law and any ICANN Requirement, Registry Operator shall provide detailed Notice of such Potential Conflict to ICANN as early as possible and, in the case of a Potential Conflict with a proposed Consensus Policy, no later than the end of any public comment period on such proposed Consensus Policy.

(c) As soon as practicable following such review, the parties shall attempt to resolve the Potential Conflict by mediation pursuant to the procedures set forth in Section 5.1. In addition, Registry Operator shall use its best efforts to eliminate or minimize any impact arising from such Potential Conflict between Applicable Laws and any ICANN Requirement. If, following such mediation, Registry Operator determines that the Potential Conflict constitutes an actual conflict between any ICANN Requirement, on the one hand, and Applicable Laws, on the other hand, then ICANN shall waive compliance with such ICANN Requirement (provided that the parties shall negotiate in good faith on a continuous basis thereafter to mitigate or eliminate the effects of such noncompliance on ICANN), unless ICANN reasonably and objectively determines that the failure of Registry Operator to comply with such ICANN Requirement would constitute a threat to the Security and Stability of Registry Services, the Internet or the DNS (hereinafter, an "ICANN Determination"). Following receipt of notice by Registry Operator of such ICANN Determination, Registry Operator shall be afforded a period of ninety (90) calendar days to resolve such conflict with an Applicable Law. If the conflict with an Applicable Law is not resolved to ICANN's complete satisfaction during such period, Registry Operator shall have the option to submit, within ten (10) calendar days thereafter, the matter to binding arbitration as defined in subsection (d) below. If during such period, Registry Operator

does not submit the matter to arbitration pursuant to subsection (d) below, ICANN may, upon notice to Registry Operator, terminate this Agreement with immediate effect.

(d) If Registry Operator disagrees with an ICANN Determination, Registry Operator may submit the matter to binding arbitration pursuant to the provisions of Section 5.2, except that the sole issue presented to the arbitrator for determination will be whether or not ICANN reasonably and objectively reached the ICANN Determination. For the purposes of such arbitration, ICANN shall present evidence to the arbitrator supporting the ICANN Determination. If the arbitrator determines that ICANN did not reasonably and objectively reach the ICANN Determination, then ICANN shall waive Registry Operator's compliance with the subject ICANN Requirement. If the arbitrators or pre-arbitral referee, as applicable, determine that ICANN did reasonably and objectively reach the ICANN Determination, then, upon notice to Registry Operator, ICANN may terminate this Agreement with immediate effect.

(e) Registry Operator hereby represents and warrants that, to the best of its knowledge as of the date of execution of this Agreement, no existing ICANN Requirement conflicts with or violates any Applicable Law.

(f) Notwithstanding any other provision of this Section 7.16, following an ICANN Determination and prior to a finding by an arbitrator pursuant to Section 7.16(d) above, ICANN may, subject to prior consultations with Registry Operator, take such reasonable technical measures as it deems necessary to ensure the Security and Stability of Registry Services, the Internet and the DNS. These reasonable technical measures shall be taken by ICANN on an interim basis, until the earlier of the date of conclusion of the arbitration procedure referred to in Section 7.16(d) above or the date of complete resolution of the conflict with an Applicable Law. In case Registry Operator disagrees with such technical measures taken by ICANN, Registry Operator may submit the matter to binding arbitration pursuant to the provisions of Section 5.2 above, during which process ICANN may continue to take such technical measures. In the event that ICANN takes such measures, Registry Operator shall pay all costs incurred by ICANN as a result of taking such measures. In addition, in the event that ICANN takes such measures, ICANN shall retain and may enforce its rights under the Continued Operations Instrument and Alternative Instrument, as applicable.

* * * * *

IN WITNESS WHEREOF, the parties hereto have caused this Agreement to be executed by their duly authorized representatives.

INTERNET CORPORATION FOR ASSIGNED NAMES AND NUMBERS

By: _____
[_____]
President and CEO
Date:

[Registry Operator]

By: _____
[_____]
[_____]
Date:

EXHIBIT A

Approved Services

The ICANN gTLD Applicant Guidebook (located at http://newgtlds.icann.org/en/applicants/agb) and the RSEP specify processes for consideration of proposed registry services. Registry Operator may provide any service that is required by the terms of this Agreement. In addition, the following services (if any) are specifically identified as having been approved by ICANN prior to the effective date of the Agreement, and Registry Operator may provide such services:

SPECIFICATION 1

CONSENSUS POLICIES AND TEMPORARY POLICIES SPECIFICATION

1. **Consensus Policies**.

1.1. "***Consensus Policies***" are those policies established (1) pursuant to the procedure set forth in ICANN's Bylaws and due process, and (2) covering those topics listed in Section 1.2 of this Specification. The Consensus Policy development process and procedure set forth in ICANN's Bylaws may be revised from time to time in accordance with the process set forth therein.

1.2. Consensus Policies and the procedures by which they are developed shall be designed to produce, to the extent possible, a consensus of Internet stakeholders, including the operators of gTLDs. Consensus Policies shall relate to one or more of the following:

1.2.1 issues for which uniform or coordinated resolution is reasonably necessary to facilitate interoperability, security and/or stability of the Internet or Domain Name System ("DNS");

1.2.2 functional and performance specifications for the provision of Registry Services;

1.2.3 Security and Stability of the registry database for the TLD;

1.2.4 registry policies reasonably necessary to implement Consensus Policies relating to registry operations or registrars;

1.2.5 resolution of disputes regarding the registration of domain names (as opposed to the use of such domain names); or

1.2.6 restrictions on cross-ownership of registry operators and registrars or registrar resellers and regulations and restrictions with respect to registry operations and the use of registry and registrar data in the event that a registry operator and a registrar or registrar reseller are affiliated.

1.3. Such categories of issues referred to in Section 1.2 of this Specification shall include, without limitation:

1.3.1 principles for allocation of registered names in the TLD (e.g., first-come/first-served, timely renewal, holding period after expiration);

1.3.2 prohibitions on warehousing of or speculation in domain names by registries or registrars;

1.3.3 reservation of registered names in the TLD that may not be registered initially or that may not be renewed due to reasons reasonably related to (i) avoidance of confusion among or misleading of users, (ii) intellectual property, or (iii) the technical management of the DNS or the Internet (e.g., establishment of reservations of names from registration); and

1.3.4 maintenance of and access to accurate and up-to-date information concerning domain name registrations; and procedures to avoid disruptions of domain name registrations due to suspension or termination of operations by a registry operator or a registrar, including procedures for allocation of responsibility for serving registered domain names in a TLD affected by such a suspension or termination.

1.4. In addition to the other limitations on Consensus Policies, they shall not:

1.4.1 prescribe or limit the price of Registry Services;

1.4.2 modify the terms or conditions for the renewal or termination of the Registry Agreement;

1.4.3 modify the limitations on Temporary Policies (defined below) or Consensus Policies;

1.4.4 modify the provisions in the registry agreement regarding fees paid by Registry Operator to ICANN; or

1.4.5 modify ICANN's obligations to ensure equitable treatment of registry operators and act in an open and transparent manner.

2. **Temporary Policies**. Registry Operator shall comply with and implement all specifications or policies established by the Board on a temporary basis, if adopted by the Board by a vote of at least two-thirds of its members, so long as the Board reasonably determines that such modifications or amendments are justified and that immediate temporary establishment of a specification or policy on the subject is necessary to maintain the stability or security of Registry Services or the DNS ("***Temporary Policies***").

2.1. Such proposed specification or policy shall be as narrowly tailored as feasible to achieve those objectives. In establishing any Temporary Policy, the Board shall state the period of time for which the Temporary Policy is adopted and shall immediately implement the Consensus Policy development process set forth in ICANN's Bylaws.

2.1.1 ICANN shall also issue an advisory statement containing a detailed explanation of its reasons for adopting the Temporary Policy and why

the Board believes such Temporary Policy should receive the consensus support of Internet stakeholders.

2.1.2 If the period of time for which the Temporary Policy is adopted exceeds ninety (90) calendar days, the Board shall reaffirm its temporary adoption every ninety (90) calendar days for a total period not to exceed one (1) year, in order to maintain such Temporary Policy in effect until such time as it becomes a Consensus Policy. If the one (1) year period expires or, if during such one (1) year period, the Temporary Policy does not become a Consensus Policy and is not reaffirmed by the Board, Registry Operator shall no longer be required to comply with or implement such Temporary Policy.

3. **Notice and Conflicts**. Registry Operator shall be afforded a reasonable period of time following notice of the establishment of a Consensus Policy or Temporary Policy in which to comply with such policy or specification, taking into account any urgency involved. In the event of a conflict between Registry Services and Consensus Policies or any Temporary Policy, the Consensus Polices or Temporary Policy shall control, but only with respect to subject matter in conflict.

SPECIFICATION 2

DATA ESCROW REQUIREMENTS

Registry Operator will engage an independent entity to act as data escrow agent ("***Escrow Agent***") for the provision of data escrow services related to the Registry Agreement. The following Technical Specifications set forth in Part A, and Legal Requirements set forth in Part B, will be included in any data escrow agreement between Registry Operator and the Escrow Agent, under which ICANN must be named a third-party beneficiary. In addition to the following requirements, the data escrow agreement may contain other provisions that are not contradictory or intended to subvert the required terms provided below.

PART A – TECHNICAL SPECIFICATIONS

1. **Deposits**. There will be two types of Deposits: Full and Differential. For both types, the universe of Registry objects to be considered for data escrow are those objects necessary in order to offer all of the approved Registry Services.

    1.1. "**Full Deposit**" will consist of data that reflects the state of the registry as of 00:00:00 UTC (Coordinated Universal Time) on the day that such Full Deposit is submitted to Escrow Agent.

    1.2. "**Differential Deposit**" means data that reflects all transactions that were not reflected in the last previous Full or Differential Deposit, as the case may be. Each Differential Deposit will contain all database transactions since the previous Deposit was completed as of 00:00:00 UTC of each day, but Sunday. Differential Deposits must include complete Escrow Records as specified below that were not included or changed since the most recent full or Differential Deposit (i.e., newly added or modified domain names).

2. **Schedule for Deposits**. Registry Operator will submit a set of escrow files on a daily basis as follows:

    2.1. Each Sunday, a Full Deposit must be submitted to the Escrow Agent by 23:59 UTC.

    2.2. The other six (6) days of the week, a Full Deposit or the corresponding Differential Deposit must be submitted to Escrow Agent by 23:59 UTC.

3. **Escrow Format Specification**.

    3.1. **Deposit's Format**. Registry objects, such as domains, contacts, name servers, registrars, etc. will be compiled into a file constructed as described in draft-arias-noguchi-registry-data-escrow, see Part A, Section 9, reference 1 of this Specification and draft-arias-noguchi-dnrd-objects-mapping, see Part A, Section 9, reference 2 of this Specification (collectively, the "DNDE Specification"). The DNDE Specification describes some elements as

optional; Registry Operator will include those elements in the Deposits if they are available. If not already an RFC, Registry Operator will use the most recent draft version of the DNDE Specification available at the Effective Date. Registry Operator may at its election use newer versions of the DNDE Specification after the Effective Date. Once the DNDE Specification is published as an RFC, Registry Operator will implement that version of the DNDE Specification, no later than one hundred eighty (180) calendar days after. UTF-8 character encoding will be used.

3.2. **Extensions**. If a Registry Operator offers additional Registry Services that require submission of additional data, not included above, additional "extension schemas" shall be defined in a case by case basis to represent that data. These "extension schemas" will be specified as described in Part A, Section 9, reference 2 of this Specification. Data related to the "extensions schemas" will be included in the deposit file described in Part A, Section 3.1 of this Specification. ICANN and the respective Registry Operator shall work together to agree on such new objects' data escrow specifications.

4. **Processing of Deposit files**. The use of compression is recommended in order to reduce electronic data transfer times, and storage capacity requirements. Data encryption will be used to ensure the privacy of registry escrow data. Files processed for compression and encryption will be in the binary OpenPGP format as per OpenPGP Message Format - RFC 4880, see Part A, Section 9, reference 3 of this Specification. Acceptable algorithms for Public-key cryptography, Symmetric-key cryptography, Hash and Compression are those enumerated in RFC 4880, not marked as deprecated in OpenPGP IANA Registry, see Part A, Section 9, reference 4 of this Specification, that are also royalty-free. The process to follow for the data file in original text format is:

(1) The XML file of the deposit as described in Part A, Section 9, reference 1 of this Specification must be named as the containing file as specified in Section 5 but with the extension xml.

(2) The data file(s) are aggregated in a tarball file named the same as (1) but with extension tar.

(3) A compressed and encrypted OpenPGP Message is created using the tarball file as sole input. The suggested algorithm for compression is ZIP as per RFC 4880. The compressed data will be encrypted using the escrow agent's public key. The suggested algorithms for Public-key encryption are Elgamal and RSA as per RFC 4880. The suggested algorithms for Symmetric-key encryption are TripleDES, AES128 and CAST5 as per RFC 4880.

(4) The file may be split as necessary if, once compressed and encrypted, it is larger than the file size limit agreed with the escrow agent. Every part of a

split file, or the whole file if not split, will be called a processed file in this section.

(5) A digital signature file will be generated for every processed file using the Registry Operator's private key. The digital signature file will be in binary OpenPGP format as per RFC 4880 Section 9, reference 3, and will not be compressed or encrypted. The suggested algorithms for Digital signatures are DSA and RSA as per RFC 4880. The suggested algorithm for Hashes in Digital signatures is SHA256.

(6) The processed files and digital signature files will then be transferred to the Escrow Agent through secure electronic mechanisms, such as, SFTP, SCP, HTTPS file upload, etc. as agreed between the Escrow Agent and the Registry Operator. Non-electronic delivery through a physical medium such as CD-ROMs, DVD-ROMs, or USB storage devices may be used if authorized by ICANN.

(7) The Escrow Agent will then validate every (processed) transferred data file using the procedure described in Part A, Section 8 of this Specification.

5. **File Naming Conventions**. Files will be named according to the following convention: {gTLD}_{YYYY-MM-DD}_{type}_S{#}_R{rev}.{ext} where:

5.1. {gTLD} is replaced with the gTLD name; in case of an IDN-TLD, the ASCII-compatible form (A-Label) must be used;

5.2. {YYYY-MM-DD} is replaced by the date corresponding to the time used as a timeline watermark for the transactions; i.e. for the Full Deposit corresponding to 2009-08-02T00:00Z, the string to be used would be "2009-08-02";

5.3. {type} is replaced by:

(1) "full", if the data represents a Full Deposit;

(2) "diff", if the data represents a Differential Deposit;

(3) "thin", if the data represents a Bulk Registration Data Access file, as specified in Section 3 of Specification 4;

5.4. {#} is replaced by the position of the file in a series of files, beginning with "1"; in case of a lone file, this must be replaced by "1".

5.5. {rev} is replaced by the number of revision (or resend) of the file beginning with "0":

5.6. {ext} is replaced by "sig" if it is a digital signature file of the quasi-homonymous file. Otherwise it is replaced by "ryde".

6. **Distribution of Public Keys**. Each of Registry Operator and Escrow Agent will distribute its public key to the other party (Registry Operator or Escrow Agent, as the case may be) via email to an email address to be specified. Each party will confirm receipt of the other party's public key with a reply email, and the distributing party will subsequently reconfirm the authenticity of the key transmitted via offline methods, like in person meeting, telephone, etc. In this way, public key transmission is authenticated to a user able to send and receive mail via a mail server operated by the distributing party. Escrow Agent, Registry Operator and ICANN will exchange public keys by the same procedure.

7. **Notification of Deposits**. Along with the delivery of each Deposit, Registry Operator will deliver to Escrow Agent and to ICANN (using the API described in draft-lozano-icann-registry-interfaces, see Part A, Section 9, reference 5 of this Specification (the "Interface Specification")) a written statement (which may be by authenticated e-mail) that includes a copy of the report generated upon creation of the Deposit and states that the Deposit has been inspected by Registry Operator and is complete and accurate. Registry Operator will include the Deposit's "id" and "resend" attributes in its statement. The attributes are explained in Part A, Section 9, reference 1 of this Specification.

   If not already an RFC, Registry Operator will use the most recent draft version of the Interface Specification at the Effective Date. Registry Operator may at its election use newer versions of the Interface Specification after the Effective Date. Once the Interface Specification is published as an RFC, Registry Operator will implement that version of the Interface Specification, no later than one hundred eighty (180) calendar days after such publishing.

8. **Verification Procedure**.

   (1) The signature file of each processed file is validated.

   (2) If processed files are pieces of a bigger file, the latter is put together.

   (3) Each file obtained in the previous step is then decrypted and uncompressed.

   (4) Each data file contained in the previous step is then validated against the format defined in Part A, Section 9, reference 1 of this Specification.

   (5) If Part A, Section 9, reference 1 of this Specification includes a verification process, that will be applied at this step.

If any discrepancy is found in any of the steps, the Deposit will be considered incomplete.

9. **References**.

(1) Domain Name Data Escrow Specification (work in progress), http://tools.ietf.org/html/draft-arias-noguchi-registry-data-escrow

(2) Domain Name Registration Data (DNRD) Objects Mapping, http://tools.ietf.org/html/draft-arias-noguchi-dnrd-objects-mapping

(3) OpenPGP Message Format, http://www.rfc-editor.org/rfc/rfc4880.txt

(4) OpenPGP parameters, http://www.iana.org/assignments/pgp-parameters/pgp-parameters.xhtml

(5) ICANN interfaces for registries and data escrow agents, http://tools.ietf.org/html/draft-lozano-icann-registry-interfaces

PART B – LEGAL REQUIREMENTS

1. **Escrow Agent**. Prior to entering into an escrow agreement, the Registry Operator must provide notice to ICANN as to the identity of the Escrow Agent, and provide ICANN with contact information and a copy of the relevant escrow agreement, and all amendments thereto. In addition, prior to entering into an escrow agreement, Registry Operator must obtain the consent of ICANN to (a) use the specified Escrow Agent, and (b) enter into the form of escrow agreement provided. ICANN must be expressly designated as a third-party beneficiary of the escrow agreement. ICANN reserves the right to withhold its consent to any Escrow Agent, escrow agreement, or any amendment thereto, all in its sole discretion.

2. **Fees**. Registry Operator must pay, or have paid on its behalf, fees to the Escrow Agent directly. If Registry Operator fails to pay any fee by the due date(s), the Escrow Agent will give ICANN written notice of such non-payment and ICANN may pay the past-due fee(s) within fifteen (15) calendar days after receipt of the written notice from Escrow Agent. Upon payment of the past-due fees by ICANN, ICANN shall have a claim for such amount against Registry Operator, which Registry Operator shall be required to submit to ICANN together with the next fee payment due under the Registry Agreement.

3. **Ownership**. Ownership of the Deposits during the effective term of the Registry Agreement shall remain with Registry Operator at all times. Thereafter, Registry Operator shall assign any such ownership rights (including intellectual property rights, as the case may be) in such Deposits to ICANN. In the event that during the term of the Registry Agreement any Deposit is released from escrow to ICANN, any intellectual property rights held by Registry Operator in the Deposits will automatically be licensed to ICANN or to a party designated in writing by ICANN on a non-exclusive, perpetual, irrevocable, royalty-free, paid-up basis, for any use related to the operation, maintenance or transition of the TLD.

4. **Integrity and Confidentiality**. Escrow Agent will be required to (i) hold and maintain the Deposits in a secure, locked, and environmentally safe facility, which is accessible only to authorized representatives of Escrow Agent, (ii) protect the integrity and confidentiality of the Deposits using commercially reasonable measures and (iii) keep and safeguard each Deposit for one (1) year. ICANN and Registry Operator will be provided the right to inspect Escrow Agent's applicable records upon reasonable prior notice and during normal business hours. Registry Operator and ICANN will be provided with the right to designate a third-party auditor to audit Escrow Agent's compliance with the technical specifications and maintenance requirements of this Specification 2 from time to time.

   If Escrow Agent receives a subpoena or any other order from a court or other judicial tribunal pertaining to the disclosure or release of the Deposits, Escrow Agent will promptly notify the Registry Operator and ICANN unless prohibited by law. After notifying the Registry Operator and ICANN, Escrow Agent shall allow

sufficient time for Registry Operator or ICANN to challenge any such order, which shall be the responsibility of Registry Operator or ICANN; provided, however, that Escrow Agent does not waive its rights to present its position with respect to any such order. Escrow Agent will cooperate with the Registry Operator or ICANN to support efforts to quash or limit any subpoena, at such party's expense. Any party requesting additional assistance shall pay Escrow Agent's standard charges or as quoted upon submission of a detailed request.

5. **Copies**. Escrow Agent may be permitted to duplicate any Deposit, in order to comply with the terms and provisions of the escrow agreement.

6. **Release of Deposits**. Escrow Agent will make available for electronic download (unless otherwise requested) to ICANN or its designee, within twenty-four (24) hours, at the Registry Operator's expense, all Deposits in Escrow Agent's possession in the event that the Escrow Agent receives a request from Registry Operator to effect such delivery to ICANN, or receives one of the following written notices by ICANN stating that:

   6.1. the Registry Agreement has expired without renewal, or been terminated; or

   6.2. ICANN has not received a notification as described in Part B, Sections 7.1 and 7.2 of this Specification from Escrow Agent within five (5) calendar days after the Deposit's scheduled delivery date; (a) ICANN gave notice to Escrow Agent and Registry Operator of that failure; and (b) ICANN has not, within seven (7) calendar days after such notice, received the notification from Escrow Agent; or

   6.3. ICANN has received notification as described in Part B, Sections 7.1 and 7.2 of this Specification from Escrow Agent of failed verification of the latest escrow deposit for a specific date or a notification of a missing deposit, and the notification is for a deposit that should have been made on Sunday (i.e., a Full Deposit); (a) ICANN gave notice to Registry Operator of that receipt; and (b) ICANN has not, within seven (7) calendar days after such notice, received notification as described in Part B, Sections 7.1 and 7.2 of this Specification from Escrow Agent of verification of a remediated version of such Full Deposit; or

   6.4. ICANN has received five notifications from Escrow Agent within the last thirty (30) calendar days notifying ICANN of either missing or failed escrow deposits that should have been made Monday through Saturday (i.e., a Differential Deposit), and (x) ICANN provided notice to Registry Operator of the receipt of such notifications; and (y) ICANN has not, within seven (7) calendar days after delivery of such notice to Registry Operator, received notification from Escrow Agent of verification of a remediated version of such Differential Deposit; or

6.5. Registry Operator has: (i) ceased to conduct its business in the ordinary course; or (ii) filed for bankruptcy, become insolvent or anything analogous to any of the foregoing under the laws of any jurisdiction anywhere in the world; or

6.6. Registry Operator has experienced a failure of critical registry functions and ICANN has asserted its rights pursuant to Section 2.13 of the Agreement; or

6.7. a competent court, arbitral, legislative, or government agency mandates the release of the Deposits to ICANN; or

6.8. pursuant to Contractual and Operational Compliance Audits as specified under Section 2.11 of the Agreement.

Unless Escrow Agent has previously released the Registry Operator's Deposits to ICANN or its designee, Escrow Agent will deliver all Deposits to ICANN upon expiration or termination of the Registry Agreement or the Escrow Agreement.

7. **Verification of Deposits**.

7.1. Within twenty-four (24) hours after receiving each Deposit or corrected Deposit, Escrow Agent must verify the format and completeness of each Deposit and deliver to ICANN a notification generated for each Deposit. Reports will be delivered electronically using the API described in draft-lozano-icann-registry-interfaces, see Part A, Section 9, reference 5 of this Specification.

7.2. If Escrow Agent discovers that any Deposit fails the verification procedures or if Escrow Agent does not receive any scheduled Deposit, Escrow Agent must notify Registry Operator either by email, fax or phone and ICANN (using the API described in draft-lozano-icann-registry-interfaces, see Part A, Section 9, reference 5 of this Specification) of such nonconformity or non-receipt within twenty-four (24) hours after receiving the non-conformant Deposit or the deadline for such Deposit, as applicable. Upon notification of such verification or delivery failure, Registry Operator must begin developing modifications, updates, corrections, and other fixes of the Deposit necessary for the Deposit to be delivered and pass the verification procedures and deliver such fixes to Escrow Agent as promptly as possible.

8. **Amendments**. Escrow Agent and Registry Operator shall amend the terms of the Escrow Agreement to conform to this Specification 2 within ten (10) calendar days of any amendment or modification to this Specification 2. In the event of a conflict between this Specification 2 and the Escrow Agreement, this Specification 2 shall control.

9. **Indemnity**. Escrow Agent shall indemnify and hold harmless Registry Operator and ICANN, and each of their respective directors, officers, agents, employees, members, and stockholders ("Indemnitees") absolutely and forever from and against any and all claims, actions, damages, suits, liabilities, obligations, costs, fees, charges, and any other expenses whatsoever, including reasonable attorneys' fees and costs, that may be asserted by a third party against any Indemnitee in connection with the misrepresentation, negligence or misconduct of Escrow Agent, its directors, officers, agents, employees and contractors.

SPECIFICATION 3

FORMAT AND CONTENT FOR REGISTRY OPERATOR MONTHLY REPORTING

Registry Operator shall provide one set of monthly reports per gTLD, using the API described in draft-lozano-icann-registry-interfaces, see Specification 2, Part A, Section 9, reference 5, with the following content.

ICANN may request in the future that the reports be delivered by other means and using other formats. ICANN will use reasonable commercial efforts to preserve the confidentiality of the information reported until three (3) months after the end of the month to which the reports relate. Unless set forth in this Specification 3, any reference to a specific time refers to Coordinated Universal Time (UTC). Monthly reports shall consist of data that reflects the state of the registry at the end of the month (UTC).

1. **Per-Registrar Transactions Report**. This report shall be compiled in a comma separated-value formatted file as specified in RFC 4180. The file shall be named "gTLD-transactions-yyyymm.csv", where "gTLD" is the gTLD name; in case of an IDN-TLD, the A-label shall be used; "yyyymm" is the year and month being reported. The file shall contain the following fields per registrar:

Field #	Field name	Description
01	registrar-name	Registrar's full corporate name as registered with IANA
02	iana-id	For cases where the registry operator acts as registrar (i.e., without the use of an ICANN accredited registrar) 9999 should be used, otherwise the sponsoring Registrar IANA id should be used as specified in http://www.iana.org/assignments/registrar-ids
03	total-domains	total domain names under sponsorship in any EPP status but pendingCreate that have not been purged
04	total-nameservers	total name servers (either host objects or name server hosts as domain name attributes) associated with domain names registered for the TLD in any EPP status but pendingCreate that have not been purged
05	net-adds-1-yr	number of domains successfully registered (i.e., not in EPP pendingCreate status) with an initial term of one (1) year (and not deleted within the add grace period). A transaction must be reported in the month the add grace period ends.
06	net-adds-2-yr	number of domains successfully registered (i.e., not

		in EPP pendingCreate status) with an initial term of two(2) years (and not deleted within the add grace period). A transaction must be reported in the month the add grace period ends.
07	net-adds-3-yr	number of domains successfully registered (i.e., not in EPP pendingCreate status) with an initial term of three (3) years (and not deleted within the add grace period). A transaction must be reported in the month the add grace period ends.
08	net-adds-4-yr	number of domains successfully registered (i.e., not in EPP pendingCreate status) with an initial term of four (4) years (and not deleted within the add grace period). A transaction must be reported in the month the add grace period ends.
09	net-adds-5-yr	number of domains successfully registered (i.e., not in EPP pendingCreate status) with an initial term of five (5) years (and not deleted within the add grace period). A transaction must be reported in the month the add grace period ends.
10	net-adds-6-yr	number of domains successfully registered (i.e., not in EPP pendingCreate status) with an initial term of six (6) years (and not deleted within the add grace period). A transaction must be reported in the month the add grace period ends.
11	net-adds-7-yr	number of domains successfully registered (i.e., not in EPP pendingCreate status) with an initial term of seven (7) years (and not deleted within the add grace period). A transaction must be reported in the month the add grace period ends.
12	net-adds-8-yr	number of domains successfully registered (i.e., not in EPP pendingCreate status) with an initial term of eight (8) years (and not deleted within the add grace period). A transaction must be reported in the month the add grace period ends.
13	net-adds-9-yr	number of domains successfully registered (i.e., not in EPP pendingCreate status) with an initial term of nine (9) years (and not deleted within the add grace period). A transaction must be reported in the month the add grace period ends.
14	net-adds-10-yr	number of domains successfully registered (i.e., not in EPP pendingCreate status) with an initial term of ten (10) years (and not deleted within the add grace period). A transaction must be reported in the month

		the add grace period ends.
15	net-renews-1-yr	number of domains successfully renewed (i.e., not in EPP pendingRenew status) either automatically or by command with a new renewal period of one (1) year (and not deleted within the renew or auto-renew grace period). A transaction must be reported in the month the renew or auto-renew grace period ends.
16	net-renews-2-yr	number of domains successfully renewed (i.e., not in EPP pendingRenew status) either automatically or by command with a new renewal period of two (2) years (and not deleted within the renew or auto-renew grace period). A transaction must be reported in the month the renew or auto-renew grace period ends.
17	net-renews-3-yr	number of domains successfully renewed (i.e., not in EPP pendingRenew status) either automatically or by command with a new renewal period of three (3) years (and not deleted within the renew or auto-renew grace period). A transaction must be reported in the month the renew or auto-renew grace period ends.
18	net-renews-4-yr	number of domains successfully renewed (i.e., not in EPP pendingRenew status) either automatically or by command with a new renewal period of four (4) years (and not deleted within the renew or auto-renew grace period). A transaction must be reported in the month the renew or auto-renew grace period ends.
19	net-renews-5-yr	number of domains successfully renewed (i.e., not in EPP pendingRenew status) either automatically or by command with a new renewal period of five (5) years (and not deleted within the renew or auto-renew grace period). A transaction must be reported in the month the renew or auto-renew grace period ends.
20	net-renews-6-yr	number of domains successfully renewed (i.e., not in EPP pendingRenew status) either automatically or by command with a new renewal period of six (6) years (and not deleted within the renew or auto-renew grace period). A transaction must be reported in the month the renew or auto-renew grace period ends.

21	net-renews-7-yr	number of domains successfully renewed (i.e., not in EPP pendingRenew status) either automatically or by command with a new renewal period of seven (7) years (and not deleted within the renew or auto-renew grace period). A transaction must be reported in the month the renew or auto-renew grace period ends.
22	net-renews-8-yr	number of domains successfully renewed (i.e., not in EPP pendingRenew status) either automatically or by command with a new renewal period of eight (8) years (and not deleted within the renew or auto-renew grace period). A transaction must be reported in the month the renew or auto-renew grace period ends.
23	net-renews-9-yr	number of domains successfully renewed (i.e., not in EPP pendingRenew status) either automatically or by command with a new renewal period of nine (9) years (and not deleted within the renew or auto-renew grace period). A transaction must be reported in the month the renew or auto-renew grace period ends.
24	net-renews-10-yr	number of domains successfully renewed (i.e., not in EPP pendingRenew status) either automatically or by command with a new renewal period of ten (10) years (and not deleted within the renew or auto-renew grace period). A transaction must be reported in the month the renew or auto-renew grace period ends.
25	transfer-gaining-successful	number of domain transfers initiated by this registrar that were successfully completed (either explicitly or automatically approved) and not deleted within the transfer grace period. A transaction must be reported in the month the transfer grace period ends.
26	transfer-gaining-nacked	number of domain transfers initiated by this registrar that were rejected (e.g., EPP transfer op="reject") by the other registrar
27	transfer-losing-successfully	number of domain transfers initiated by another registrar that were successfully completed (either explicitly or automatically approved)
28	transfer-losing-nacked	number of domain transfers initiated by another registrar that this registrar rejected (e.g., EPP transfer op="reject")

29	transfer-disputed-won	number of transfer disputes in which this registrar prevailed (reported in the month where the determination happened)
30	transfer-disputed-lost	number of transfer disputes this registrar lost (reported in the month where the determination happened)
31	transfer-disputed-nodecision	number of transfer disputes involving this registrar with a split or no decision (reported in the month where the determination happened)
32	deleted-domains-grace	domains deleted within the add grace period (does not include names deleted while in EPP pendingCreate status). A deletion must be reported in the month the name is purged.
33	deleted-domains-nograce	domains deleted outside the add grace period (does not include names deleted while in EPP pendingCreate status). A deletion must be reported in the month the name is purged.
34	restored-domains	domain names restored from redemption period
35	restored-noreport	total number of restored names for which the registrar failed to submit a restore report
36	agp-exemption-requests	total number of AGP (add grace period) exemption requests
37	agp-exemptions-granted	total number of AGP (add grace period) exemption requests granted
38	agp-exempted-domains	total number of names affected by granted AGP (add grace period) exemption requests
39	attempted-adds	number of attempted (both successful and failed) domain name create commands

The first line shall include the field names exactly as described in the table above as a "header line" as described in section 2 of RFC 4180. The last line of each report shall include totals for each column across all registrars; the first field of this line shall read "Totals" while the second field shall be left empty in that line. No other lines besides the ones described above shall be included. Line breaks shall be <U+000D, U+000A> as described in RFC 4180.

2. **Registry Functions Activity Report**. This report shall be compiled in a comma separated-value formatted file as specified in RFC 4180. The file shall be named "gTLD-activity-yyyymm.csv", where "gTLD" is the gTLD name; in case of an IDN-TLD, the A-label shall be used; "yyyymm" is the year and month being reported. The file shall contain the following fields:

Field #	Field Name	Description
01	operational-registrars	number of operational registrars at the end of the reporting period
02	ramp-up-registrars	number of registrars that have received a password for access to OT&E at the end of the reporting period
03	pre-ramp-up-registrars	number of registrars that have requested access, but have not yet entered the ramp-up period at the end of the reporting period
04	zfa-passwords	number of active zone file access passwords at the end of the reporting period
05	whois-43-queries	number of WHOIS (port-43) queries responded during the reporting period
06	web-whois-queries	number of Web-based Whois queries responded during the reporting period, not including searchable Whois
07	searchable-whois-queries	number of searchable Whois queries responded during the reporting period, if offered
08	dns-udp-queries-received	number of DNS queries received over UDP transport during the reporting period
09	dns-udp-queries-responded	number of DNS queries received over UDP transport that were responded during the reporting period
10	dns-tcp-queries-received	number of DNS queries received over TCP transport during the reporting period
11	dns-tcp-queries-responded	number of DNS queries received over TCP transport that were responded during the reporting period
12	srs-dom-check	number of SRS (EPP and any other interface) domain name “check” requests responded during the reporting period
13	srs-dom-create	number of SRS (EPP and any other interface) domain name “create” requests responded during the reporting period
14	srs-dom-delete	number of SRS (EPP and any other interface) domain name “delete” requests responded during the reporting period
15	srs-dom-info	number of SRS (EPP and any other interface) domain name “info” requests responded during the reporting period
16	srs-dom-renew	number of SRS (EPP and any other interface) domain name “renew” requests responded during

Field #	Field Name	Description
		the reporting period
17	srs-dom-rgp-restore-report	number of SRS (EPP and any other interface) domain name RGP “restore” requests delivering a restore report responded during the reporting period
18	srs-dom-rgp-restore-request	number of SRS (EPP and any other interface) domain name RGP “restore” requests responded during the reporting period
19	srs-dom-transfer-approve	number of SRS (EPP and any other interface) domain name “transfer” requests to approve transfers responded during the reporting period
20	srs-dom-transfer-cancel	number of SRS (EPP and any other interface) domain name “transfer” requests to cancel transfers responded during the reporting period
21	srs-dom-transfer-query	number of SRS (EPP and any other interface) domain name “transfer” requests to query about a transfer responded during the reporting period
22	srs-dom-transfer-reject	number of SRS (EPP and any other interface) domain name “transfer” requests to reject transfers responded during the reporting period
23	srs-dom-transfer-request	number of SRS (EPP and any other interface) domain name “transfer” requests to request transfers responded during the reporting period
24	srs-dom-update	number of SRS (EPP and any other interface) domain name “update” requests (not including RGP restore requests) responded during the reporting period
25	srs-host-check	number of SRS (EPP and any other interface) host “check” requests responded during the reporting period
26	srs-host-create	number of SRS (EPP and any other interface) host “create” requests responded during the reporting period
27	srs-host-delete	number of SRS (EPP and any other interface) host “delete” requests responded during the reporting period
28	srs-host-info	number of SRS (EPP and any other interface) host “info” requests responded during the reporting period
29	srs-host-update	number of SRS (EPP and any other interface) host

Field #	Field Name	Description
		"update" requests responded during the reporting period
30	srs-cont-check	number of SRS (EPP and any other interface) contact "check" requests responded during the reporting period
31	srs-cont-create	number of SRS (EPP and any other interface) contact "create" requests responded during the reporting period
32	srs-cont-delete	number of SRS (EPP and any other interface) contact "delete" requests responded during the reporting period
33	srs-cont-info	number of SRS (EPP and any other interface) contact "info" requests responded during the reporting period
34	srs-cont-transfer-approve	number of SRS (EPP and any other interface) contact "transfer" requests to approve transfers responded during the reporting period
35	srs-cont-transfer-cancel	number of SRS (EPP and any other interface) contact "transfer" requests to cancel transfers responded during the reporting period
36	srs-cont-transfer-query	number of SRS (EPP and any other interface) contact "transfer" requests to query about a transfer responded during the reporting period
37	srs-cont-transfer-reject	number of SRS (EPP and any other interface) contact "transfer" requests to reject transfers responded during the reporting period
38	srs-cont-transfer-request	number of SRS (EPP and any other interface) contact "transfer" requests to request transfers responded during the reporting period
39	srs-cont-update	number of SRS (EPP and any other interface) contact "update" requests responded during the reporting period

The first line shall include the field names exactly as described in the table above as a "header line" as described in section 2 of RFC 4180. No other lines besides the ones described above shall be included. Line breaks shall be <U+000D, U+000A> as described in RFC 4180.

For gTLDs that are part of a single-instance Shared Registry System, the Registry Functions Activity Report may include the total contact or host transactions for all the gTLDs in the system.

SPECIFICATION 4

REGISTRATION DATA PUBLICATION SERVICES

1. **Registration Data Directory Services**. Until ICANN requires a different protocol, Registry Operator will operate a WHOIS service available via port 43 in accordance with RFC 3912, and a web-based Directory Service at <whois.nic.TLD> providing free public query-based access to at least the following elements in the following format. ICANN reserves the right to specify alternative formats and protocols, and upon such specification, the Registry Operator will implement such alternative specification as soon as reasonably practicable.

   Registry Operator shall implement a new standard supporting access to domain name registration data (SAC 051) no later than one hundred thirty-five (135) days after it is requested by ICANN if: 1) the IETF produces a standard (i.e., it is published, at least, as a Proposed Standard RFC as specified in RFC 2026); and 2) its implementation is commercially reasonable in the context of the overall operation of the registry.

   1.1. The format of responses shall follow a semi-free text format outline below, followed by a blank line and a legal disclaimer specifying the rights of Registry Operator, and of the user querying the database.

   1.2. Each data object shall be represented as a set of key/value pairs, with lines beginning with keys, followed by a colon and a space as delimiters, followed by the value.

   1.3. For fields where more than one value exists, multiple key/value pairs with the same key shall be allowed (for example to list multiple name servers). The first key/value pair after a blank line should be considered the start of a new record, and should be considered as identifying that record, and is used to group data, such as hostnames and IP addresses, or a domain name and registrant information, together.

   1.4. The fields specified below set forth the minimum output requirements. Registry Operator may output data fields in addition to those specified below, subject to approval by ICANN, which approval shall not be unreasonably withheld.

   1.5. **Domain Name Data:**

      1.5.1 **Query format:** whois EXAMPLE.TLD

      1.5.2 **Response format:**

      Domain Name: EXAMPLE.TLD
      Domain ID: D1234567-TLD

WHOIS Server: whois.example.tld
Referral URL: http://www.example.tld
Updated Date: 2009-05-29T20:13:00Z
Creation Date: 2000-10-08T00:45:00Z
Registry Expiry Date: 2010-10-08T00:44:59Z
Sponsoring Registrar: EXAMPLE REGISTRAR LLC
Sponsoring Registrar IANA ID: 5555555
Domain Status: clientDeleteProhibited
Domain Status: clientRenewProhibited
Domain Status: clientTransferProhibited
Domain Status: serverUpdateProhibited
Registrant ID: 5372808-ERL
Registrant Name: EXAMPLE REGISTRANT
Registrant Organization: EXAMPLE ORGANIZATION
Registrant Street: 123 EXAMPLE STREET
Registrant City: ANYTOWN
Registrant State/Province: AP
Registrant Postal Code: A1A1A1
Registrant Country: EX
Registrant Phone: +1.5555551212
Registrant Phone Ext: 1234
Registrant Fax: +1.5555551213
Registrant Fax Ext: 4321
Registrant Email: EMAIL@EXAMPLE.TLD
Admin ID: 5372809-ERL
Admin Name: EXAMPLE REGISTRANT ADMINISTRATIVE
Admin Organization: EXAMPLE REGISTRANT ORGANIZATION
Admin Street: 123 EXAMPLE STREET
Admin City: ANYTOWN
Admin State/Province: AP
Admin Postal Code: A1A1A1
Admin Country: EX
Admin Phone: +1.5555551212
Admin Phone Ext: 1234
Admin Fax: +1.5555551213
Admin Fax Ext:
Admin Email: EMAIL@EXAMPLE.TLD
Tech ID: 5372811-ERL
Tech Name: EXAMPLE REGISTRAR TECHNICAL
Tech Organization: EXAMPLE REGISTRAR LLC
Tech Street: 123 EXAMPLE STREET
Tech City: ANYTOWN
Tech State/Province: AP
Tech Postal Code: A1A1A1
Tech Country: EX
Tech Phone: +1.1235551234

Tech Phone Ext: 1234
Tech Fax: +1.5555551213
Tech Fax Ext: 93
Tech Email: EMAIL@EXAMPLE.TLD
Name Server: NS01.EXAMPLEREGISTRAR.TLD
Name Server: NS02.EXAMPLEREGISTRAR.TLD
DNSSEC: signedDelegation
DNSSEC: unsigned
>>> Last update of WHOIS database: 2009-05-29T20:15:00Z <<<

1.6. **Registrar Data:**

1.6.1 **Query format**: whois "registrar Example Registrar, Inc."

1.6.2 **Response format**:

Registrar Name: Example Registrar, Inc.
Street: 1234 Admiralty Way
City: Marina del Rey
State/Province: CA
Postal Code: 90292
Country: US
Phone Number: +1.3105551212
Fax Number: +1.3105551213
Email: registrar@example.tld
WHOIS Server: whois.example-registrar.tld
Referral URL: http://www.example-registrar.tld
Admin Contact: Joe Registrar
Phone Number: +1.3105551213
Fax Number: +1.3105551213
Email: joeregistrar@example-registrar.tld
Admin Contact: Jane Registrar
Phone Number: +1.3105551214
Fax Number: +1.3105551213
Email: janeregistrar@example-registrar.tld
Technical Contact: John Geek
Phone Number: +1.3105551215
Fax Number: +1.3105551216
Email: johngeek@example-registrar.tld
>>> Last update of WHOIS database: 2009-05-29T20:15:00Z <<<

1.7. **Nameserver Data:**

1.7.1 **Query format**: whois "NS1.EXAMPLE.TLD", whois "nameserver (nameserver name)", or whois "nameserver (IP Address)"

1.7.2 **Response format:**

Server Name: NS1.EXAMPLE.TLD
IP Address: 192.0.2.123
IP Address: 2001:0DB8::1
Registrar: Example Registrar, Inc.
WHOIS Server: whois.example-registrar.tld
Referral URL: http://www.example-registrar.tld
>>> Last update of WHOIS database: 2009-05-29T20:15:00Z <<<

1.8. The format of the following data fields: domain status, individual and organizational names, address, street, city, state/province, postal code, country, telephone and fax numbers (the extension will be provided as a separate field as shown above), email addresses, date and times should conform to the mappings specified in EPP RFCs 5730-5734 so that the display of this information (or values return in WHOIS responses) can be uniformly processed and understood.

1.9. In order to be compatible with ICANN's common interface for WHOIS (InterNIC), WHOIS output shall be in the format outline above.

1.10. **Searchability**. Offering searchability capabilities on the Directory Services is optional but if offered by the Registry Operator it shall comply with the specification described in this section.

1.10.1 Registry Operator will offer searchability on the web-based Directory Service.

1.10.2 Registry Operator will offer partial match capabilities, at least, on the following fields: domain name, contacts and registrant's name, and contact and registrant's postal address, including all the sub-fields described in EPP (e.g., street, city, state or province, etc.).

1.10.3 Registry Operator will offer exact-match capabilities, at least, on the following fields: registrar id, name server name, and name server's IP address (only applies to IP addresses stored by the registry, i.e., glue records).

1.10.4 Registry Operator will offer Boolean search capabilities supporting, at least, the following logical operators to join a set of search criteria: AND, OR, NOT.

1.10.5 Search results will include domain names matching the search criteria.

1.10.6 Registry Operator will: 1) implement appropriate measures to avoid abuse of this feature (e.g., permitting access only to legitimate authorized users); and 2) ensure the feature is in compliance with any applicable privacy laws or policies.

1.11. Registry Operator shall provide a link on the primary website for the TLD (i.e., the website provided to ICANN for publishing on the ICANN website) to a web page designated by ICANN containing WHOIS policy and educational materials.

2. Zone File Access

2.1. Third-Party Access

2.1.1 **Zone File Access Agreement**. Registry Operator will enter into an agreement with any Internet user, which will allow such user to access an Internet host server or servers designated by Registry Operator and download zone file data. The agreement will be standardized, facilitated and administered by a Centralized Zone Data Access Provider, which may be ICANN or an ICANN designee (the "CZDA Provider"). Registry Operator (optionally through the CZDA Provider) will provide access to zone file data per Section 2.1.3 of this Specification and do so using the file format described in Section 2.1.4 of this Specification. Notwithstanding the foregoing, (a) the CZDA Provider may reject the request for access of any user that does not satisfy the credentialing requirements in Section 2.1.2 below; (b) Registry Operator may reject the request for access of any user that does not provide correct or legitimate credentials under Section 2.1.2 below or where Registry Operator reasonably believes will violate the terms of Section 2.1.5. below; and, (c) Registry Operator may revoke access of any user if Registry Operator has evidence to support that the user has violated the terms of Section 2.1.5 below.

2.1.2 **Credentialing Requirements**. Registry Operator, through the facilitation of the CZDA Provider, will request each user to provide it with information sufficient to correctly identify and locate the user. Such user information will include, without limitation, company name, contact name, address, telephone number, facsimile number, email address and IP address.

2.1.3 **Grant of Access**. Each Registry Operator (optionally through the CZDA Provider) will provide the Zone File FTP (or other Registry supported) service for an ICANN-specified and managed URL (specifically, <TLD>.zda.icann.org where <TLD> is the TLD for which the registry is responsible) for the user to access the Registry's zone data archives. Registry Operator will grant the user a non-exclusive, nontransferable, limited right to access Registry Operator's (optionally CZDA Provider's) Zone File hosting server, and to transfer a copy of the top-level domain zone files, and any associated cryptographic checksum files no more than once per 24 hour period using FTP, or other data transport and access protocols that may be

prescribed by ICANN. For every zone file access server, the zone files are in the top-level directory called <zone>.zone.gz, with <zone>.zone.gz.md5 and <zone>.zone.gz.sig to verify downloads. If the Registry Operator (or the CZDA Provider) also provides historical data, it will use the naming pattern <zone>-yyyymmdd.zone.gz, etc.

2.1.4 **File Format Standard**. Registry Operator (optionally through the CZDA Provider) will provide zone files using a subformat of the standard Master File format as originally defined in RFC 1035, Section 5, including all the records present in the actual zone used in the public DNS. Sub-format is as follows:

1. Each record must include all fields in one line as: <domain-name> <TTL> <class> <type> <RDATA>.

2. Class and Type must use the standard mnemonics and must be in lower case.

3. TTL must be present as a decimal integer.

4. Use of /X and /DDD inside domain names is allowed.

5. All domain names must be in lower case.

6. Must use exactly one tab as separator of fields inside a record.

7. All domain names must be fully qualified.

8. No $ORIGIN directives.

9. No use of "@" to denote current origin.

10. No use of "blank domain names" at the beginning of a record to continue the use of the domain name in the previous record.

11. No $INCLUDE directives.

12. No $TTL directives.

13. No use of parentheses, e.g., to continue the list of fields in a record across a line boundary.

14. No use of comments.

15. No blank lines.

16. The SOA record should be present at the top and (duplicated at) the end of the zone file.

17. With the exception of the SOA record, all the records in a file must be in alphabetical order.

18. One zone per file. If a TLD divides its DNS data into multiple zones, each goes into a separate file named as above, with all the files combined using tar into a file called <tld>.zone.tar.

2.1.5 **Use of Data by User**. Registry Operator will permit user to use the zone file for lawful purposes; provided that (a) user takes all reasonable steps to protect against unauthorized access to and use and disclosure of the data and (b) under no circumstances will Registry Operator be required or permitted to allow user to use the data to, (i) allow, enable, or otherwise support the transmission by email, telephone, or facsimile of mass unsolicited, commercial advertising or solicitations to entities other than user's own existing customers, or (ii) enable high volume, automated, electronic processes that send queries or data to the systems of Registry Operator or any ICANN-accredited registrar.

2.1.6 **Term of Use**. Registry Operator, through CZDA Provider, will provide each user with access to the zone file for a period of not less than three (3) months. Registry Operator will allow users to renew their Grant of Access.

2.1.7 **No Fee for Access**. Registry Operator will provide, and CZDA Provider will facilitate, access to the zone file to user at no cost.

2.2. **Co-operation**

2.2.1 **Assistance**. Registry Operator will co-operate and provide reasonable assistance to ICANN and the CZDA Provider to facilitate and maintain the efficient access of zone file data by permitted users as contemplated under this Schedule.

2.3. **ICANN Access**. Registry Operator shall provide bulk access to the zone files for the TLD to ICANN or its designee on a continuous basis in the manner ICANN may reasonably specify from time to time. Access will be provided at least daily. Zone files will include SRS data committed as close as possible to 00:00:00 UTC.

2.4. **Emergency Operator Access**. Registry Operator shall provide bulk access to the zone files for the TLD to the Emergency Operators designated by ICANN on a continuous basis in the manner ICANN may reasonably specify from time to time.

3. **Bulk Registration Data Access to ICANN**

3.1. **Periodic Access to Thin Registration Data**. In order to verify and ensure the operational stability of Registry Services as well as to facilitate compliance checks on accredited registrars, Registry Operator will provide ICANN on a weekly basis (the day to be designated by ICANN) with up-to-date Registration Data as specified below. Data will include data committed as of 00:00:00 UTC on the day previous to the one designated for retrieval by ICANN.

3.1.1 **Contents**. Registry Operator will provide, at least, the following data for all registered domain names: domain name, domain name repository object id (roid), registrar id (IANA ID), statuses, last updated date, creation date, expiration date, and name server names. For sponsoring registrars, at least, it will provide: registrar name, registrar repository object id (roid), hostname of registrar Whois server, and URL of registrar.

3.1.2 **Format**. The data will be provided in the format specified in Specification 2 for Data Escrow (including encryption, signing, etc.) but including only the fields mentioned in the previous section, i.e., the file will only contain Domain and Registrar objects with the fields mentioned above. Registry Operator has the option to provide a full deposit file instead as specified in Specification 2.

3.1.3 **Access**. Registry Operator will have the file(s) ready for download as of 00:00:00 UTC on the day designated for retrieval by ICANN. The file(s) will be made available for download by SFTP, though ICANN may request other means in the future.

3.2. **Exceptional Access to Thick Registration Data**. In case of a registrar failure, deaccreditation, court order, etc. that prompts the temporary or definitive transfer of its domain names to another registrar, at the request of ICANN, Registry Operator will provide ICANN with up-to-date data for the domain names of the losing registrar. The data will be provided in the format specified in Specification 2 for Data Escrow. The file will only contain data related to the domain names of the losing registrar. Registry Operator will provide the data as soon as commercially practicable, but in no event later than five (5) calendar days following ICANN's request. Unless otherwise agreed by Registry Operator and ICANN, the file will be made available for download by ICANN in the same manner as the data specified in Section 3.1 of this Specification.

SPECIFICATION 5

SCHEDULE OF RESERVED NAMES

Except to the extent that ICANN otherwise expressly authorizes in writing, and subject to the terms and conditions of this Specification, Registry Operator shall reserve the following labels from initial (i.e., other than renewal) registration within the TLD. If using self-allocation, the Registry Operator must show the registration in the RDDS. In the case of IDN names (as indicated below), IDN variants will be identified according to the registry operator IDN registration policy, where applicable.

1. **Example.** The ASCII label "EXAMPLE" shall be withheld from registration or allocated to Registry Operator at the second level and at all other levels within the TLD at which Registry Operator offers registrations (such second level and all other levels are collectively referred to herein as, "All Levels"). Such label may not be activated in the DNS, and may not be released for registration to any person or entity other than Registry Operator. Upon conclusion of Registry Operator's designation as operator of the registry for the TLD, such withheld or allocated label shall be transferred as specified by ICANN. Registry Operator may self-allocate and renew such name without use of an ICANN accredited registrar, which will not be considered Transactions for purposes of Section 6.1 of the Agreement.

2. **Two-character labels**. All two-character ASCII labels shall be withheld from registration or allocated to Registry Operator at the second level within the TLD. Such labels may not be activated in the DNS, and may not be released for registration to any person or entity other than Registry Operator, provided that such two-character label strings may be released to the extent that Registry Operator reaches agreement with the related government and country-code manager of the string as specified in the ISO 3166-1 alpha-2 standard. The Registry Operator may also propose the release of these reservations based on its implementation of measures to avoid confusion with the corresponding country codes, subject to approval by ICANN. Upon conclusion of Registry Operator's designation as operator of the registry for the TLD, all such labels that remain withheld from registration or allocated to Registry Operator shall be transferred as specified by ICANN. Registry Operator may self-allocate and renew such names without use of an ICANN accredited registrar, which will not be considered Transactions for purposes of Section 6.1 of the Agreement.

3. **Reservations for Registry Operations**.

    3.1. The following ASCII labels must be withheld from registration or allocated to Registry Operator at All Levels for use in connection with the operation of the registry for the TLD: WWW, RDDS and WHOIS. The following ASCII label must be allocated to Registry Operator at All Levels for use in connection with the operation of the registry for the TLD: NIC. Registry Operator may activate WWW, RDDS and WHOIS in the DNS, but must activate NIC in the

DNS, as necessary for the operation of the TLD. None of WWW, RDDS, WHOIS or NIC may be released or registered to any person (other than Registry Operator) or third party. Upon conclusion of Registry Operator's designation as operator of the registry for the TLD all such withheld or allocated names shall be transferred as specified by ICANN. Registry Operator may self-allocate and renew such names without use of an ICANN accredited registrar, which will not be considered Transactions for purposes of Section 6.1 of the Agreement.

3.2. Registry Operator may activate in the DNS at All Levels up to one hundred (100) names (plus their IDN variants, where applicable) necessary for the operation or the promotion of the TLD. Registry Operator must act as the Registered Name Holder of such names as that term is defined in the then-current ICANN Registrar Accreditation Agreement (RAA). These activations will be considered Transactions for purposes of Section 6.1 of the Agreement. Registry Operator must either (i) register such names through an ICANN-accredited registrar; or (ii) self-allocate such names and with respect to those names submit to and be responsible to ICANN for compliance with ICANN Consensus Policies and the obligations set forth in Subsections 3.7.7.1 through 3.7.7.12 of the then-current RAA (or any other replacement clause setting out the terms of the registration agreement between a registrar and a registered name holder). At Registry Operator's discretion and in compliance with all other terms of this Agreement, such names may be released for registration to another person or entity.

3.3. Registry Operator may withhold from registration or allocate to Registry Operator names (including their IDN variants, where applicable) at All Levels in accordance with Section 2.6 of the Agreement. Such names may not be activated in the DNS, but may be released for registration to another person or entity at Registry Operator's discretion. Upon conclusion of Registry Operator's designation as operator of the registry for the TLD, all such names that remain withheld from registration or allocated to Registry Operator shall be transferred as specified by ICANN. Upon ICANN's request, Registry Operator shall provide a listing of all names withheld or allocated to Registry Operator pursuant to Section 2.6 of the Agreement. Registry Operator may self-allocate and renew such names without use of an ICANN accredited registrar, which will not be considered Transactions for purposes of Section 6.1 of the Agreement.

4. **Country and Territory Names**. The country and territory names (including their IDN variants, where applicable) contained in the following internationally recognized lists shall be withheld from registration or allocated to Registry Operator at All Levels:

4.1. the short form (in English) of all country and territory names contained on the ISO 3166-1 list, as updated from time to time, including the European

Union, which is exceptionally reserved on the ISO 3166-1 list, and its scope extended in August 1999 to any application needing to represent the name European Union <http://www.iso.org/iso/support/country_codes/iso_3166_code_lists/iso-3166-1_decoding_table.htm>;

4.2. the United Nations Group of Experts on Geographical Names, Technical Reference Manual for the Standardization of Geographical Names, Part III Names of Countries of the World; and

4.3. the list of United Nations member states in 6 official United Nations languages prepared by the Working Group on Country Names of the United Nations Conference on the Standardization of Geographical Names;

provided, that the reservation of specific country and territory names (including their IDN variants according to the registry operator IDN registration policy, where applicable) may be released to the extent that Registry Operator reaches agreement with the applicable government(s). Registry Operator must not activate such names in the DNS; provided, that Registry Operator may propose the release of these reservations, subject to review by ICANN's Governmental Advisory Committee and approval by ICANN. Upon conclusion of Registry Operator's designation as operator of the registry for the TLD, all such names that remain withheld from registration or allocated to Registry Operator shall be transferred as specified by ICANN. Registry Operator may self-allocate and renew such names without use of an ICANN accredited registrar, which will not be considered Transactions for purposes of Section 6.1 of the Agreement.

5. **International Olympic Committee; International Red Cross and Red Crescent Movement**. As instructed from time to time by ICANN, the names (including their IDN variants, where applicable) relating to the International Olympic Committee, International Red Cross and Red Crescent Movement listed at http://www.icann.org/en/resources/registries/reserved shall be withheld from registration or allocated to Registry Operator at the second level within the TLD. Additional International Olympic Committee, International Red Cross and Red Crescent Movement names (including their IDN variants) may be added to the list upon ten (10) calendar days notice from ICANN to Registry Operator. Such names may not be activated in the DNS, and may not be released for registration to any person or entity other than Registry Operator. Upon conclusion of Registry Operator's designation as operator of the registry for the TLD, all such names withheld from registration or allocated to Registry Operator shall be transferred as specified by ICANN. Registry Operator may self-allocate and renew such names without use of an ICANN accredited registrar, which will not be considered Transactions for purposes of Section 6.1 of the Agreement.

6. **Intergovernmental Organizations**. As instructed from time to time by ICANN, Registry Operator will implement the protections mechanism determined by the

ICANN Board of Directors relating to the protection of identifiers for Intergovernmental Organizations. A list of reserved names for this Section 6 is available at http://www.icann.org/en/resources/registries/reserved. Additional names (including their IDN variants) may be added to the list upon ten (10) calendar days notice from ICANN to Registry Operator. Any such protected identifiers for Intergovernmental Organizations may not be activated in the DNS, and may not be released for registration to any person or entity other than Registry Operator. Upon conclusion of Registry Operator's designation as operator of the registry for the TLD, all such protected identifiers shall be transferred as specified by ICANN. Registry Operator may self-allocate and renew such names without use of an ICANN accredited registrar, which will not be considered Transactions for purposes of Section 6.1 of the Agreement.

SPECIFICATION 6

REGISTRY INTEROPERABILITY AND CONTINUITY SPECIFICATIONS

1. **Standards Compliance**

1.1. **DNS**. Registry Operator shall comply with relevant existing RFCs and those published in the future by the Internet Engineering Task Force (IETF), including all successor standards, modifications or additions thereto relating to the DNS and name server operations including without limitation RFCs 1034, 1035, 1123, 1982, 2181, 2182, 2671, 3226, 3596, 3597, 4343, and 5966. DNS labels may only include hyphens in the third and fourth position if they represent valid IDNs (as specified above) in their ASCII encoding (e.g., "xn--ndk061n").

1.2. **EPP**. Registry Operator shall comply with relevant existing RFCs and those published in the future by the Internet Engineering Task Force (IETF) including all successor standards, modifications or additions thereto relating to the provisioning and management of domain names using the Extensible Provisioning Protocol (EPP) in conformance with RFCs 5910, 5730, 5731, 5732 (if using host objects), 5733 and 5734. If Registry Operator implements Registry Grace Period (RGP), it will comply with RFC 3915 and its successors. If Registry Operator requires the use of functionality outside the base EPP RFCs, Registry Operator must document EPP extensions in Internet-Draft format following the guidelines described in RFC 3735. Registry Operator will provide and update the relevant documentation of all the EPP Objects and Extensions supported to ICANN prior to deployment.

1.3. **DNSSEC**. Registry Operator shall sign its TLD zone files implementing Domain Name System Security Extensions ("DNSSEC"). During the Term, Registry Operator shall comply with RFCs 4033, 4034, 4035, 4509 and their successors, and follow the best practices described in RFC 4641 and its successors. If Registry Operator implements Hashed Authenticated Denial of Existence for DNS Security Extensions, it shall comply with RFC 5155 and its successors. Registry Operator shall accept public-key material from child domain names in a secure manner according to industry best practices. Registry shall also publish in its website the DNSSEC Practice Statements (DPS) describing critical security controls and procedures for key material storage, access and usage for its own keys and secure acceptance of registrants' public-key material. Registry Operator shall publish its DPS following the format described in RFC 6841.

1.4. **IDN**. If the Registry Operator offers Internationalized Domain Names ("IDNs"), it shall comply with RFCs 5890, 5891, 5892, 5893 and their successors. Registry Operator shall comply with the ICANN IDN Guidelines at <http://www.icann.org/en/topics/idn/implementation-guidelines.htm>,

as they may be amended, modified, or superseded from time to time. Registry Operator shall publish and keep updated its IDN Tables and IDN Registration Rules in the IANA Repository of IDN Practices as specified in the ICANN IDN Guidelines.

1.5. **IPv6**. Registry Operator shall be able to accept IPv6 addresses as glue records in its Registry System and publish them in the DNS. Registry Operator shall offer public IPv6 transport for, at least, two of the Registry's name servers listed in the root zone with the corresponding IPv6 addresses registered with IANA. Registry Operator should follow "DNS IPv6 Transport Operational Guidelines" as described in BCP 91 and the recommendations and considerations described in RFC 4472. Registry Operator shall offer public IPv6 transport for its Registration Data Publication Services as defined in Specification 4 of this Agreement; e.g., Whois (RFC 3912), Web based Whois. Registry Operator shall offer public IPv6 transport for its Shared Registration System (SRS) to any Registrar, no later than six (6) months after receiving the first request in writing from a gTLD accredited Registrar willing to operate with the SRS over IPv6.

2. **Registry Services**

2.1. **Registry Services**. "Registry Services" are, for purposes of the Agreement, defined as the following: (a) those services that are operations of the registry critical to the following tasks: the receipt of data from registrars concerning registrations of domain names and name servers; provision to registrars of status information relating to the zone servers for the TLD; dissemination of TLD zone files; operation of the registry DNS servers; and dissemination of contact and other information concerning domain name server registrations in the TLD as required by this Agreement; (b) other products or services that the Registry Operator is required to provide because of the establishment of a Consensus Policy as defined in Specification 1; (c) any other products or services that only a registry operator is capable of providing, by reason of its designation as the registry operator; and (d) material changes to any Registry Service within the scope of (a), (b) or (c) above.

2.2. **Wildcard Prohibition**. For domain names which are either not registered, or the registrant has not supplied valid records such as NS records for listing in the DNS zone file, or their status does not allow them to be published in the DNS, the use of DNS wildcard Resource Records as described in RFCs 1034 and 4592 or any other method or technology for synthesizing DNS Resources Records or using redirection within the DNS by the Registry is prohibited. When queried for such domain names the authoritative name servers must return a "Name Error" response (also known as NXDOMAIN), RCODE 3 as described in RFC 1035 and related RFCs. This provision applies for all DNS zone files at all levels in the DNS tree for which the Registry

Operator (or an affiliate engaged in providing Registration Services) maintains data, arranges for such maintenance, or derives revenue from such maintenance.

3. **Registry Continuity**

3.1. **High Availability**. Registry Operator will conduct its operations using network and geographically diverse, redundant servers (including network-level redundancy, end-node level redundancy and the implementation of a load balancing scheme where applicable) to ensure continued operation in the case of technical failure (widespread or local), or an extraordinary occurrence or circumstance beyond the control of the Registry Operator. Registry Operator's emergency operations department shall be available at all times to respond to extraordinary occurrences.

3.2. **Extraordinary Event**. Registry Operator will use commercially reasonable efforts to restore the critical functions of the registry within twenty-four (24) hours after the termination of an extraordinary event beyond the control of the Registry Operator and restore full system functionality within a maximum of forty-eight (48) hours following such event, depending on the type of critical function involved. Outages due to such an event will not be considered a lack of service availability.

3.3. **Business Continuity**. Registry Operator shall maintain a business continuity plan, which will provide for the maintenance of Registry Services in the event of an extraordinary event beyond the control of the Registry Operator or business failure of Registry Operator, and may include the designation of a Registry Services continuity provider. If such plan includes the designation of a Registry Services continuity provider, Registry Operator shall provide the name and contact information for such Registry Services continuity provider to ICANN. In the case of an extraordinary event beyond the control of the Registry Operator where the Registry Operator cannot be contacted, Registry Operator consents that ICANN may contact the designated Registry Services continuity provider, if one exists. Registry Operator shall conduct Registry Services Continuity testing at least once per year.

4. **Abuse Mitigation**

4.1. **Abuse Contact**. Registry Operator shall provide to ICANN and publish on its website its accurate contact details including a valid email and mailing address as well as a primary contact for handling inquiries related to malicious conduct in the TLD, and will provide ICANN with prompt notice of any changes to such contact details.

4.2. **Malicious Use of Orphan Glue Records**. Registry Operator shall take action to remove orphan glue records (as defined at http://www.icann.org/en/committees/security/sac048.pdf) when provided

with evidence in written form that such records are present in connection with malicious conduct.

5. **Supported Initial and Renewal Registration Periods**

5.1. **Initial Registration Periods**. Initial registrations of registered names may be made in the registry in one (1) year increments for up to a maximum of ten (10) years. For the avoidance of doubt, initial registrations of registered names may not exceed ten (10) years.

5.2. **Renewal Periods**. Renewal of registered names may be made in one (1) year increments for up to a maximum of ten (10) years. For the avoidance of doubt, renewal of registered names may not extend their registration period beyond ten (10) years from the time of the renewal.

6. **Name Collision Occurrence Management**

6.1. **No-Activation Period.** Registry Operator shall not activate any names in the DNS zone for the Registry TLD (except for "NIC") until at least 120 calendar days after the effective date of this agreement. Registry Operator may allocate names (subject to subsection 6.2 below) during this period only if Registry Operator causes registrants to be clearly informed of the inability to activate names until the No-Activation Period ends.

6.2. **Name Collision Occurrence Assessment**

6.2.1 Registry Operator shall not activate any names in the DNS zone for the Registry TLD except in compliance with a Name Collision Occurrence Assessment provided by ICANN regarding the Registry TLD. Registry Operator will either (A) implement the mitigation measures described in its Name Collision Occurrence Assessment before activating any second-level domain name, or (B) block those second-level domain names for which the mitigation measures as described in the Name Collision Occurrence Assessment have not been implemented and proceed with activating names that are not listed in the Assessment.

6.2.2 Notwithstanding subsection 6.2.1, Registry Operator may proceed with activation of names in the DNS zone without implementation of the measures set forth in Section 6.2.1 only if (A) ICANN determines that the Registry TLD is eligible for this alternative path to activation of names; and (B) Registry Operator blocks all second-level domain names identified by ICANN and set forth at <http://newgtlds.icann.org/en/announcements-and-media/announcement-2-17nov13-en> as such list may be modified by ICANN from time to time. Registry Operator may activate names pursuant to this subsection and later activate names pursuant to subsection 6.2.1.

6.2.3 The sets of names subject to mitigation or blocking pursuant to Sections 6.2.1 and 6.2.2 will be based on ICANN analysis of DNS information including "Day in the Life of the Internet" data maintained by the DNS Operations, Analysis, and Research Center (DNS-OARC) <https://www.dns-oarc.net/oarc/data/ditl>.

6.2.4 Registry Operator may participate in the development by the ICANN community of a process for determining whether and how these blocked names may be released.

6.2.5 If ICANN determines that the TLD is ineligible for the alternative path to activation of names, ICANN may elect not to delegate the TLD pending completion of the final Name Collision Occurrence Assessment for the TLD, and Registry Operator's completion of all required mitigation measures. Registry Operator understands that the mitigation measures required by ICANN as a condition to activation of names in the DNS zone for the TLD may include, without limitation, mitigation measures such as those described in Section 3.2 of the New gTLD Name Collision Occurrence Management Plan approved by the ICANN Board New gTLD Program Committee (NGPC) on 7 October 2013 as found at <http://www.icann.org/en/groups/board/documents/resolutions-new-gtld-annex-1-07oct13-en.pdf>.

6.3. **Name Collision Report Handling**

6.3.1 During the first two years after delegation of the TLD, Registry Operator's emergency operations department shall be available to receive reports, relayed by ICANN, alleging demonstrably severe harm from collisions with overlapping use of the names outside of the authoritative DNS.

6.3.2 Registry Operator shall develop an internal process for handling in an expedited manner reports received pursuant to subsection 6.3.1 under which Registry Operator may, to the extent necessary and appropriate, remove a recently activated name from the TLD zone for a period of up to two years in order to allow the affected party to make changes to its systems.

SPECIFICATION 7

MINIMUM REQUIREMENTS FOR RIGHTS PROTECTION MECHANISMS

1. **Rights Protection Mechanisms**. Registry Operator shall implement and adhere to the rights protection mechanisms ("RPMs") specified in this Specification. In addition to such RPMs, Registry Operator may develop and implement additional RPMs that discourage or prevent registration of domain names that violate or abuse another party's legal rights. Registry Operator will include all RPMs required by this Specification 7 and any additional RPMs developed and implemented by Registry Operator in the registry-registrar agreement entered into by ICANN-accredited registrars authorized to register names in the TLD. Registry Operator shall implement in accordance with requirements set forth therein each of the mandatory RPMs set forth in the Trademark Clearinghouse as of the date hereof, as posted at [*url to be inserted*] (the "Trademark Clearinghouse Requirements"), which may be revised in immaterial respects by ICANN from time to time. Registry Operator shall not mandate that any owner of applicable intellectual property rights use any other trademark information aggregation, notification, or validation service in addition to or instead of the ICANN-designated Trademark Clearinghouse. If there is a conflict between the terms and conditions of this Agreement and the Trademark Clearinghouse Requirements, the terms and conditions of this Agreement shall control.

2. **Dispute Resolution Mechanisms**. Registry Operator will comply with the following dispute resolution mechanisms as they may be revised from time to time:

    a. the Trademark Post-Delegation Dispute Resolution Procedure (PDDRP) and the Registration Restriction Dispute Resolution Procedure (RRDRP) adopted by ICANN (posted at [urls to be inserted when final procedure is adopted]). Registry Operator agrees to implement and adhere to any remedies ICANN imposes (which may include any reasonable remedy, including for the avoidance of doubt, the termination of the Registry Agreement pursuant to Section 4.3(e) of the Agreement) following a determination by any PDDRP or RRDRP panel and to be bound by any such determination; and

    b. the Uniform Rapid Suspension system ("URS") adopted by ICANN (posted at [url to be inserted]), including the implementation of determinations issued by URS examiners.

SPECIFICATION 8

CONTINUED OPERATIONS INSTRUMENT

1. The Continued Operations Instrument shall (a) provide for sufficient financial resources to ensure the continued operation of the critical registry functions related to the TLD set forth in Section 6 of Specification 10 to this Agreement for a period of three (3) years following any termination of this Agreement on or prior to the fifth anniversary of the Effective Date or for a period of one (1) year following any termination of this Agreement after the fifth anniversary of the Effective Date but prior to or on the sixth (6^{th}) anniversary of the Effective Date, and (b) be in the form of either (i) an irrevocable standby letter of credit, or (ii) an irrevocable cash escrow deposit, each meeting the requirements set forth in item 50(b) of Attachment to Module 2 – Evaluation Questions and Criteria – of the gTLD Applicant Guidebook, as published and supplemented by ICANN prior to the date hereof (which is hereby incorporated by reference into this Specification 8). Registry Operator shall use its best efforts to take all actions necessary or advisable to maintain in effect the Continued Operations Instrument for a period of six (6) years from the Effective Date, and to maintain ICANN as a third party beneficiary thereof. If Registry Operator elects to obtain an irrevocable standby letter of credit but the term required above is unobtainable, Registry Operator may obtain a letter of credit with a one-year term and an "evergreen provision," providing for annual extensions, without amendment, for an indefinite number of additional periods until the issuing bank informs ICANN of its final expiration or until ICANN releases the letter of credit as evidenced in writing, if the letter of credit otherwise meets the requirements set forth in item 50(b) of Attachment to Module 2 – Evaluation Questions and Criteria – of the gTLD Applicant Guidebook, as published and supplemented by ICANN prior to the date hereof; provided, however, that if the issuing bank informs ICANN of the expiration of such letter of credit prior to the sixth (6th) anniversary of the Effective Date, such letter of credit must provide that ICANN is entitled to draw the funds secured by the letter of credit prior to such expiration. The letter of credit must require the issuing bank to give ICANN at least thirty (30) calendar days' notice of any such expiration or non-renewal. If the letter of credit expires or is terminated at any time prior to the sixth (6th) anniversary of the Effective Date, Registry Operator will be required to obtain a replacement Continued Operations Instrument. ICANN may draw the funds under the original letter of credit, if the replacement Continued Operations Instrument is not in place prior to the expiration of the original letter of credit. Registry Operator shall provide to ICANN copies of all final documents relating to the Continued Operations Instrument and shall keep ICANN reasonably informed of material developments relating to the Continued Operations Instrument. Registry Operator shall not agree to, or permit, any amendment of, or waiver under, the Continued Operations Instrument or other documentation relating thereto without the prior written consent of ICANN (such consent not to be unreasonably withheld).

2. If, notwithstanding the use of best efforts by Registry Operator to satisfy its obligations under the preceding paragraph, the Continued Operations Instrument expires or is terminated by another party thereto, in whole or in part, for any reason, prior to the sixth anniversary of the Effective Date, Registry Operator shall promptly (i) notify ICANN of such expiration or termination and the reasons therefor and (ii) arrange for an alternative instrument that provides for sufficient financial resources to ensure the continued operation of the critical registry functions related to the TLD set forth in Section 6 of Specification 10 to this Agreement for a period of three (3) years following any termination of this Agreement on or prior to the fifth anniversary of the Effective Date or for a period of one (1) year following any termination of this Agreement after the fifth anniversary of the Effective Date but prior to or on the sixth (6) anniversary of the Effective Date (an "Alternative Instrument"). Any such Alternative Instrument shall be on terms no less favorable to ICANN than the Continued Operations Instrument and shall otherwise be in form and substance reasonably acceptable to ICANN.

3. Notwithstanding anything to the contrary contained in this Specification 8, at any time, Registry Operator may replace the Continued Operations Instrument with an Alternative Instrument that (i) provides for sufficient financial resources to ensure the continued operation of the critical registry functions related to the TLD set forth in Section 6 of Specification 10 to this Agreement for a period of three (3) years following any termination of this Agreement on or prior to the fifth anniversary of the Effective Date or for a period one (1) year following any termination of this Agreement after the fifth anniversary of the Effective Date but prior to or on the sixth (6) anniversary of the Effective Date, and (ii) contains terms no less favorable to ICANN than the Continued Operations Instrument and is otherwise in form and substance reasonably acceptable to ICANN. In the event Registry Operator replaces the Continued Operations Instrument either pursuant to paragraph 2 or this paragraph 3, the terms of this Specification 8 shall no longer apply with respect to the original Continuing Operations Instrument, but shall thereafter apply with respect to such Alternative Instrument(s), and such instrument shall thereafter be considered the Continued Operations Instrument for purposes of this Agreement.

SPECIFICATION 9

REGISTRY OPERATOR CODE OF CONDUCT

1. In connection with the operation of the registry for the TLD, Registry Operator will not, and will not allow any parent, subsidiary, Affiliate, subcontractor or other related entity, to the extent such party is engaged in the provision of Registry Services with respect to the TLD (each, a "Registry Related Party"), to:

    a. directly or indirectly show any preference or provide any special consideration to any registrar with respect to operational access to registry systems and related registry services, unless comparable opportunities to qualify for such preferences or considerations are made available to all registrars on substantially similar terms and subject to substantially similar conditions;

    b. register domain names in its own right, except for names registered through an ICANN accredited registrar; provided, however, that Registry Operator may (a) reserve names from registration pursuant to Section 2.6 of the Agreement and (b) may withhold from registration or allocate to Registry Operator up to one hundred (100) names pursuant to Section 3.2 of Specification 5;

    c. register names in the TLD or sub-domains of the TLD based upon proprietary access to information about searches or resolution requests by consumers for domain names not yet registered (commonly known as, "front-running"); or

    d. allow any Affiliated registrar to disclose Personal Data about registrants to Registry Operator or any Registry Related Party, except as reasonably necessary for the management and operations of the TLD, unless all unrelated third parties (including other registry operators) are given equivalent access to such user data on substantially similar terms and subject to substantially similar conditions.

2. If Registry Operator or a Registry Related Party also operates as a provider of registrar or registrar-reseller services, Registry Operator will, or will cause such Registry Related Party to, ensure that such services are offered through a legal entity separate from Registry Operator, and maintain separate books of accounts with respect to its registrar or registrar-reseller operations.

3. If Registry Operator or a Registry Related Party also operates as a provider of registrar or registrar-reseller services, Registry Operator will conduct internal reviews at least once per calendar year to ensure compliance with this Code of Conduct. Within twenty (20) calendar days following the end of each calendar year, Registry Operator will provide the results of the internal review, along with a certification executed by an executive officer of Registry Operator certifying as to

Registry Operator's compliance with this Code of Conduct, via email to an address to be provided by ICANN. (ICANN may specify in the future the form and contents of such reports or that the reports be delivered by other reasonable means.) Registry Operator agrees that ICANN may publicly post such results and certification; provided, however, ICANN shall not disclose Confidential Information contained in such results except in accordance with Section 7.15 of the Agreement.

4. Nothing set forth herein shall: (i) limit ICANN from conducting investigations of claims of Registry Operator's non-compliance with this Code of Conduct; or (ii) provide grounds for Registry Operator to refuse to cooperate with ICANN investigations of claims of Registry Operator's non-compliance with this Code of Conduct.

5. Nothing set forth herein shall limit the ability of Registry Operator or any Registry Related Party, to enter into arms-length transactions in the ordinary course of business with a registrar or reseller with respect to products and services unrelated in all respects to the TLD.

6. Registry Operator may request an exemption to this Code of Conduct, and such exemption may be granted by ICANN in ICANN's reasonable discretion, if Registry Operator demonstrates to ICANN's reasonable satisfaction that (i) all domain name registrations in the TLD are registered to, and maintained by, Registry Operator for the exclusive use of Registry Operator or its Affiliates, (ii) Registry Operator does not sell, distribute or transfer control or use of any registrations in the TLD to any third party that is not an Affiliate of Registry Operator, and (iii) application of this Code of Conduct to the TLD is not necessary to protect the public interest.

SPECIFICATION 10

REGISTRY PERFORMANCE SPECIFICATIONS

1. **Definitions**

1.1. **DNS**. Refers to the Domain Name System as specified in RFCs 1034, 1035, and related RFCs.

1.2. **DNSSEC proper resolution**. There is a valid DNSSEC chain of trust from the root trust anchor to a particular domain name, e.g., a TLD, a domain name registered under a TLD, etc.

1.3. **EPP**. Refers to the Extensible Provisioning Protocol as specified in RFC 5730 and related RFCs.

1.4. **IP address**. Refers to IPv4 or IPv6 addresses without making any distinction between the two. When there is need to make a distinction, IPv4 or IPv6 is used.

1.5. **Probes**. Network hosts used to perform (DNS, EPP, etc.) tests (see below) that are located at various global locations.

1.6. **RDDS**. Registration Data Directory Services refers to the collective of WHOIS and Web-based WHOIS services as defined in Specification 4 of this Agreement.

1.7. **RTT**. Round-Trip Time or RTT refers to the time measured from the sending of the first bit of the first packet of the sequence of packets needed to make a request until the reception of the last bit of the last packet of the sequence needed to receive the response. If the client does not receive the whole sequence of packets needed to consider the response as received, the request will be considered unanswered.

1.8. **SLR**. Service Level Requirement is the level of service expected for a certain parameter being measured in a Service Level Agreement (SLA).

2. **Service Level Agreement Matrix**

	Parameter	SLR (monthly basis)
DNS	DNS service availability	0 min downtime = 100% availability
	DNS name server availability	≤ 432 min of downtime (≈ 99%)
	TCP DNS resolution RTT	≤ 1500 ms, for at least 95% of the queries
	UDP DNS resolution RTT	≤ 500 ms, for at least 95% of the queries
	DNS update time	≤ 60 min, for at least 95% of the probes
RDDS	RDDS availability	≤ 864 min of downtime (≈ 98%)

	RDDS query RTT	≤ 2000 ms, for at least 95% of the queries
	RDDS update time	≤ 60 min, for at least 95% of the probes
EPP	EPP service availability	≤ 864 min of downtime (≈ 98%)
	EPP session-command RTT	≤ 4000 ms, for at least 90% of the commands
	EPP query-command RTT	≤ 2000 ms, for at least 90% of the commands
	EPP transform-command RTT	≤ 4000 ms, for at least 90% of the commands

Registry Operator is encouraged to do maintenance for the different services at the times and dates of statistically lower traffic for each service. However, note that there is no provision for planned outages or similar periods of unavailable or slow service; any downtime, be it for maintenance or due to system failures, will be noted simply as downtime and counted for SLA purposes.

3. **DNS**

3.1. **DNS service availability**. Refers to the ability of the group of listed-as-authoritative name servers of a particular domain name (e.g., a TLD), to answer DNS queries from DNS probes. For the service to be considered available at a particular moment, at least, two of the delegated name servers registered in the DNS must have successful results from "**DNS tests**" to each of their public-DNS registered "**IP addresses**" to which the name server resolves. If 51% or more of the DNS testing probes see the service as unavailable during a given time, the DNS service will be considered unavailable.

3.2. **DNS name server availability**. Refers to the ability of a public-DNS registered "**IP address**" of a particular name server listed as authoritative for a domain name, to answer DNS queries from an Internet user. All the public DNS-registered "**IP address**" of all name servers of the domain name being monitored shall be tested individually. If 51% or more of the DNS testing probes get undefined/unanswered results from "**DNS tests**" to a name server "**IP address**" during a given time, the name server "**IP address**" will be considered unavailable.

3.3. **UDP DNS resolution RTT**. Refers to the **RTT** of the sequence of two packets, the UDP DNS query and the corresponding UDP DNS response. If the **RTT** is 5 times greater than the time specified in the relevant **SLR**, the **RTT** will be considered undefined.

3.4. **TCP DNS resolution RTT**. Refers to the **RTT** of the sequence of packets from the start of the TCP connection to its end, including the reception of the DNS response for only one DNS query. If the **RTT** is 5 times greater than the time specified in the relevant **SLR**, the **RTT** will be considered undefined.

3.5. **DNS resolution RTT**. Refers to either "**UDP DNS resolution RTT**" or "**TCP DNS resolution RTT**".

3.6. **DNS update time**. Refers to the time measured from the reception of an EPP confirmation to a transform command on a domain name, until the name servers of the parent domain name answer "**DNS queries**" with data consistent with the change made. This only applies for changes to DNS information.

3.7. **DNS test**. Means one non-recursive DNS query sent to a particular "**IP address**" (via UDP or TCP). If DNSSEC is offered in the queried DNS zone, for a query to be considered answered, the signatures must be positively verified against a corresponding DS record published in the parent zone or, if the parent is not signed, against a statically configured Trust Anchor. The answer to the query must contain the corresponding information from the Registry System, otherwise the query will be considered unanswered. A query with a "**DNS resolution RTT**" 5 times higher than the corresponding SLR, will be considered unanswered. The possible results to a DNS test are: a number in milliseconds corresponding to the "**DNS resolution RTT**" or, undefined/unanswered.

3.8. **Measuring DNS parameters**. Every minute, every DNS probe will make an UDP or TCP "**DNS test**" to each of the public-DNS registered "**IP addresses**" of the name servers of the domain name being monitored. If a "**DNS test**" result is undefined/unanswered, the tested IP will be considered unavailable from that probe until it is time to make a new test.

3.9. **Collating the results from DNS probes**. The minimum number of active testing probes to consider a measurement valid is 20 at any given measurement period, otherwise the measurements will be discarded and will be considered inconclusive; during this situation no fault will be flagged against the SLRs.

3.10. **Distribution of UDP and TCP queries**. DNS probes will send UDP or TCP "**DNS test**" approximating the distribution of these queries.

3.11. **Placement of DNS probes**. Probes for measuring DNS parameters shall be placed as near as possible to the DNS resolvers on the networks with the most users across the different geographic regions; care shall be taken not to deploy probes behind high propagation-delay links, such as satellite links.

4. **RDDS**

4.1. **RDDS availability**. Refers to the ability of all the RDDS services for the TLD, to respond to queries from an Internet user with appropriate data from the relevant Registry System. If 51% or more of the RDDS testing probes see any of the RDDS services as unavailable during a given time, the RDDS will be considered unavailable.

4.2. **WHOIS query RTT**. Refers to the **RTT** of the sequence of packets from the start of the TCP connection to its end, including the reception of the WHOIS response. If the **RTT** is 5-times or more the corresponding SLR, the **RTT** will be considered undefined.

4.3. **Web-based-WHOIS query RTT**. Refers to the **RTT** of the sequence of packets from the start of the TCP connection to its end, including the reception of the HTTP response for only one HTTP request. If Registry Operator implements a multiple-step process to get to the information, only the last step shall be measured. If the **RTT** is 5-times or more the corresponding SLR, the **RTT** will be considered undefined.

4.4. **RDDS query RTT**. Refers to the collective of "**WHOIS query RTT**" and "**Web-based- WHOIS query RTT**".

4.5. **RDDS update time**. Refers to the time measured from the reception of an EPP confirmation to a transform command on a domain name, host or contact, up until the servers of the RDDS services reflect the changes made.

4.6. **RDDS test**. Means one query sent to a particular "**IP address**" of one of the servers of one of the RDDS services. Queries shall be about existing objects in the Registry System and the responses must contain the corresponding information otherwise the query will be considered unanswered. Queries with an **RTT** 5 times higher than the corresponding SLR will be considered as unanswered. The possible results to an RDDS test are: a number in milliseconds corresponding to the **RTT** or undefined/unanswered.

4.7. **Measuring RDDS parameters**. Every 5 minutes, RDDS probes will select one IP address from all the public-DNS registered "**IP addresses**" of the servers for each RDDS service of the TLD being monitored and make an "**RDDS test**" to each one. If an "**RDDS test**" result is undefined/unanswered, the corresponding RDDS service will be considered as unavailable from that probe until it is time to make a new test.

4.8. **Collating the results from RDDS probes**. The minimum number of active testing probes to consider a measurement valid is 10 at any given measurement period, otherwise the measurements will be discarded and will be considered inconclusive; during this situation no fault will be flagged against the SLRs.

4.9. **Placement of RDDS probes**. Probes for measuring RDDS parameters shall be placed inside the networks with the most users across the different geographic regions; care shall be taken not to deploy probes behind high propagation-delay links, such as satellite links.

5. **EPP**

5.1. **EPP service availability**. Refers to the ability of the TLD EPP servers as a group, to respond to commands from the Registry accredited Registrars, who already have credentials to the servers. The response shall include appropriate data from the Registry System. An EPP command with "**EPP command RTT**" 5 times higher than the corresponding SLR will be considered as unanswered. If 51% or more of the EPP testing probes see the EPP service as unavailable during a given time, the EPP service will be considered unavailable.

5.2. **EPP session-command RTT**. Refers to the **RTT** of the sequence of packets that includes the sending of a session command plus the reception of the EPP response for only one EPP session command. For the login command it will include packets needed for starting the TCP session. For the logout command it will include packets needed for closing the TCP session. EPP session commands are those described in section 2.9.1 of EPP RFC 5730. If the **RTT** is 5 times or more the corresponding SLR, the **RTT** will be considered undefined.

5.3. **EPP query-command RTT**. Refers to the **RTT** of the sequence of packets that includes the sending of a query command plus the reception of the EPP response for only one EPP query command. It does not include packets needed for the start or close of either the EPP or the TCP session. EPP query commands are those described in section 2.9.2 of EPP RFC 5730. If the **RTT** is 5-times or more the corresponding SLR, the **RTT** will be considered undefined.

5.4. **EPP transform-command RTT**. Refers to the **RTT** of the sequence of packets that includes the sending of a transform command plus the reception of the EPP response for only one EPP transform command. It does not include packets needed for the start or close of either the EPP or the TCP session. EPP transform commands are those described in section 2.9.3 of EPP RFC 5730. If the **RTT** is 5 times or more the corresponding SLR, the **RTT** will be considered undefined.

5.5. **EPP command RTT**. Refers to "**EPP session-command RTT**", "**EPP query-command RTT**" or "**EPP transform-command RTT**".

5.6. **EPP test**. Means one EPP command sent to a particular "**IP address**" for one of the EPP servers. Query and transform commands, with the exception of "create", shall be about existing objects in the Registry System. The response shall include appropriate data from the Registry System. The possible results to an EPP test are: a number in milliseconds corresponding to the "**EPP command RTT**" or undefined/unanswered.

5.7. **Measuring EPP parameters**. Every 5 minutes, EPP probes will select one "**IP address**" of the EPP servers of the TLD being monitored and make an

"**EPP test**"; every time they should alternate between the 3 different types of commands and between the commands inside each category. If an "**EPP test**" result is undefined/unanswered, the EPP service will be considered as unavailable from that probe until it is time to make a new test.

5.8. **Collating the results from EPP probes**. The minimum number of active testing probes to consider a measurement valid is 5 at any given measurement period, otherwise the measurements will be discarded and will be considered inconclusive; during this situation no fault will be flagged against the SLRs.

5.9. **Placement of EPP probes**. Probes for measuring EPP parameters shall be placed inside or close to Registrars points of access to the Internet across the different geographic regions; care shall be taken not to deploy probes behind high propagation-delay links, such as satellite links.

6. Emergency Thresholds

The following matrix presents the emergency thresholds that, if reached by any of the services mentioned above for a TLD, would cause the emergency transition of the Registry for the TLD as specified in Section 2.13 of this Agreement.

Critical Function	Emergency Threshold
DNS Service (all servers)	4-hour total downtime / week
DNSSEC proper resolution	4-hour total downtime / week
EPP	24-hour total downtime / week
RDDS (WHOIS/Web-based WHOIS)	24-hour total downtime / week
Data Escrow	Breach of the Registry Agreement as described in Specification 2, Part B, Section 6.

7. Emergency Escalation

Escalation is strictly for purposes of notifying and investigating possible or potential issues in relation to monitored services. The initiation of any escalation and the subsequent cooperative investigations do not in themselves imply that a monitored service has failed its performance requirements.

Escalations shall be carried out between ICANN and Registry Operators, Registrars and Registry Operator, and Registrars and ICANN. Registry Operators and ICANN must provide said emergency operations departments. Current contacts must be maintained between ICANN and Registry Operators and published to Registrars, where relevant to their role in

escalations, prior to any processing of an Emergency Escalation by all related parties, and kept current at all times.

7.1. **Emergency Escalation initiated by ICANN**

Upon reaching 10% of the Emergency thresholds as described in Section 6 of this Specification, ICANN's emergency operations will initiate an Emergency Escalation with the relevant Registry Operator. An Emergency Escalation consists of the following minimum elements: electronic (i.e., email or SMS) and/or voice contact notification to the Registry Operator's emergency operations department with detailed information concerning the issue being escalated, including evidence of monitoring failures, cooperative trouble-shooting of the monitoring failure between ICANN staff and the Registry Operator, and the commitment to begin the process of rectifying issues with either the monitoring service or the service being monitoring.

7.2. **Emergency Escalation initiated by Registrars**

Registry Operator will maintain an emergency operations department prepared to handle emergency requests from registrars. In the event that a registrar is unable to conduct EPP transactions with the registry for the TLD because of a fault with the Registry Service and is unable to either contact (through ICANN mandated methods of communication) the Registry Operator, or the Registry Operator is unable or unwilling to address the fault, the registrar may initiate an emergency escalation to the emergency operations department of ICANN. ICANN then may initiate an emergency escalation with the Registry Operator as explained above.

7.3. **Notifications of Outages and Maintenance**

In the event that a Registry Operator plans maintenance, it will provide notice to the ICANN emergency operations department, at least, twenty-four (24) hours ahead of that maintenance. ICANN's emergency operations department will note planned maintenance times, and suspend Emergency Escalation services for the monitored services during the expected maintenance outage period.

If Registry Operator declares an outage, as per its contractual obligations with ICANN, on services under a service level agreement and performance requirements, it will notify the ICANN emergency operations department. During that declared outage, ICANN's emergency operations department will note and suspend emergency escalation services for the monitored services involved.

8. **Covenants of Performance Measurement**

8.1. **No interference**. Registry Operator shall not interfere with measurement **Probes**, including any form of preferential treatment of the requests for the monitored services. Registry Operator shall respond to the measurement tests described in this Specification as it would to any other request from an Internet user (for DNS and RDDS) or registrar (for EPP).

8.2. **ICANN testing registrar**. Registry Operator agrees that ICANN will have a testing registrar used for purposes of measuring the **SLR**s described above. Registry Operator agrees to not provide any differentiated treatment for the testing registrar other than no billing of the transactions. ICANN shall not use the registrar for registering domain names (or other registry objects) for itself or others, except for the purposes of verifying contractual compliance with the conditions described in this Agreement.

SPECIFICATION 11

PUBLIC INTEREST COMMITMENTS

1. Registry Operator will use only ICANN accredited registrars that are party to the Registrar Accreditation Agreement approved by the ICANN Board of Directors on 27 June 2013 in registering domain names. A list of such registrars shall be maintained by ICANN on ICANN's website.

2. Registry Operator will operate the registry for the TLD in compliance with all commitments, statements of intent and business plans stated in the following sections of Registry Operator's application to ICANN for the TLD, which commitments, statements of intent and business plans are hereby incorporated by reference into this Agreement. Registry Operator's obligations pursuant to this paragraph shall be enforceable by ICANN and through the Public Interest Commitment Dispute Resolution Process established by ICANN (posted at [url to be inserted when final procedure is adopted]), which may be revised in immaterial respects by ICANN from time to time (the "PICDRP"). Registry Operator shall comply with the PICDRP. Registry Operator agrees to implement and adhere to any remedies ICANN imposes (which may include any reasonable remedy, including for the avoidance of doubt, the termination of the Registry Agreement pursuant to Section 4.3(e) of the Agreement) following a determination by any PICDRP panel and to be bound by any such determination

   [Registry Operator to insert specific application sections here, if applicable]

3. Registry Operator agrees to perform the following specific public interest commitments, which commitments shall be enforceable by ICANN and through the PICDRP. Registry Operator shall comply with the PICDRP. Registry Operator agrees to implement and adhere to any remedies ICANN imposes (which may include any reasonable remedy, including for the avoidance of doubt, the termination of the Registry Agreement pursuant to Section 4.3(e) of the Agreement) following a determination by any PICDRP panel and to be bound by any such determination.

   a. Registry Operator will include a provision in its Registry-Registrar Agreement that requires Registrars to include in their Registration Agreements a provision prohibiting Registered Name Holders from distributing malware, abusively operating botnets, phishing, piracy, trademark or copyright infringement, fraudulent or deceptive practices, counterfeiting or otherwise engaging in activity contrary to applicable law, and providing (consistent with applicable law and any related procedures) consequences for such activities including suspension of the domain name.

b. Registry Operator will periodically conduct a technical analysis to assess whether domains in the TLD are being used to perpetrate security threats, such as pharming, phishing, malware, and botnets. Registry Operator will maintain statistical reports on the number of security threats identified and the actions taken as a result of the periodic security checks. Registry Operator will maintain these reports for the term of the Agreement unless a shorter period is required by law or approved by ICANN, and will provide them to ICANN upon request.

c. Registry Operator will operate the TLD in a transparent manner consistent with general principles of openness and non-discrimination by establishing, publishing and adhering to clear registration policies.

d. Registry Operator of a "Generic String" TLD may not impose eligibility criteria for registering names in the TLD that limit registrations exclusively to a single person or entity and/or that person's or entity's "Affiliates" (as defined in Section 2.9(c) of the Registry Agreement). "Generic String" means a string consisting of a word or term that denominates or describes a general class of goods, services, groups, organizations or things, as opposed to distinguishing a specific brand of goods, services, groups, organizations or things from those of others.

SPECIFICATION 12

COMMUNITY REGISTRATION POLICIES

Registry Operator shall implement and comply with all community registration policies described below and/or attached to this Specification 12.

[Insert registration policies]

Reconsideration Request

Union of Orthodox Jewish Congregations of America, *et al.*

Annex N

ICANN, Approved Resolutions,
Meeting of the New gTLD Program Committee
(June 25, 2013)

Approved Resolutions | Meeting of the New gTLD Program Committee

25 June 2013

1. **Consent Agenda**
   a. Approval of NGPC Meeting Minutes

2. **Main Agenda**
   a. ALAC (At-Large Advisory Committee) (At-Large Advisory Committee) Statement on TMCH/Variants
   b. Safeguards Applicable to all New gTLDs

      Rationale for Resolutions 2013.06.25.NG02 – 2013.06.25.NG03

   c. Category 2 Safeguard Advice re Restricted and Exclusive Registry Access

      Rationale for Resolutions 2013.06.25.NG04 – 2013.06.25.06

   d. Singular & Plural Versions of the Same String as a TLD (Top Level Domain) (Top Level Domain)

      Rationale for Resolution 2013.06.25.NG07

      13

   e. IGO (Intergovernmental Organization) (Intergovernmental Organization) Protection
   f. AOB

1.

Consent Agenda:

a.

Approval of NGPC Meeting Minutes

Resolved (2013.06.25.NG01), the Board approves the minutes of the 4 June 2013 New gTLD (generic Top Level Domain) (generic Top Level Domain) Program Committee Meeting.

2.

Main Agenda:

a.

ALAC (At-Large Advisory Committee) (At-Large Advisory Committee) Statement on TMCH/Variants

No resolution taken.

b.

Safeguards Applicable to all New gTLDs

Whereas, the GAC (Governmental Advisory Committee) (Governmental Advisory Committee) met during the ICANN (Internet Corporation for Assigned Names and Numbers) (Internet Corporation for Assigned Names and Numbers) 46 meeting in Beijing and issued a Communiqué on 11 April 2013 ("Beijing Communiqué");

Whereas, the Beijing Communiqué included six (6) elements of safeguard advice applicable to all new gTLDs, which are identified in the GAC (Governmental Advisory Committee) (Governmental Advisory Committee) Register of Advice as: (a) 2013-04-11-Safeguards-1, (b) 2013-04-11-Safeguards-2, (c) 2013-04-11-Safeguards-3, (d) 2013-04-11-Safeguards-4, (e) 2013-04-11-Safeguards-5, and (f) 2013-04-11-Safeguards-6 (collectively, the "Safeguards Applicable to All Strings");

Whereas, on 23 April 2013, ICANN (Internet Corporation for Assigned Names and Numbers) (Internet Corporation for Assigned Names and Numbers) initiated a public comment forum to solicit the community's input on how the NGPC should address GAC (Governmental Advisory Committee) (Governmental Advisory Committee) advice regarding safeguards applicable to broad categories of New gTLD (generic Top Level Domain) (generic Top Level Domain) strings <http://www.icann.org/en/news/public-comment/gac-safeguard-advice-23apr13-en.htm (/en/news/public-comment/gac-safeguard-advice-23apr13-en.htm)>;

Whereas, the NGPC met on 8 and 18 May and 4, 11 and 18 June 2013 to consider a plan for responding to the GAC (Governmental Advisory Committee) (Governmental Advisory Committee)'s advice on the New gTLD (generic Top Level Domain) (generic Top Level Domain) Program, including the Safeguards Applicable to All Strings;

Whereas, the NGPC met on 25 June 2013 to further discuss and consider its plan for responding the GAC (Governmental Advisory Committee) (Governmental Advisory Committee)'s advice in the Beijing Communiqué on the New gTLD (generic Top Level Domain) (generic Top Level Domain) Program;

Whereas, the NGPC has considered the public comments submitted during the public comment forum, and has determined that its position, as presented in Annex I (/en/groups/board/documents/resolutions-new-gtld-annex-i-agenda-2b-25jun13-en.pdf) [PDF, 72 KB] attached to this Resolution, is consistent with the GAC (Governmental Advisory Committee) (Governmental Advisory Committee)'s advice regarding Safeguards Applicable to All Strings;

Whereas, the NGPC proposes revisions to the final draft of the New gTLD (generic Top Level Domain) (generic Top Level Domain) Registry Agreement <http://www.icann.org/en/news/public-comment/base-agreement-29apr13-en.htm (/en/news/public-comment/base-agreement-29apr13-en.htm)> as presented in Annex II (/en/groups/board/documents/resolutions-new-gtld-annex-ii-agenda-2b-25jun13-en.pdf) [PDF, 64 KB] attached to this Resolution to implement certain elements of the GAC (Governmental Advisory Committee) (Governmental Advisory Committee) advice regarding Safeguards Applicable to All Strings; and

Whereas, the NGPC is undertaking this action pursuant to the authority granted to it by the Board on 10 April 2012, to exercise the ICANN (Internet Corporation for Assigned Names and Numbers) (Internet Corporation for Assigned Names and Numbers) Board's authority for any and all issues that may arise relating to the New gTLD (generic Top Level Domain) (generic Top Level Domain) Program.

Resolved (2013.06.25.NG02), the NGPC adopts the "NGPC Proposal for Implementation of GAC (Governmental Advisory Committee) (Governmental Advisory Committee) Safeguards Applicable to All New gTLDs" (19 June 2013), attached as Annex I (/en/groups/board/documents/resolutions-new-gtld-annex-i-agenda-2b-25jun13-en.pdf) [PDF, 72 KB] to this Resolution, to accept the GAC (Governmental Advisory Committee) (Governmental Advisory Committee)'s advice regarding Safeguards Applicable to All Strings.

Resolved (2013.06.25.NG03), the NGPC directs staff to make appropriate changes to the final draft of the New gTLD (generic Top Level Domain) (generic Top Level Domain) Registry Agreement, as presented in Annex II (/en/groups/board/documents/resolutions-

new-gtld-annex-ii-agenda-2b-25jun13-en.pdf) [PDF, 64 KB] attached to this Resolution, to implement certain elements of the GAC (Governmental Advisory Committee) (Governmental Advisory Committee) advice regarding Safeguards Applicable to All Strings.

Rationale for Resolutions 2013.06.25.NG02 – 2013.06.25.NG03

Why the NGPC is addressing the issue?

Article XI, Section 2.1 of the ICANN (Internet Corporation for Assigned Names and Numbers) (Internet Corporation for Assigned Names and Numbers) Bylaws http://www.icann.org/en/about/governance/bylaws#XI (/en/about/governance/bylaws#XI) permit the GAC (Governmental Advisory Committee) (Governmental Advisory Committee) to "put issues to the Board directly, either by way of comment or prior advice, or by way of specifically recommending action or new policy development or revision to existing policies." The GAC (Governmental Advisory Committee) (Governmental Advisory Committee) issued advice to the Board on the New gTLD (generic Top Level Domain) (generic Top Level Domain) Program through its Beijing Communiqué dated 11 April 2013. The ICANN (Internet Corporation for Assigned Names and Numbers) (Internet Corporation for Assigned Names and Numbers) Bylaws require the Board to take into account the GAC (Governmental Advisory Committee) (Governmental Advisory Committee)'s advice on public policy matters in the formulation and adoption of the polices. If the Board decides to take an action that is not consistent with the GAC (Governmental Advisory Committee) (Governmental Advisory Committee) advice, it must inform the GAC (Governmental Advisory Committee) (Governmental Advisory Committee) and state the reasons why it decided not to follow the advice. The Board and the GAC (Governmental Advisory Committee) (Governmental Advisory Committee) will then try in good faith to find a mutually acceptable solution. If no solution can be found, the Board will state in its final decision why the GAC (Governmental Advisory Committee) (Governmental Advisory Committee) advice was not followed.

What is the proposal being considered?

The NGPC is being asked to consider accepting a discrete grouping of the GAC (Governmental Advisory Committee) (Governmental Advisory Committee) advice as described in the attached "NGPC Proposal for Implementation of GAC (Governmental Advisory Committee) (Governmental Advisory Committee) Safeguards Applicable to All New gTLDs" (Annex I (/en/groups/board/documents/resolutions-new-gtld-annex-i-agenda-2b-25jun13-en.pdf) [PDF, 72 KB]; 19 June 2013), which includes the six (6) items of safeguard advice from the Beijing Communiqué applicable to all new gTLDs. This advice is identified in the GAC (Governmental Advisory Committee) (Governmental Advisory Committee) Register of Advice as: (a) 2013-04-11-Safeguards-1, (b) 2013-04-11-Safeguards-2, (c) 2013-04-11-Safeguards-3, (d) 2013-04-11-Safeguards-4, (e) 2013-04-11-Safeguards-5, and (f) 2013-04-11-Safeguards-6 (collectively, the "Safeguards Applicable to All Strings").

Which stakeholders or others were consulted?

On 23 April 2013, ICANN (Internet Corporation for Assigned Names and Numbers) (Internet Corporation for Assigned Names and Numbers) initiated a public comment forum to solicit input on how the NGPC should address GAC (Governmental Advisory Committee) (Governmental Advisory Committee) advice regarding safeguards applicable to broad categories of new gTLD (generic Top Level Domain) (generic Top Level Domain) strings http://www.icann.org/en/news/public-comment/gac-safeguard-advice-23apr13-en.htm (/en/news/public-comment/gac-safeguard-advice-23apr13-en.htm). The public comment forum closed on 4 June 2013. The NGPC has considered the community's comments in formulating its response to the GAC (Governmental Advisory Committee) (Governmental Advisory Committee) advice regarding Safeguards Applicable to All Strings. These comments also will serve as important inputs to the NGPC's future consideration of the other elements of GAC (Governmental Advisory Committee) (Governmental Advisory Committee) advice not being considered at this time in the attached annexes.

What concerns or issues were raised by the community?

ICANN (Internet Corporation for Assigned Names and Numbers) (Internet Corporation for Assigned Names and Numbers) received several responses from the community during the course of the public comment forum on broad categories of GAC (Governmental Advisory Committee) (Governmental Advisory Committee) safeguard advice. Of comments regarding safeguards applicable to all new gTLDs, approximately 29% of unique commenters expressed opposition whereas approximately 71% expressed support.

Regarding support, commenters expressed general agreement with the safeguards. Those expressing support also expressed concern over the method of implementation and that the GAC (Governmental Advisory Committee) (Governmental Advisory Committee) should not dictate the specific procedures for implementation. Supporters also indicated that some of these safeguards are already inherent in the 2013 RAA (Registrar Accreditation Agreement) (Registrar Accreditation Agreement).

In adopting this Resolution, the NGPC specifically acknowledges comments from the community opposed to the NGPC accepting the GAC (Governmental Advisory Committee) (Governmental Advisory Committee)'s advice. The NGPC takes note of comments asserting that adopting the GAC (Governmental Advisory Committee) (Governmental Advisory Committee) advice threatens the multi-stakeholder policy development process. ICANN (Internet Corporation for Assigned Names and Numbers) (Internet Corporation for Assigned Names and Numbers)'s Bylaws permit the GAC (Governmental Advisory Committee) (Governmental Advisory Committee) to "consider and provide advice on the activities of ICANN (Internet Corporation for Assigned Names and Numbers) (Internet Corporation for Assigned Names and Numbers) as they relate to concerns of governments, particularly matters where there may be an interaction between ICANN (Internet Corporation for Assigned Names and Numbers) (Internet Corporation for Assigned Names and Numbers)'s policies and various laws and international agreements or where they may affect public policy issues." (Art. XI, § 2.1.a) The GAC (Governmental Advisory Committee) (Governmental Advisory Committee) issued advice to the Board on the New gTLD (generic Top Level Domain) (generic Top Level Domain) Program through its Be jing Communiqué dated 11 April 2013. The ICANN (Internet Corporation for Assigned Names and Numbers) (Internet Corporation for Assigned Names and Numbers) Bylaws require the Board (and the NGPC) to take into account the GAC (Governmental Advisory Committee) (Governmental Advisory Committee)'s advice on public policy matters in the formulation and adoption of the polices, and if the Board (and the NGPC) takes an action that is not consistent with the GAC (Governmental Advisory Committee) (Governmental Advisory Committee) advice, it must inform the GAC (Governmental Advisory Committee) (Governmental Advisory Committee) and state the reasons why it decided not to follow the advice. The parties must then try in good faith to find a mutually acceptable solution. Thus, the GAC (Governmental Advisory Committee) (Governmental Advisory Committee)'s advice is part of the multi-stakeholder process.

The posting of the Be jing Communiqué to solicit public comment on the broad categories of the GAC (Governmental Advisory Committee) (Governmental Advisory Committee)'s safeguard advice demonstrates ICANN (Internet Corporation for Assigned Names and Numbers) (Internet Corporation for Assigned Names and Numbers)'s commitment to a bottom-up, multi-stakeholder model, and provided stakeholders with approximately six weeks (including the public comment and reply periods) to analyze, review and respond to the proposed recommendations. The NGPC views finding a workable solution to the GAC (Governmental Advisory Committee) (Governmental Advisory Committee)'s advice as a step forward as the community continues to respond to the needs of registrants, the community and all stakeholders.

The NGPC also took note of the comments from the community in opposition to ICANN (Internet Corporation for Assigned Names and Numbers) (Internet Corporation for Assigned Names and Numbers) implementing the safeguard advice concerning WHOIS verification checks to be performed by registry operators. The NGPC acknowledges the ongoing work in the community on WHOIS verification. In response to these comments in opposition, the NGPC accepted the spirit and intent of the GAC (Governmental Advisory Committee) (Governmental Advisory Committee)'s advice on the WHOIS

verification checks by having ICANN (Internet Corporation for Assigned Names and Numbers) (Internet Corporation for Assigned Names and Numbers), instead of registry operators, implement the checks. ICANN (Internet Corporation for Assigned Names and Numbers) (Internet Corporation for Assigned Names and Numbers) is concluding its development of a WHOIS tool that gives it the ability to check false, incomplete or inaccurate WHOIS data, as the Board previously directed staff in Board Resolutions 2012.11.08.01 - 2012.11.08.02 to begin to "proactively identify potentially inaccurate gTLD (generic Top Level Domain) (generic Top Level Domain) data registration in gTLD (generic Top Level Domain) (generic Top Level Domain) registry and registrar services, explore using automated tools, and forward potentially inaccurate records to gTLD (generic Top Level Domain) (generic Top Level Domain) registrars for action; and 2) publicly report on the resulting actions to encourage improved accuracy." <http://www.icann.org/en/groups/board/documents/resolutions-08nov12-en.htm (/en/groups/board/documents/resolutions-08nov12-en.htm)>. Given these ongoing activities, the NGPC determined that ICANN (Internet Corporation for Assigned Names and Numbers) (Internet Corporation for Assigned Names and Numbers) (instead of Registry Operators) is well positioned to implement the GAC (Governmental Advisory Committee) (Governmental Advisory Committee)'s advice.

With respect to mitigating abusive activity, the NGPC acknowledges the comments noting that registries do not have relationships with registrants and should not be required to determine whether a registrant is in compliance with applicable laws. To address this concern, the NGPC included language in the PIC Specification that would obligate registry operators to include a provision in their Registry-Registrar Agreements that requires registrars to include in their Registration Agreements a provision prohibiting registered name holders from distr buting malware, abusively operating botnets, phishing, piracy, trademark or copyright infringement, fraudulent or deceptive practices, counterfeiting or otherwise engaging in activity contrary to applicable law, and providing (consistent with applicable law and any related procedures) consequences for such activities including suspension of the domain name.

With respect to the safeguards regarding security checks, the NGPC considered that the comments in opposition raise important questions about the costs and timing of implementing this measure, and the scope and framework of the security checks. The NGPC is mindful that there are various ways a registry operator could implement the required security checks, and has taken these concerns into consideration in its response to the GAC (Governmental Advisory Committee) (Governmental Advisory Committee)'s advice. The NGPC's response directs ICANN (Internet Corporation for Assigned Names and Numbers) (Internet Corporation for Assigned Names and Numbers) to solicit community participation (including conferring with the GAC (Governmental Advisory Committee) (Governmental Advisory Committee)) in a task force or through a policy development process in the GNSO (Generic Names Supporting Organization) (Generic Names Supporting Organization), as appropriate, to develop the framework for Registry Operators to respond to identified security risks that pose an actual risk of harm, notification procedures, and appropriate consequences, including a process for suspending domain names until the matter is resolved, while respecting privacy and confidentiality. The proposed implementation of the GAC (Governmental Advisory Committee) (Governmental Advisory Committee)'s advice is phased to account for the commenters' concerns. The proposed language in the PIC Specification will provide the general guidelines for what registry operators must do, but omits the specific details from the contractual language to allow for the future development and evolution of the parameters for conducting security checks.

With respect to consequences in the safeguards applicable to all strings, the NGPC took note of the commenters' concerns that this item of safeguard advice is already addressed in the 2013 RAA (Registrar Accreditation Agreement) (Registrar Accreditation Agreement) and by the WHOIS Data Problem Report system. The GAC (Governmental Advisory Committee) (Governmental Advisory Committee)'s concerns are addressed in the existing framework and the NGPC is not proposing to duplicate the existing enforcement models.

The NGPC also takes note of the comments requesting that the GAC (Governmental Advisory Committee) (Governmental Advisory Committee) advice be rejected as "last-minute" or "untimely." The commenters asserted that this introduces uncertainty into the Program and the makes material changes to the AGB. As an alternative to accepting the advice, the NGPC considered the timing consequences if the NGPC rejected the advice. The NGPC took note of the procedure for any consultations that might be needed if the Board (and the NGPC) determines to take an action that is not consistent with GAC (Governmental Advisory Committee) (Governmental Advisory Committee) advice, which was developed by the ICANN (Internet Corporation for Assigned Names and Numbers) (Internet Corporation for Assigned Names and Numbers) Board-GAC Recommendation Implementation Working Group (BGRI-WG). The procedure was approved by the BGRI-WG in Beijing and would be used for any consultation on this GAC (Governmental Advisory Committee) (Governmental Advisory Committee) advice. The procedure says that the consultation process should conclude within six months, but that the GAC (Governmental Advisory Committee) (Governmental Advisory Committee) and the Board can agree to a different timetable. On balance, the NGPC determined that entering into a consultation process on this particular section of the safeguard advice would introduce greater uncertainty into the Program than if the NGPC found a workable solution to accept and implement the GAC (Governmental Advisory Committee) (Governmental Advisory Committee)'s safeguard advice applicable to all strings.

The complete set of comments can be reviewed at: http://www.icann.org/en/news/public-comment/gac-safeguard-advice-23apr13-en.htm (/en/news/public-comment/gac-safeguard-advice-23apr13-en.htm).

What significant materials did the NGPC review?

As part of its deliberations, the NGPC reviewed the following significant materials and documents:

GAC (Governmental Advisory Committee) (Governmental Advisory Committee) Beijing Communiqué: http://www.icann.org/en/news/correspondence/gac-to-board-18apr13-en.pdf (/en/news/correspondence/gac-to-board-18apr13-en.pdf) [PDF, 156 KB]

Public comments in response to broad categories of GAC (Governmental Advisory Committee) (Governmental Advisory Committee) safeguard advice: http://www.icann.org/en/news/public-comment/gac-safeguard-advice-23apr13-en.htm (/en/news/public-comment/gac-safeguard-advice-23apr13-en.htm)

Report of Public Comments, New gTLD (generic Top Level Domain) (generic Top Level Domain) Board Committee Consideration of GAC (Governmental Advisory Committee) (Governmental Advisory Committee) Safeguard Advice dated 18 June 2013: http://www.icann.org/en/news/public-comment/report-comments-gac-safeguard-advice-19jun13-en (/en/news/public-comment/report-comments-gac-safeguard-advice-19jun13-en)

What factors did the NGPC find to be significant?

The Beijing Communiqué generated significant interest from the community and resulted in many comments. The NGPC considered the community comments, the GAC (Governmental Advisory Committee) (Governmental Advisory Committee)'s advice transmitted in the Beijing Communiqué, and the procedures established in the AGB for addressing GAC (Governmental Advisory Committee) (Governmental Advisory Committee) advice to the New gTLD (generic Top Level Domain) (generic Top Level Domain) Program.

Are there positive or negative community impacts?

The adoption of the GAC (Governmental Advisory Committee) (Governmental Advisory Committee) advice as provided in the attached annexes will assist with resolving the GAC (Governmental Advisory Committee) (Governmental Advisory Committee) advice in manner that permits the greatest number of new gTLD (generic Top Level Domain) (generic Top Level Domain) applications to continue to move forward as soon as possible.

Are there fiscal impacts or ramifications on ICANN (Internet Corporation for Assigned Names and Numbers) (Internet Corporation for Assigned Names and Numbers) (strategic plan, operating plan, budget); the community; and/or the public?

There are no foreseen fiscal impacts associated with the adoption of this resolution.

Are there any security, stability or resiliency issues relating to the DNS (Domain Name System) (Domain Name System)?

Approval of the proposed resolution will not impact security, stability or resiliency issues relating to the DNS (Domain Name System) (Domain Name System).

Is this either a defined policy process within ICANN (Internet Corporation for Assigned Names and Numbers) (Internet Corporation for Assigned Names and Numbers)'s Supporting Organizations or ICANN (Internet Corporation for Assigned Names and Numbers) (Internet Corporation for Assigned Names and Numbers)'s Organizational Administrative Function decision requiring public comment or not requiring public comment?

On 23 April 2013, ICANN (Internet Corporation for Assigned Names and Numbers) (Internet Corporation for Assigned Names and Numbers) initiated a public comment forum to solicit input on how the NGPC should address GAC (Governmental Advisory Committee) (Governmental Advisory Committee) advice regarding safeguards applicable to broad categories of new gTLD (generic Top Level Domain) (generic Top Level Domain) strings http://www.icann.org/en/news/public-comment/gac-safeguard-advice-23apr13-en.htm (/en/news/public-comment/gac-safeguard-advice-23apr13-en.htm). The public comment forum closed on 4 June 2013.

c.

Category 2 Safeguard Advice re Restricted and Exclusive Registry Access

Whereas, the GAC (Governmental Advisory Committee) (Governmental Advisory Committee) met during the ICANN (Internet Corporation for Assigned Names and Numbers) (Internet Corporation for Assigned Names and Numbers) 46 meeting in Beijing and issued a Communiqué on 11 April 2013 ("Beijing Communiqué");

Whereas, the Beijing Communiqué included Category 2 safeguard advice, which is identified in the GAC (Governmental Advisory Committee) (Governmental Advisory Committee) Register of Advice as 2013-04-11-Safeguards-Categories-2 (the "Category 2 Safeguard Advice");

Whereas, on 23 April 2013, ICANN (Internet Corporation for Assigned Names and Numbers) (Internet Corporation for Assigned Names and Numbers) initiated a public comment forum to solicit the community's input on how the NGPC should address GAC (Governmental Advisory Committee) (Governmental Advisory Committee) advice regarding safeguards applicable to broad categories of New gTLD (generic Top Level Domain) (generic Top Level Domain) strings <http://www.icann.org/en/news/public-comment/gac-safeguard-advice-23apr13-en.htm (/en/news/public-comment/gac-safeguard-advice-23apr13-en.htm)>;

Whereas, the NGPC met on 8 and 18 May and 4, 11 and 18 June 2013 to consider a plan for responding to the GAC (Governmental Advisory Committee) (Governmental Advisory Committee)'s advice on the New gTLD (generic Top Level Domain) (generic Top Level Domain) Program, including the Category 2 Safeguard Advice;

Whereas, the NGPC met on 25 June 2013 to further discuss and consider its plan for responding the GAC (Governmental Advisory Committee) (Governmental Advisory Committee)'s advice in the Beijing Communiqué on the New gTLD (generic Top Level Domain) (generic Top Level Domain) Program;

Whereas, the NGPC has considered the public comments submitted during the public comment forum, and proposes revisions to the final draft of the New gTLD (generic Top Level Domain) (generic Top Level Domain) Registry Agreement <http://www.icann.org/en/news/public-comment/base-agreement-29apr13-en.htm (/en/news/public-comment/base-agreement-29apr13-en.htm)> as presented in Annex I

(/en/groups/board/documents/resolutions-new-gtld-annex-i-agenda-2c-25jun13-en.pdf) [PDF, 52 KB] attached to this Resolution to implement the Category 2 Safeguard Advice for applicants not seeking to impose exclusive registry access; and

Whereas, the NGPC is undertaking this action pursuant to the authority granted to it by the Board on 10 April 2012, to exercise the ICANN (Internet Corporation for Assigned Names and Numbers) (Internet Corporation for Assigned Names and Numbers) Board's authority for any and all issues that may arise relating to the New gTLD (generic Top Level Domain) (generic Top Level Domain) Program.

Resolved (2013.06.25.NG04), the NGPC adopts the "Proposed PIC Spec Implementation of GAC (Governmental Advisory Committee) (Governmental Advisory Committee) Category 2 Safeguards" (20 June 2013), attached as Annex I (/en/groups/board/documents/resolutions-new-gtld-annex-i-agenda-2c-25jun13-en.pdf) [PDF, 52 KB] to this Resolution, to accept and implement the GAC (Governmental Advisory Committee) (Governmental Advisory Committee)'s Category 2 Safeguard Advice for applicants not seeking to impose exclusive registry access.

Resolved (2013.06.25.NG05), the NGPC directs staff to make appropriate changes to the final draft of the New gTLD (generic Top Level Domain) (generic Top Level Domain) Registry Agreement, as presented in Annex I (/en/groups/board/documents/resolutions-new-gtld-annex-i-agenda-2c-25jun13-en.pdf) [PDF, 52 KB] attached to this Resolution, to implement the GAC (Governmental Advisory Committee) (Governmental Advisory Committee)'s Category 2 Safeguard Advice for applicants not seeking to impose exclusive registry access.

Resolved (2013.06.25.NG06), the NGPC directs staff to defer moving forward with the contracting process for applicants seeking to impose exclusive registry access for "generic strings" to a single person or entity and/or that person's or entity's Affiliates (as defined in Section 2.9(c) of the Registry Agreement), pending a dialogue with the GAC (Governmental Advisory Committee) (Governmental Advisory Committee).

Rationale for Resolutions 2013.06.25.NG04 – 2013.06.25.06

Why the NGPC is addressing the issue?

Article XI, Section 2.1 of the ICANN (Internet Corporation for Assigned Names and Numbers) (Internet Corporation for Assigned Names and Numbers) Bylaws http://www.icann.org/en/about/governance/bylaws#XI (/en/about/governance/bylaws#XI) permit the GAC (Governmental Advisory Committee) (Governmental Advisory Committee) to "put issues to the Board directly, either by way of comment or prior advice, or by way of specifically recommending action or new policy development or revision to existing policies." The GAC (Governmental Advisory Committee) (Governmental Advisory Committee) issued advice to the Board on the New gTLD (generic Top Level Domain) (generic Top Level Domain) Program through its Beijing Communiqué dated 11 April 2013. The ICANN (Internet Corporation for Assigned Names and Numbers) (Internet Corporation for Assigned Names and Numbers) Bylaws require the Board to take into account the GAC (Governmental Advisory Committee) (Governmental Advisory Committee)'s advice on public policy matters in the formulation and adoption of the polices. If the Board decides to take an action that is not consistent with the GAC (Governmental Advisory Committee) (Governmental Advisory Committee) advice, it must inform the GAC (Governmental Advisory Committee) (Governmental Advisory Committee) and state the reasons why it decided not to follow the advice. The Board and the GAC (Governmental Advisory Committee) (Governmental Advisory Committee) will then try in good faith to find a mutually acceptable solution. If no solution can be found, the Board will state in its final decision why the GAC (Governmental Advisory Committee) (Governmental Advisory Committee) advice was not followed.

What is the proposal being considered?

The NGPC is being asked to consider accepting Category 2 safeguard advice identified in the GAC (Governmental Advisory Committee) (Governmental Advisory Committee) Register of Advice as 2013-04-11-Safeguards-Categories-2. For applicants not seeking to impose exclusive registry access, the NGPC is being asked to consider including a provision in the PIC Specification in the New gTLD (generic Top Level Domain) (generic Top Level Domain) Registry Agreement that would require TLDs to operate in a

transparent manner consistent with general principles of openness and non-discrimination. Additionally, the proposed PIC Specification would include a provision to preclude registry operators from imposing eligibility criteria that limit registration of a generic string exclusively to a single person or entity and their "affiliates." The term "affiliate" is defined to mean a person or entity that, directly or indirectly, through one or more intermediaries, controls, is controlled by, or is under common control with, the person or entity specified, and "control" (including the terms "controlled by" and "under common control with") means the possession, directly or indirectly, of the power to direct or cause the direction of the management or policies of a person or entity, whether through the ownership of securities, as trustee or executor, by serving as an employee or a member of a board of directors or equivalent governing body, by contract, by credit arrangement or otherwise. [New gTLD (generic Top Level Domain) (generic Top Level Domain) Registry Agreement § 2.9(c) http://newgtlds.icann.org/en/applicants/agb/base-agreement-specs-29apr13-en.pdf (http://newgtlds.icann.org/en/applicants/agb/base-agreement-specs-29apr13-en.pdf) [PDF, 600 KB]]

For applicants seeking to impose exclusive registry access for "generic strings", the NGPC is being asked to defer moving forward with the contracting process for these applicants, pending a dialogue with the GAC (Governmental Advisory Committee) (Governmental Advisory Committee). The term "generic string" is defined in the PIC Specification to mean "a string consisting of a word or term that denominates or describes a general class of goods, services, groups, organizations or things, as opposed to distinguishing a specific brand of goods, services, groups, organizations or things from those of others."

To implement the advice in this way, the PIC Specification will define exclusive registry access as limiting registration of a generic string exclusively to a single person or entity and their affiliates (as defined above). All applicants would be required to respond by a specified date indicating whether (a) the applicant is prepared to accept the proposed PIC Specification that precludes exclusive registry access or (b) the applicant is unwilling to accept the proposed PIC Specification because the applicant intends to implement exclusive registry access.

Which stakeholders or others were consulted?

On 23 April 2013, ICANN (Internet Corporation for Assigned Names and Numbers) (Internet Corporation for Assigned Names and Numbers) initiated a public comment forum to solicit input on how the NGPC should address GAC (Governmental Advisory Committee) (Governmental Advisory Committee) advice regarding safeguards applicable to broad categories of new gTLD (generic Top Level Domain) (generic Top Level Domain) strings http://www.icann.org/en/news/public-comment/gac-safeguard-advice-23apr13-en.htm (/en/news/public-comment/gac-safeguard-advice-23apr13-en.htm). The public comment forum closed on 4 June 2013. The NGPC has considered the community comments in formulating its response to the GAC (Governmental Advisory Committee) (Governmental Advisory Committee)'s Category 2 Safeguard Advice.

What concerns or issues were raised by the community?

ICANN (Internet Corporation for Assigned Names and Numbers) (Internet Corporation for Assigned Names and Numbers) received several responses from the community during the course of the public comment forum on broad categories of GAC (Governmental Advisory Committee) (Governmental Advisory Committee) safeguard advice. Of the limited number of comments specific to the Category 2, Restricted Access safeguards, approximately 60% expressed support versus approximately 40% expressing concern or opposition. Supporting comments generally agreed that, for certain strings, restricted access is warranted. Opposing comments generally indicated that this is unanticipated and wholly new policy without justification and that these strings would be unfairly prejudiced in the consumer marketplace. Of the comments specific to the Category 2, Exclusive Access safeguards, approximately 86% expressed support versus approximately 14% expressing concern or opposition. Supporting comments indicated that exclusive registry access should "serve a public purpose." Others indicated that "closed generics" should not be allowed at all.

In adopting this Resolution, the NGPC specifically acknowledges comments from the community opposed to the NGPC accepting the GAC (Governmental Advisory Committee) (Governmental Advisory Committee)'s advice. Opposing commenters generally expressed concern that this is new and unanticipated policy, contrary to the bottom-up process. They also indicated that the concept of public interest is vague and not adequately defined. The NGPC notes that the Beijing Communiqué was published to solicit public comment on the broad categories of the GAC (Governmental Advisory Committee) (Governmental Advisory Committee)'s safeguard advice. This demonstrates ICANN (Internet Corporation for Assigned Names and Numbers) (Internet Corporation for Assigned Names and Numbers)'s commitment to a bottom-up, multi-stakeholder model, and provided stakeholders with approximately six weeks (including the public comment and reply periods) to analyze, review and respond to the proposed recommendations. The NGPC views finding a workable solution to the GAC (Governmental Advisory Committee) (Governmental Advisory Committee)'s advice as a step forward as the community continues to respond to the needs of registrants, the community and all stakeholders.

For the comments specifically concerning restricted registry access (i.e. Paragraph 1 of the Category 2 Advice), the NGPC takes note of the concerns expressed in the comments regarding the "general rule" that a TLD (Top Level Domain) (Top Level Domain) should be operated in an open manner. The NGPC understands the GAC (Governmental Advisory Committee) (Governmental Advisory Committee)'s advice for TLDs for which registration is restricted to generally be operated in an open manner to be a call for transparency, which is fundamental to providing consumers choice in the marketplace, and a goal that ICANN (Internet Corporation for Assigned Names and Numbers) (Internet Corporation for Assigned Names and Numbers) supports. In light of the comments raised, ICANN (Internet Corporation for Assigned Names and Numbers) (Internet Corporation for Assigned Names and Numbers) included new language in the PIC Specification to accept and respond to the GAC (Governmental Advisory Committee) (Governmental Advisory Committee) advice regarding restricted access in a way that balances the concerns raised in the public comments with the GAC (Governmental Advisory Committee) (Governmental Advisory Committee)'s advice for restricted TLDs. The revised PIC Specification establishes what it means for a TLD (Top Level Domain) (Top Level Domain) to be operated consistent with principals of openness and non-discrimination. Specifically, by establishing, publishing and adhering to clear registration policies, the TLD (Top Level Domain) (Top Level Domain) would fulfill its obligation to be operated in a "transparent manner consistent with general principles of openness and non-discrimination."

With respect to comments specifically regarding exclusive registry access safeguards (i.e. Paragraph 2 of the Category 2 Advice), the NGPC understands that the GAC (Governmental Advisory Committee) (Governmental Advisory Committee) and other members of the community have expressed concerns regarding "closed generic" TLDs. In February 2013, the NGPC directed ICANN (Internet Corporation for Assigned Names and Numbers) (Internet Corporation for Assigned Names and Numbers) staff to initiate a public comment period on the issue of closed generic TLD (Top Level Domain) (Top Level Domain) applications so that the NGPC could understand and consider all views and potential ramifications related to closed generic TLDs. <http://www.icann.org/en/news/announcements/announcement-2-05feb13-en.htm (/en/news/announcements/announcement-2-05feb13-en.htm)>. In light of the comments raised in this public comment forum, the closed generics public comment forum, and the GAC (Governmental Advisory Committee) (Governmental Advisory Committee) advice, ICANN (Internet Corporation for Assigned Names and Numbers) (Internet Corporation for Assigned Names and Numbers) is proposing a way for a large number of strings to move forward while the community continues to work through the issue.

While respecting the community's comments, the NGPC revised the PIC Specification to address the GAC (Governmental Advisory Committee) (Governmental Advisory Committee)'s advice regarding exclusive registry access. The proposed PIC Specification includes a provision to preclude registry operators from imposing eligibility criteria that limit registration of a generic string exclusively to a single person or entity and their "affiliates." The definition for "affiliates" is the definition in Section 2.9(c) of the

New gTLD (generic Top Level Domain) (generic Top Level Domain) Registry Agreement. For applicants seeking to impose exclusive registry access for "generic strings", the NGPC agrees to defer moving forward with the contracting process for these applicants, pending a dialogue with the GAC (Governmental Advisory Committee) (Governmental Advisory Committee) to seek clarification regarding aspects of the advice, including key definitions, and its implementation. Revising the PIC Specification in this way permits the greatest number of strings to continue moving forward while recognizing the concerns raised in the community's comments, including additional policy work.

The complete set of public comments can be reviewed at: http://www.icann.org/en/news/public-comment/gac-safeguard-advice-23apr13-en.htm (/en/news/public-comment/gac-safeguard-advice-23apr13-en.htm).

What significant materials did the NGPC review?

As part of its deliberations, the NGPC reviewed the following significant materials and documents:

GAC (Governmental Advisory Committee) (Governmental Advisory Committee) Beijing Communiqué: http://www.icann.org/en/news/correspondence/gac-to-board-18apr13-en.pdf (/en/news/correspondence/gac-to-board-18apr13-en.pdf) [PDF, 156 KB]

Public comments in response to broad categories of GAC (Governmental Advisory Committee) (Governmental Advisory Committee) safeguard advice: http://www.icann.org/en/news/public-comment/gac-safeguard-advice-23apr13-en.htm (/en/news/public-comment/gac-safeguard-advice-23apr13-en.htm)

Report of Public Comments, New gTLD (generic Top Level Domain) (generic Top Level Domain) Board Committee Consideration of GAC (Governmental Advisory Committee) (Governmental Advisory Committee) Safeguard Advice dated 18 June 2013: http://www.icann.org/en/news/public-comment/report-comments-gac-safeguard-advice-19jun13-en (/en/news/public-comment/report-comments-gac-safeguard-advice-19jun13-en)

What factors did the Board find to be significant?

The Beijing Communiqué generated significant interest from the community and stimulated many comments. The NGPC considered the community comments, the GAC (Governmental Advisory Committee) (Governmental Advisory Committee)'s advice transmitted in the Beijing Communiqué, and the procedures established in the AGB for addressing GAC (Governmental Advisory Committee) (Governmental Advisory Committee) advice to the New gTLD (generic Top Level Domain) (generic Top Level Domain) Program.

Are there positive or negative community impacts?

The adoption of the GAC (Governmental Advisory Committee) (Governmental Advisory Committee) advice as provided in the attached Annex I (/en/groups/board/documents/resolutions-new-gtld-annex-i-agenda-2c-25jun13-en.pdf) [PDF, 52 KB] will assist with resolving the GAC (Governmental Advisory Committee) (Governmental Advisory Committee) advice in a manner that permits the greatest number of new gTLD (generic Top Level Domain) (generic Top Level Domain) applications to continue to move forward as soon as possible. However, applicants seeking to impose exclusive registry access would not be able to progress to the contracting process at this time if the NGPC adopts the proposed Resolution. Those applicants would be on hold pending the outcome of the dialogue with the GAC (Governmental Advisory Committee) (Governmental Advisory Committee).

Are there fiscal impacts or ramifications on ICANN (Internet Corporation for Assigned Names and Numbers) (Internet Corporation for Assigned Names and Numbers) (strategic plan, operating plan, budget); the community; and/or the public?

There are no foreseen fiscal impacts associated with the adoption of this resolution.

Are there any security, stability or resiliency issues relating to the DNS (Domain Name System) (Domain Name System)?

Approval of the proposed resolution will not impact security, stability or resiliency issues relating to the DNS (Domain Name System) (Domain Name System).

Is this either a defined policy process within ICANN (Internet Corporation for Assigned Names and Numbers) (Internet Corporation for Assigned Names and Numbers)'s Supporting Organizations or ICANN (Internet Corporation for Assigned Names and Numbers) (Internet Corporation for Assigned Names and Numbers)'s Organizational Administrative Function decision requiring public comment or not requiring public comment?

On 23 April 2013, ICANN (Internet Corporation for Assigned Names and Numbers) (Internet Corporation for Assigned Names and Numbers) initiated a public comment forum to solicit input on how the NGPC should address GAC (Governmental Advisory Committee) (Governmental Advisory Committee) advice regarding safeguards applicable to broad categories of new gTLD (generic Top Level Domain) (generic Top Level Domain) strings http://www.icann.org/en/news/public-comment/gac-safeguard-advice-23apr13-en.htm (/en/news/public-comment/gac-safeguard-advice-23apr13-en.htm). The public comment forum closed on 4 June 2013.

d.

Singular & Plural Versions of the Same String as a TLD (Top Level Domain) (Top Level Domain)

Whereas, the GAC (Governmental Advisory Committee) (Governmental Advisory Committee) met during the ICANN (Internet Corporation for Assigned Names and Numbers) (Internet Corporation for Assigned Names and Numbers) 46 meeting in Beijing and issued a Communiqué on 11 April 2013 ("Beijing Communiqué");

Whereas, the NGPC met on 8 and 18 May and 4 and 11 June 2013, to consider a plan for responding to the GAC (Governmental Advisory Committee) (Governmental Advisory Committee)'s advice on the New gTLD (generic Top Level Domain) (generic Top Level Domain) Program, transmitted to the Board through its Beijing Communiqué;

Whereas, on 4 June 2013, the NGPC took action accepting GAC (Governmental Advisory Committee) (Governmental Advisory Committee) advice identified in the GAC (Governmental Advisory Committee) (Governmental Advisory Committee) Register of Advice as "2013-04-11-PluralStrings" and agreed to consider whether to allow singular and plural versions of the same string;

Whereas, the NGPC met on 11 June 2013 to consider the GAC (Governmental Advisory Committee) (Governmental Advisory Committee) Beijing advice regarding singular and plural versions of the same string; and

Whereas, after careful consideration of the issues, review of the comments raised by the community, the process documents of the expert review panels, and deliberations by the NGPC, the NGPC has determined that no changes to the ABG are needed to address potential consumer confusion specifically resulting from allowing singular and plural versions of the same strings;

Whereas, the NGPC is undertaking this action pursuant to the authority granted to it by the Board on 10 April 2012, to exercise the ICANN (Internet Corporation for Assigned Names and Numbers) (Internet Corporation for Assigned Names and Numbers) Board's authority for any and all issues that may arise relating to the New gTLD (generic Top Level Domain) (generic Top Level Domain) Program.

Resolved (2013.06.25.NG07), the NGPC has determined that no changes are needed to the existing mechanisms in the Applicant Guidebook to address potential consumer confusion resulting from allowing singular and plural versions of the same string.

Rationale for Resolution 2013.06.25.NG07

Why the NGPC is addressing the issue?

Article XI, Section 2.1 of the ICANN (Internet Corporation for Assigned Names and Numbers) (Internet Corporation for Assigned Names and Numbers) Bylaws (http://www.icann.org/en/about/governance/bylaws#XI (/en/about/governance/bylaws#XI)) permit the GAC (Governmental Advisory Committee) (Governmental Advisory Committee) to "put issues to the Board directly, either by way of

comment or prior advice, or by way of specifically recommending action or new policy development or revision to existing policies." The GAC (Governmental Advisory Committee) (Governmental Advisory Committee) issued advice to the Board on the New gTLD (generic Top Level Domain) (generic Top Level Domain) Program through its Beijing Communiqué dated 11 April 2013. The ICANN (Internet Corporation for Assigned Names and Numbers) (Internet Corporation for Assigned Names and Numbers) Bylaws require the Board to take into account the GAC (Governmental Advisory Committee) (Governmental Advisory Committee)'s advice on public policy matters in the formulation and adoption of the polices. If the Board decides to take an action that is not consistent with the GAC (Governmental Advisory Committee) (Governmental Advisory Committee) advice, it must inform the GAC (Governmental Advisory Committee) (Governmental Advisory Committee) and state the reasons why it decided not to follow the advice. The Board and the GAC (Governmental Advisory Committee) (Governmental Advisory Committee) will then try in good faith to find a mutually acceptable solution. If no solution can be found, the Board will state in its final decision why the GAC (Governmental Advisory Committee) (Governmental Advisory Committee) advice was not followed.

In its Beijing Communiqué, the GAC (Governmental Advisory Committee) (Governmental Advisory Committee) advised the Board that due to potential consumer confusion, the Board should "reconsider its decision to allow singular and plural version of the same strings." On 4 June 2013, the NGPC accepted the GAC (Governmental Advisory Committee) (Governmental Advisory Committee)'s advice to consider this issue. The NGPC met on 11 June 2013 to discuss this advice, and to consider whether any changes are needed to the New gTLD (generic Top Level Domain) (generic Top Level Domain) Program to address singular and plural versions of the same string.

What is the proposal being considered?

The NGPC is considering whether any changes are needed to the New gTLD (generic Top Level Domain) (generic Top Level Domain) Program (i.e. the Applicant Guidebook) as a result of the NGPC considering whether to allow singular and plural versions of the same strings as requested by the GAC (Governmental Advisory Committee) (Governmental Advisory Committee) in its Beijing Communiqué.

Which stakeholders or others were consulted?

On 18 April 2013, ICANN (Internet Corporation for Assigned Names and Numbers) (Internet Corporation for Assigned Names and Numbers) posted the GAC (Governmental Advisory Committee) (Governmental Advisory Committee) advice and officially notified applicants of the advice, http://newgtlds.icann.org/en/announcements-and-media/announcement-18apr13-en (http://newgtlds.icann.org/en/announcements-and-media/announcement-18apr13-en) triggering the 21-day applicant response period pursuant to the Applicant Guidebook Module 3.1 <http://newgtlds.icann.org/en/applicants/gac-advice-responses (http://newgtlds.icann.org/en/applicants/gac-advice-responses)>. The NGPC considered the applicant responses in considering this issue.

To note, a handful of unique applicants, representing nearly 400 application responses, addressed this piece of GAC (Governmental Advisory Committee) (Governmental Advisory Committee) advice. Most were against changing the existing policy but with one identified in support of the GAC (Governmental Advisory Committee) (Governmental Advisory Committee)'s concern. The supporting applicant has filed a string confusion objection. Those not supporting the GAC (Governmental Advisory Committee) (Governmental Advisory Committee)'s concern indicated this topic was agreed as part of the AGB and is addressed in the evaluation processes. The full summary of applicant responses can be reviewed at: <http://newgtlds.icann.org/en/applicants/gac-advice-responses (http://newgtlds.icann.org/en/applicants/gac-advice-responses)>.

What concerns or issues were raised by the community?

In September 2007, the GNSO (Generic Names Supporting Organization) (Generic Names Supporting Organization) issued a set of recommendations (approved by the ICANN (Internet Corporation for Assigned Names and Numbers) (Internet Corporation for Assigned Names and Numbers) Board in June 2008) to implement a process to allow for the introduction of new gTLDs. These include a recommendation that new gTLD (generic Top Level Domain) (generic Top Level Domain) strings must not be confusingly

similar to an existing top-level domain or a reserved name. The GNSO (Generic Names Supporting Organization) (Generic Names Supporting Organization) constituency groups lodged comments during that time, and these comments were considered as part of the approval of the Program. The NGPC considered these community comments as part of its deliberations.

More recently, ICANN (Internet Corporation for Assigned Names and Numbers) (Internet Corporation for Assigned Names and Numbers) posted the GAC (Governmental Advisory Committee) (Governmental Advisory Committee)'s Be jing Communiqué and officially notified applicants of the advice, <http://newgtlds.icann.org/en/announcements-and-media/announcement-18apr13-en (http://newgtlds.icann.org/en/announcements-and-media/announcement-18apr13-en)> triggering the 21-day applicant response period pursuant to the AGB Module 3.1. Multiple members of the ICANN (Internet Corporation for Assigned Names and Numbers) (Internet Corporation for Assigned Names and Numbers) and New gTLD (generic Top Level Domain) (generic Top Level Domain) applicant communities have raised concerns to the ICANN (Internet Corporation for Assigned Names and Numbers) (Internet Corporation for Assigned Names and Numbers) Board regarding the GAC (Governmental Advisory Committee) (Governmental Advisory Committee)'s advice regarding singular and plural versions of the same string. Some of the concerns raised by the community are as follows:

- Allowing singular and plural versions of the same string amounts to a "serious flaw" in the Program, and the Program should not rely on the self-interest of others to file objections to avoid string confusion.
- The independent panels have ruled and it would not be appropriate for either ICANN (Internet Corporation for Assigned Names and Numbers) (Internet Corporation for Assigned Names and Numbers) or the Board to overturn these decisions. The findings of the independent string similarity review panel should not be upset, absent a finding of misconduct.
- The Board approved the evaluation process, which included independent assessment of each application against AGB criteria, appropriately away from the interests of those with stakes in the outcome.
- ICANN (Internet Corporation for Assigned Names and Numbers) (Internet Corporation for Assigned Names and Numbers) should not change course on this issue, as it would open the door to one stakeholder group undoing independently arrived-at results because it disagrees with the outcome.

The concerns raised by the community highlight the difficulty of the issue and the tension that exists between minimizing user confusion while encouraging creativity, expression and competition. The NGPC weighed these comments during its del berations on the issue.

What significant materials did the NGPC review?

The NGPC reviewed and considered the following significant materials as part of its consideration of the issue:

- GAC (Governmental Advisory Committee) (Governmental Advisory Committee) Beijing Communiqué: http://www.icann.org/en/news/correspondence/gac-to-board-18apr13-en.pdf (/en/news/correspondence/gac-to-board-18apr13-en.pdf) [PDF, 156 KB]
- Applicant responses to GAC (Governmental Advisory Committee) (Governmental Advisory Committee) advice: http://newgtlds.icann.org/en/applicants/gac-advice-responses (http://newgtlds.icann.org/en/applicants/gac-advice-responses)
- String Similarity Contention Sets <http://www.icann.org/en/news/announcements/announcement-26feb13-en.htm (/en/news/announcements/announcement-26feb13-en.htm)>

What factors did the NGPC find to be significant?

The NGPC considered several significant factors during its deliberations about whether to allow singular and plural version of the same strings. The NGPC had to balance the competing interests of each factor to arrive at a decision. The following are among the factors the NGPC found to be significant:

- The NGPC considered whether it was appropriate to reject the work of the expert review panel and apply its own judgment to a determination of what rises to the level of probable user confusion. The NGPC considered whether the evaluation process would be undermined if it were to exert its own non-expert opinion and override the determination of the expert panel. It also considered whether taking an action to make program changes would cause a ripple effect and re-open the decisions of all expert panels.

  The NGPC considered that the objective of the string similarity review in the AGB is to prevent user confusion and loss of confidence in the DNS (Domain Name System) (Domain Name System) resulting from delegation of many similar strings. In the AGB, "similar" means strings so similar that they create a probability of user confusion if more than one of the strings is delegated into the root zone. During the policy development and implementation design phases of the New gTLD (generic Top Level Domain) (generic Top Level Domain) Program, aural and conceptual string similarities were considered. These types of similarity were discussed at length, yet ultimately not agreed to be used as a basis for the analysis of the string similarity panels' consideration because on balance, this could have unanticipated results in limiting the expansion of the DNS (Domain Name System) (Domain Name System) as well as the reach and utility of the Internet. However, the grounds for string confusion objections include all types of similarity, including visual, aural, or similarity of meaning. All new gTLD (generic Top Level Domain) (generic Top Level Domain) applicants had standing to file a string confusion objection against another application.

- The NGPC considered the objective function of the string similarity algorithm in the AGB (§ 2.2.1.1.2) and the results it produced. SWORD assisted ICANN (Internet Corporation for Assigned Names and Numbers) (Internet Corporation for Assigned Names and Numbers) with the creation of an algorithm that helped automate the process for objectively assessing similarity among proposed and existing TLD (Top Level Domain) (Top Level Domain) strings. Various patent and trademark offices throughout the world use SWORD's verbal search algorithms. The String Similarity Panel was informed in part by the algorithmic score for the visual similarity between each applied-for string and each of other existing and applied-for TLDs and reserved names. The score provided one objective measure for consideration by the panel, as part of the process of identifying strings likely to result in user confusion. However, this score was only indicative and the panel's final determination was based on careful review and analysis. A full consideration of potential consumer confusion issues is built into the procedures that have been applied in the analysis of the strings.

- The NGPC reflected on existing string similarity in the DNS (Domain Name System) (Domain Name System) and considered the positive and negative impacts. The NGPC observed that numerous examples of similar strings, including singulars and plurals exist within the DNS (Domain Name System) (Domain Name System) at the second level. Many of these are not registered to or operated by the same registrant. There are thousands of examples including:

auto.com	autos.com
car.com	cars.com
new.com	news.com
store.com	stores.com

- The NGPC considered the process used by the panel of experts from InterConnect Communications working in conjunction with the University College London to perform a visual similarity review to prevent used confusion and loss of confidence in the DNS (Domain Name System) (Domain Name System) resulting fro the delegation of similar strings. The panel made its assessments using the standard defined in the Applicant Guidebook: String confusion exists where a string so nearly resembles another visually that it is likely to deceive or cause confusion. For the likelihood of confusion to exist, it must be probable, not merely poss ble that confusion will arise in the mind of the average, reasonable Internet user. Mere association, in the sense that the string brings another string to mind, is insufficient to find a l kelihood of confusion. This panel utilized its independent expertise, including in linguistics, to perform the review against the criteria in the Applicant Guidebook. ICANN (Internet Corporation for Assigned Names and Numbers) (Internet Corporation for Assigned Names and Numbers) did not provide any instructions to the panel outside of the criteria specified in the Applicant Guidebook, including any pre-judgment of whether singular or plural versions of strings should be considered visually similar.

- The NGPC considered whether there were alternative methods to address potential user confusion if singular and plural versions of the same string are allowed to proceed. The NGPC discussed the String Confusion Objection mechanism in the AGB, and noted that string confusion objections are not limited to visual similarity, but may include any type of similarity, including visual, aural, or similarity of meaning. The DRSP panels reviewing string confusion objections use the following standard for assessing string confusion, as specified in the Applicant Guidebook: String confusion exists where a string so nearly resembles another that it is likely to deceive or cause confusion. For a l kelihood of confusion to exist, it must be probable, not merely possible that confusion will arise in the mind of the average, reasonable Internet user. Mere association, in the sense that *the string brings another string to mind, is insufficient to find a likelihood of confusion*. The NGPC took note of the fact that in the case of a successful string confusion objection, either the application would not proceed (for an objection by an existing gTLD (generic Top Level Domain) (generic Top Level Domain) operator) or an existing contention set would be modified to include the application subject to the objection (for an objection by another gTLD (generic Top Level Domain) (generic Top Level Domain) applicant).

- The NGPC took note of the objections filed during the objection period, which closed on 13 March 2013. All new gTLD (generic Top Level Domain) (generic Top Level Domain) applicants had standing to file a string confusion objection against another application. By the end of the objection period, a total of 67 string confusion objections were filed (see http://newgtlds.icann.org/en/program-status/odr/filings (http://newgtlds.icann.org/en/program-status/odr/filings)). Based on staff analysis, there were a total of 26 singular/plural applied-for, English language strings. The strings in these pairs had a total of 21 string similarity objections filed against them.

Are there positive or negative community impacts?

The string similarity review is the implementation of the GNSO (Generic Names Supporting Organization) (Generic Names Supporting Organization)'s policy recommendation 2: "Strings must not be confusingly similar to an existing top-level domain or a Reserved Name." As noted above, the objective of the string similarity review is to prevent user confusion and loss of confidence in the DNS (Domain Name System) (Domain Name System) resulting from delegation of many similar strings. A full consideration of potential consumer confusion issues is built into the procedures that have been applied in the analysis of the strings. The adoption of the proposed resolution will assist with continuing to resolve the GAC (Governmental Advisory Committee)

(Governmental Advisory Committee) advice in manner that permits the greatest number of new gTLD (generic Top Level Domain) (generic Top Level Domain) applications to continue to move forward as soon as possible.

Are there fiscal impacts or ramifications on ICANN (Internet Corporation for Assigned Names and Numbers) (Internet Corporation for Assigned Names and Numbers) (strategic plan, operating plan, budget); the community; and/or the public?

There are no foreseen fiscal impacts associated with the adoption of this resolution.

Are there any security, stability or resiliency issues relating to the DNS (Domain Name System) (Domain Name System)?

The security, stability and resiliency issues relating to the DNS (Domain Name System) (Domain Name System) were considered when the AGB was adopted. The NGPC's decision does not propose any changes to the existing program in the AGB, and thus there are no additional foreseen issues related to the security, stability or resiliency of the DNS (Domain Name System) (Domain Name System).

Is this either a defined policy process within ICANN (Internet Corporation for Assigned Names and Numbers) (Internet Corporation for Assigned Names and Numbers)'s Supporting Organizations or ICANN (Internet Corporation for Assigned Names and Numbers) (Internet Corporation for Assigned Names and Numbers)'s Organizational Administrative Function decision requiring public comment or not requiring public comment?

ICANN (Internet Corporation for Assigned Names and Numbers) (Internet Corporation for Assigned Names and Numbers) posted the GAC (Governmental Advisory Committee) (Governmental Advisory Committee) advice and officially notified applicants of the advice on 18 April 2013 <http://newgtlds.icann.org/en/announcements-and-media/announcement-18apr13-en (http://newgtlds.icann.org/en/announcements-and-media/announcement-18apr13-en)>. This triggered the 21-day applicant response period pursuant to the Applicant Guidebook Module 3.1. No additional public comment is required as the NGPC's action does not propose any policy or program changes to the New gTLD (generic Top Level Domain) (generic Top Level Domain) Program.

e.

IGO (Intergovernmental Organization) (Intergovernmental Organization) Protection

No resolution taken.

f.

AOB

No resolution taken.

Published on 27 June 2013

Reconsideration Request

Union of Orthodox Jewish Congregations of America, *et al.*

Annex O

GAC, Buenos Aires Communiqué
(21 Nov. 2013)

Governmental Advisory Committee

Buenos Aires, 20 November 2013

GAC Communiqué – Buenos Aires, Argentina

I. Introduction

The Governmental Advisory Committee (GAC) of the Internet Corporation for Assigned Names and Numbers (ICANN) met in Buenos Aires during the week of 16 November 2013. 56 GAC Members attended the meetings, with one GAC Member participating remotely, and five Observers. The GAC expresses warm thanks to the local host, NIC Argentina, for their support.

At the beginning of its meeting the GAC expressed its sympathy for and solidarity with the people and government of the Philippines following the recent disaster of Typhoon Haiyan.

II. GAC Advice to the Board[1]

1. Category 1 and Category 2 Safeguard Advice

The GAC welcomed the response of the Board to the GAC's Beijing Communiqué advice on Category 1 and Category 2 safeguards. The GAC received useful information regarding implementation of the safeguards during its discussions with the New gTLD Program Committee. GAC members asked for clarification of a number of issues and look forward to ICANN's response.

a. The GAC highlights the importance of its Beijing advice on 'Restricted Access' registries, particularly with regard to the need to avoid undue preference and/or undue disadvantage.

i. **The GAC requests**

1. A briefing on whether the Board considers that the existing PIC specifications (including 3c) fully implements this advice.

b. The GAC requests a briefing on the public policy implications of holding auctions to resolve string contention (including community applications).

[1] To track the history and progress of GAC Advice to the Board, please visit the GAC Advice Online Register available at: https://gacweb.icann.org/display/GACADV/GAC+Register+of+Advice

c. The GAC considers that new gTLD registry operators should be made aware of the importance of protecting children and their rights consistent with the UN Convention on the Rights of the Child.

d. **The GAC advises the ICANN Board:**

i. to re-categorize the string .doctor as falling within Category 1 safeguard advice addressing highly regulated sectors, therefore ascribing these domains exclusively to legitimate medical practitioners. The GAC notes the strong implications for consumer protection and consumer trust, and the need for proper medical ethical standards, demanded by the medical field online to be fully respected.

e. The GAC welcomes the Board's communication with applicants with regard to open and closed gTLDs, but seeks **written clarification** of how strings are identified as being generic.

2. **GAC Objections to Specific Applications (ref. Beijing Communiqué 1.c.)**

a. .guangzhou (IDN in Chinese), .shenzhen (IDN in Chinese), and .spa

Discussions between interested parties are ongoing so as noted in the Durban Communiqué

i. **The GAC advises the ICANN Board**:

1. Not to proceed beyond initial evaluation until the agreements between the relevant parties are reached.

a. The application for .guangzhou (IDN in Chinese – application number 1-1121-22691)

b. The application for .shenzhen (IDN in Chinese – 1-1121-82863)

c. The applications for .spa (application number 1-1309-12524 and 1-1619-92115)

b. The GAC notes that the application for .yun (application number 1-1318-12524) has been withdrawn.

c. The GAC welcomes the Board's acceptance of its advice in the Durban Communiqué on the application for .thai.

d. The GAC sought an update from the Board on the current status of the implementation of the GAC Advice for .amazon.

3. **.wine and .vin**

The GAC took note of the developments on the two strings .wine and .vin from its previous meetings in Beijing and Durban.

GAC members have undertaken extensive discussions to examine a diversity of views on these applications, and the protections associated with Geographical Indications (GIs).

GAC considers that appropriate safeguards against possible abuse of these new gTLDs are needed.

Some members are of the view, after prolonged and careful consideration, that the existing safeguards outlined in the GAC's Beijing Communiqué and implemented by the ICANN Board are appropriate and sufficient to deal with the potential for misuse of the .wine and .vin new gTLDs. These members welcome the Board's response to these safeguards, which prohibit fraudulent or deceptive use of domain names. They consider that it would be inappropriate and a serious concern if the agreed international settings on GIs were to be redesigned by ICANN. The current protections for geographical indications are the outcome of carefully balanced negotiations. Any changes to those protections are more appropriately negotiated among intellectual property experts in the World Intellectual Property Organization and the World Trade Organization.

Other members consider that delegation of .wine and.vin strings should remain on hold until either sufficient additional safeguards to protect GIs are put into place in these strings to protect the consumers and businesses that rely on such GIs; or common ground has been reached for the worldwide protection of GIs via international fora and wide array of major trade agreements. Given this changing context, they welcome the current face-to-face talks between the applicants for .wine and .vin. and wine producers, aiming to protect their assets and consumers' interests whilst taking into account governments' public policy concerns.

The Board may wish to seek a clear understanding of the legally complex and politically sensitive background on this matter in order to consider the appropriate next steps in the process of delegating the two strings. GAC members may wish to write to the Board to further elaborate their views.

4. Protection of Inter-Governmental Organisations (IGOs)

a. The GAC Advises the ICANN Board that:

i. The GAC, together with IGOs, remains committed to continuing the dialogue with NGPC on finalising the modalities for permanent protection of IGO acronyms at the second level, by putting in place a mechanism which would:

1. provide for a permanent system of notifications to both the potential registrant and the relevant IGO as to a possible conflict if a potential registrant seeks to register a domain name matching the acronym of that IGO;
2. allow the IGO a timely opportunity to effectively prevent potential misuse and confusion;
3. allow for a final and binding determination by an independent third party in order to resolve any disagreement between an IGO and a potential registrant; and
4. be at no cost or of a nominal cost only to the IGO.

The GAC looks forward to receiving the alternative NGPC proposal adequately addressing this advice. The initial protections for IGO acronyms should remain in place until the dialogue between the NGPC, the IGOs and the GAC ensuring the implementation of this protection is completed.

5. **Special Launch Program for Geographic and Community TLDs**

   The GAC recognizes the importance of the priority inclusion of government and locally relevant name strings for the successful launch and continued administration of community and geographic TLDs.

   The GAC appreciates that the Trademark Clearing House (TMCH) is an important rights protection mechanism applicable across all the new gTLDs and has an invaluable role to fulfill across the new gTLD spectrum as a basic safety net for the protection of trademark rights.

   a. **The GAC Advises the ICANN Board:**

      i. that ICANN provide clarity on the proposed launch program for special cases as a matter of urgency.

6. **Protection of Red Cross/Red Crescent Names**

   a. The GAC advises the ICANN Board:

      i. that it is giving further consideration to the way in which existing protections should apply to the words “Red Cross”, “Red Crescent” and related designations at the top and second levels with specific regard to national Red Cross and Red Crescent entities; and that it will provide further advice to the Board on this.

7. **.islam and .halal**

   a. GAC took note of letters sent by the OIC and the ICANN Chairman in relation to the strings .islam and .halal. The GAC has previously provided advice in its Beijing Communiqué, when it concluded its discussions on these strings. The GAC Chair will respond to the OIC correspondence accordingly, noting the OIC’s plans to hold a meeting in early December. The GAC chair will also respond to the ICANN Chair's correspondence in similar terms.

III. Inter-constituencies Activities

1. **Meeting with the Generic Names Supporting Organisation (GNSO)**

   The GAC met with the GNSO and welcomed preliminary work that has been done to identify improved ways for earlier GAC involvement in policy development processes which have potential public policy aspects. A joint GAC/GNSO working group will be established to develop inter-sessionally more detailed options for implementation.

2. **Meeting with the Expert Working Group on gTLD Directory Services (EWG)**

The GAC met with the EWG and exchanged views on the model proposed by the EWG for next generation directory services. GAC members highlighted a range of issues including the importance of applicable data privacy laws, the balance between public and restricted data elements, and the accreditation process to allow access to restricted data for legitimate purposes. The GAC welcomed the opportunity for continuing engagement with the EWG.

3. **Meeting with the Country Code Names Supporting Organisation (ccNSO)**

   The GAC met with the ccNSO and received briefings on ccNSO working groups on the IDN policy development process and the framework of interpretation; and the study group on country names. The GAC committed to continuing engagement with these issues, all of which have public policy implications, and will continue to work closely with the ccNSO.

4. **Meeting with the Accountability and Transparency Review Team 2 (ATRT 2)**

   The GAC is grateful for the work undertaken by the ATRT2 and discussed with review team members their draft recommendations and report, noting that it was valuable to gain an external perspective on the work and operations of the GAC. The GAC has already made progress in relation to early engagement in policy development processes, increased transparency and improved working methods, but acknowledges that there is always more to be done, particularly in outreach. GAC members noted that the GAC provides policy advice, not legal advice. The GAC noted that each member already operates within their own government's code of conduct framework.

5. **Meeting with the Brand Registry Group (BRG)**

   The GAC met with the Brand Registry Group to discuss their proposal for a streamlined process under an addendum to the Registry Agreement for the approval of country names and 2-letter and character codes at the second level. The GAC undertook to consider this proposal further and respond to the BRG in due course.

***

The GAC warmly thanks the GNSO, the EWG, the ccNSO, and the ATRT 2, who jointly met with the GAC; as well as all those among the ICANN community who have contributed to the dialogue with the GAC in Buenos Aires.

IV. Internal Matters

1. **New Members and Observers** - The GAC welcomes the Commonwealth of Dominica and Montenegro as members, and the Organisation of Islamic Cooperation and the Caribbean Telecommunications Union as observers.

2. **GAC Secretariat** – The independent consultants, Australian Continuous Improvement Group, have begun providing additional secretariat services to the

GAC. A range of measures to improve the efficiency and effectiveness of the GAC is being progressively implemented.

3. **GAC Leadership** - The GAC welcomed the re-election of the current Vice Chairs (Australia, Switzerland and Trinidad and Tobago) for a further term. The issue of a possible increase in the number of Vice Chairs to better represent regions and manage workload has been referred to the GAC working group on working methods for consideration and report.

4. **New gTLDs** - At the ICANN meeting in Durban, the GAC formed a working group to begin consideration of potential public policy input for future rounds of new gTLDs. This working group has been focusing on issues associated with the protection of geographic names, the processes associated with identified communities, and developing economy issues and applicant support. The outcomes of the Geographic names working group are expected to be presented to the community by the ICANN 49 Singapore meeting. The GAC looks forward to discussing these issues with the community in future meetings.

5. **Working Methods** – At the ICANN meeting in Durban the GAC formed a working group to consider improvements to the GAC's working methods. A range of immediate measures has been identified and is being progressively implemented. Other matters will be progressed in coordination with related initiatives including the ATRT 2 process.

6. **High Level Meeting** - A high level meeting of governments will be held in London in June 2014 in conjunction with the ICANN and GAC meetings. The agenda for the meeting should be finalised in Singapore.

V. Next Meeting

The GAC will meet during the period of the 49th ICANN meeting in Singapore.

Reconsideration Request

Union of Orthodox Jewish Congregations of America, *et al.*

Annex P

ICANN's Opposition to Plaintiff's Motion for Preliminary Injunction,
Dotster v. ICANN,
Case No. CV03-5045 (D.D.C. 15 Sept. 2003)

ICANN's Opposition to Plaintiffs' Motion for Preliminary Injunction *Dotster v. ICANN*

(15 September 2003)

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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

DOTSTER, INC., GO DADDY SOFTWARE, INC., and eNOM, INC., Plaintiffs, v. INTERNET CORPORATION FOR ASSIGNED NAMES AND NUMBERS, Defendant.	Case No. CV03-5045 JFW (MANx) **DEFENDANT'S OPPOSITION TO PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION** Date: September 29, 2003 Time: 1:30 p.m. Courtroom: 16 {Original Date: October 6, 2003} **Before the Hon. John F. Walter**

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INTRODUCTION

Despite plaintiffs' strenuous effort to persuade this Court to the contrary, what is before the Court is a very simple contract dispute. Plaintiffs argue that Defendant Internet Corporation for Assigned Names and Numbers ("ICANN") has breached the Registrar Accreditation Agreements ("RAA") that ICANN has entered into with each of the plaintiffs by proposing to amend ICANN's contract with a third party. A plain reading of the RAA, however, shows nothing that would prevent or restrict ICANN from entering into new or amended agreements with any other party. What plaintiffs really seek here is a significant reformation of the RAA to provide them with a veto over any action by ICANN that, in their view, adversely affects their commercial interests. The RAA provides absolutely no basis for any such relief and it would be completely contrary to ICANN's public interest mission.

The RAA is a fairly simple document, setting forth in separate sections the obligations of both parties. Plaintiffs' primary argument is that ICANN cannot take any action that affects plaintiffs' commercial interests without following the "Consensus Policy" requirements of the RAA. But the "Consensus Policy" provisions of the RAA clearly apply only to those instances in which ICANN seeks to impose new obligations on registrars. What plaintiffs are arguing is that the RAA "Consensus Policy" provisions should be interpreted to impose obligations on ICANN generally, whenever ICANN takes actions that might have some impact on registrars, or even more broadly on domain name policy generally. This is not what the RAA says.

The only place in which any "Consensus Policy" obligations are set forth in the RAA is subsection 4.1, which speaks to the circumstances in which ICANN may impose additional obligations on registrars (such as the three plaintiffs). It is revealing that plaintiffs never discuss that subsection of the RAA, seeking instead to focus on subsection 4.2, which does nothing more than delineate an illustrative list of topics that could be the subject of new registrar obligations, and subsection 4.3, which sets forth the procedures that must be followed in those circumstances where a Consensus Policy is to be established. Plaintiffs argue that these subsidiary subsections 4.2 and 4.3 somehow "obligate Defendant to ensure that any new policies or specifications identified in the Agreements and imposed on Registrars are approved by a consensus of Internet stakeholders" (Motion at 5:13-15), notwithstanding the plain language to the contrary in subsection 4.1. While that is not accurate -- those subsections merely define the

obligation expressed in subsection 4.1 -- plaintiffs have, perhaps inadvertently, with this articulation exposed the basic flaw in their argument: the ICANN action challenged here does not impose any obligation on registrars.

It is important to understand what plaintiffs are really complaining about. Some registrars, including plaintiffs, have created products that they sell to consumers. Those products are not the result of any ICANN process or consensus; they represent market decisions made by these economic actors without any ICANN input, involvement or oversight. The development of these products was not governed by the RAA; they required no approval by ICANN or anyone else; they were, in fact, created wholly outside the ICANN process. This fact alone illustrates why plaintiffs' argument overreaches: plaintiffs' own actions, which clearly had "an impact on registrars" (and, indeed, involved a new product offered by some registrars), were certainly not the result of any consensus process.

Now, VeriSign has sought to create a product that will compete with those offered by plaintiffs. Plaintiffs obviously fear that this new product may be preferred by consumers once that option is available to them. But VeriSign, unlike plaintiffs, was not able to simply create and offer this product without any ICANN involvement, because VeriSign is a registry, not a registrar, and in that role it operates not under the RAA but a different agreement. VeriSign's registry agreement with ICANN requires ICANN approval for any new registry product that will be offered for sale, a provision that is intended to prevent evasion of the price ceiling set in the registry agreement so as to prevent monopoly pricing by the registry, for which some customers have no practical substitute[1]. Plaintiffs are attempting here to take commercial advantage of this wholly independent agreement and its requirement that ICANN approve this new registry product so as to prevent the introduction of new competition -- competition they fear will reduce the revenues that they have been able to generate from their products that did not require ICANN approval.

Plaintiffs seek to wrap this rather unattractive position -- that this Court should prevent VeriSign from offering consumers an additional and potentially more attractive option to the products plaintiffs offer -- in a bunch of public policy/competition/contract mumbo-jumbo, because it is difficult to explain otherwise why plaintiffs should be protected from this new competition and why consumers should be deprived of this new (and less costly and more manageable) option. In doing so, plaintiffs ignore the plain language of the RAA and seek to invent obligations that do not exist. To be very clear on what is happening here: this is an attempt to use this Court to *exclude* new competition on the basis of imaginary contractual obligations that are flatly inconsistent with the actual language of the RAA. This effort should be summarily rejected.

The fact, as opposed to the fiction, is that ICANN, in its ongoing effort to promote consensus and broad participation wherever possible, voluntarily sought community input on the pros and cons of the proposal by VeriSign to modify its registry agreement. This was not required by any agreement, including the RAA, but was thought to be a desirable approach to what was anticipated would be a controversial subject. Plaintiffs argue that by seeking public input ICANN invoked the "Consensus Policy" requirement of the RAA, but in fact it was a voluntary initiative by ICANN, as was obvious from all the contemporaneous discussion. There were a wide range of views expressed by various parts of the ICANN community, including registrars such as the plaintiffs,[2] and in the end, ICANN's Board took those views into consideration and came to a decision.

Plaintiffs now propose to redefine the RAA so that ICANN is required to develop a "Consensus Policy" anytime there are "new principles established for the allocation of domain names." (Motion at 10:19-20). They argue, in a way that is flatly inconsistent with contemporaneous statements of ICANN during the process that it initiated,[3] that ICANN agreed with this interpretation. But because the record is clear that ICANN did not agree with this interpretation, plaintiffs' argument boils down to a contention that, because ICANN voluntarily sought public input, without a contractual obligation to do so, this creates a basis for reforming the RAA to require such an obligation. This is a remarkable and unsupportable notion of contract interpretation, and if adopted by the Court would have dramatic negative implications on the ability of ICANN to carry out its mission.

The structure and purpose of the "Consensus Policy" term in the RAA was not intended to protect ICANN-accredited registrars from competition but only from additional obligations imposed by ICANN. An amendment to VeriSign's registry agreement allowing it to offer the WLS would impose no obligations on plaintiffs or any other registrars but would simply present them with an additional competitive challenge.

In short, plaintiffs ask this Court to rewrite the RAA and to protect them from having to respond to this new competition. This is not consistent with the language of the RAA, nor with the public interest. The motion for preliminary injunction should be denied.

STATEMENT OF FACTS

ICANN

ICANN is a not-for-profit corporation that was organized under California law in 1998. Pursuant to a series of agreements with the United States Department of Commerce ("DOC"), ICANN is responsible for administering certain aspects of the Internet's domain name system. (Halloran Decl., ¶ 13.) Among its various activities, ICANN accredits companies known as "registrars" that make Internet "domain names," such as "cnn.com" or "pbs.org," available to consumers. (Id., ¶ 15.) Each registrar enters into an RAA with ICANN that permits it to sell the right to use domain names in a particular domain (such as ".com," ".net," ".biz" and so forth). (Id.) Registrars, in turn, contract with consumers and businesses that wish to register Internet domain names. (Id.) Typically, those contracts last one or two years, and at the end of that term, the consumer is given the option to renew the contract so as to retain that particular domain name.

Separately, ICANN also contracts with Internet "registries." Each "top level domain name" -- such as .com, .net, .biz and so forth -- is operated by a single registry that functions similar to a phone book, making sure that each name registered in that domain is unique. Registries offer a variety of services that, for example, permit consumers to check to see if a particular domain name has already been registered and when the name is set to expire. (Id., ¶ 8.) A registry that wishes to offer new services for a fee must obtain ICANN's permission via an amendment to its registry agreement.

VeriSign's Wait Listing Service

Beginning in late 2001, VeriSign proposed to offer the WLS, which would operate by permitting ICANN-accredited registrars, acting on behalf of customers, to place reservations for currently registered domain names in the .com and .net top-level

domains. (Id. ¶ 16.) Only one reservation would be accepted for each registered domain name. Each reservation would be for a one-year period. Registrations for names would be accepted on a first-come/first-served basis, with the opportunity for renewal. (Id.) VeriSign would charge the registrar a fee, which would be no higher than $24.00 for a one-year reservation and would be the same for all registrars. (Id.) The registrar's fee to the customer would be established by the registrar, not by VeriSign. In the event that a registered domain name is not renewed and is thus to be deleted from the registry, VeriSign would check to determine whether a reservation for the name is in effect, and if so would automatically register the name to the customer. If there is no reservation, VeriSign would simply delete the name from the registry, so that the name is returned to the pool of names equally available for registration through all registrars, also on a first-come/first-served basis. (Id.) VeriSign proposed to implement the WLS for a twelve-month trial. At the end of the trial, ICANN and VeriSign would evaluate whether the WLS should be continued. (Id., ¶ 17.)

In order to provide this service and charge a fee, VeriSign is required by its registry agreement with ICANN to obtain ICANN's approval to modify that agreement, which requires a modification to the registry agreement for the offering of any new registry service for which a fee will be charged. (Id., ¶ 18.) In addition, the Memorandum of Understanding between ICANN and the U.S. Department of Commerce, which requires ICANN to submit for DOC approval any material change to the .com and .net registry agreements between ICANN and VeriSign. (Id. at ¶ 18.)

Presently, several registrars, including the three plaintiffs, provide their own form of "wait list services." (Id., ¶ 24.) (As reflected in plaintiffs' declarations, some of these services commenced after VeriSign proposed the WLS.) Under these services, a consumer who wants to register a particular name that is already registered by someone else may sign up, and in many cases pay in advance, for the opportunity to try to obtain that name when, and if, it is deleted at some point in the future. (Id.) Upon receiving such a request from a consumer, the registrar would then watch for the particular name to be deleted and, if and when that happened, immediately attempt to register it. (Id.) However, none of these services can provide a customer with any certainty that a particular domain name will be registered to it (if and when the name is deleted from the registry) because there may be numerous registrars that have sold to different customers the chance to obtain the right to use the very same deleted name, and only one of those registrars will be successful in registering that name for its customer.

In contrast to the various "wait list services" offered by Plaintiffs and other registrars, the WLS would permit a consumer to sign up with any participating registrar to be placed on the waiting list for a particular name if there was not already a WLS registration for that name, and such a registration would guarantee that consumer the right to register that particular name should it subsequently be deleted. (Id., ¶ 25.) This description illustrates why plaintiffs fear the introduction of this new product: the WLS will offer the certainty that none of the plaintiffs can offer today.

The WLS will not affect current domain name registrations. (Id. at ¶ 19.) An existing registrant will continue to be the registrant of its domain name for so long as it continues to renew the domain name in a timely fashion and to meet the requirements of its chosen registrar. (Id.) A WLS subscription matures into an actual domain name registration only when a domain name is finally deleted by the registry. (Id.)

Likewise, the WLS will not change the manner in which a deleted domain name is processed when there is no WLS subscription for the domain name. (Id. at ¶ 20.) If the domain name has not been redeemed or renewed, the deletion of the domain name is effectuated by the registry and the domain name ceases to exist in the registry database until and if registered again at some time in the future. (Id.) In the absence of a WLS subscription, the deleted domain name becomes available for creation and registration through any ICANN-accredited registrar on a first-come/first-served basis, just as it was before WLS. (Id.)

All ICANN-accredited registrars will have an equal opportunity, at the same wholesale price, to participate in the WLS. (Id. at 22.) Registrars also have the option of not participating, since the WLS is an entirely optional service. (Id.) If they elect not to participate in the WLS, registrars may still register, delete, transfer or otherwise make registered domain names available in the secondary market (e.g., auctions, person-to-person transactions, etc.). The WLS services at the registrar level might be differentiated through customer service, marketing, registrar value-added services, or other creative actions, and through competitive retail pricing. (Id.)

As this explanation demonstrates, plaintiffs' argument (Motion at 12:20-25) that the creation of the WLS will be anticompetitive is flatly wrong: the only competitive effect that it will have is the introduction of a new product to the marketplace. Registrars can continue to vigorously compete with each other in the sale of domain name registrations, in the sale of WLS subscriptions, and (if they choose) in the sale of other deleted domain name services such as those currently offered by plaintiffs. Plaintiffs obviously fear that their existing deleted name services will not fare well in this new competition with WLS subscriptions, and that they will generate smaller profits in this more competitive environment. But this is hardly a concern that should trouble this Court, and certainly is not a basis for invoking or revising the provisions of the RAA.

Consensus Policies

Under subsection 4.1 of the RAA (Halloran Decl. at ¶ 15, Ex. 2), all ICANN-accredited registrars agree to comply with new or revised "policies" that apply to all registrars and are developed during the term of the agreement, provided they are established according to a consensus process described in subsection 4.3 and in the circumstances prescribed in subsection 4.1.2 (a.k.a. "Consensus Policies"). (Id. at ¶ 27.) Registrars thus contractually agree that, through this process, they may be compelled to take action in compliance with a duly-established Consensus Policy without an amendment to their RAAs. (Id.) In essence, subsection 4.1 permits ICANN to impose new policies on all of its registrars, if adopted as set forth in the RAA, without requiring each of its 170 or so registrars to sign new agreements. This is the only place in which "consensus policy" development is even discussed in the RAA, and its only impact is to require ICANN to follow certain procedures when it seeks to impose additional obligations on registrars generally. This provision insures that registrars are not obligated to comply with any ICANN action or policy that was not developed pursuant to the RAA's specified procedures or is not a result of a negotiated amendment to the RAA.

Decision to Proceed with the WLS

Contrary to the inference that plaintiffs seek to leave with the Court, ICANN has been

clear from the beginning of the WLS process that it did not consider the issue of a possible amendment of the VeriSign registry contract to be subject to any consensus policy requirement. (See footnote 3, supra.) It did, however, believe that it was appropriate to seek public input as an aid to its decisional process, and therefore it invited input from various ICANN constituencies, including the Registrar Constituency of which plaintiffs are a part.

On March 10, 2002, ICANN's "Registrar Constituency" issued a position paper opposing the WLS and urging ICANN to withhold permission for its implementation. The registrars supporting the paper, to nobody's surprise, were those who already had their own version of a wait-list service in place, including the plaintiffs in this action. Several registrars that did not offer such wait-listing services dissented from the paper. (Halloran Decl. at ¶ 40.)

On August 23, 2002, the ICANN Board determined that the WLS "promotes consumer choice" and that the "option of subscribing to a guaranteed 'wait list' service is a beneficial option for consumers." For these reasons, the Board approved a resolution (Resolution 02.100) authorizing (with certain conditions, imposed largely to address the stated concerns of registrars) ICANN's President and General Counsel to negotiate appropriate revisions to VeriSign's registry agreements to allow for the offering of the WLS. (See id. at ¶ 41, Ex. 15.)

On September 9, 2002, after the Board had approved the WLS, counsel for Dotster, Inc. ("Dotster") submitted a letter to ICANN and then filed a formal request for reconsideration of the Board's decision regarding the WLS. As is its usual practice, ICANN posted a copy of Dotster's letter on its website. (Id. at 42, Ex. 16) On May 20, 2003, ICANN's Reconsideration Committee determined that Dotster's request lacked merit and recommended that the Board take no action on it. (Id.)

On July 16, 2003, plaintiffs initiated this litigation and filed a request for a temporary restraining order, which the Court denied via its order of July 18, 2003.[4] Plaintiffs took no further action in the case until they filed their motion for preliminary injunction.

ARGUMENT

It is a '"fundamental principle that an injunction is an equitable remedy that does not issue as of course.'" *Miller For And On Behalf Of N.L.R.B. v. Cal. Pac. Med. Ctr.*, 991 F.2d 536, 539 (9th Cir. 1993) (quoting *Amoco Prod. Co. v. Village of Gambell*, 480 U.S. 531, 542 (1987)). To obtain a preliminary injunction, the moving party must establish: 1) a strong likelihood of success on the merits; 2) that the balance of irreparable harm favors the moving party; and 3) that the public interest favors the issuance of an injunction. *Regents of the Univ. of Cal. v. Am. Broad. Co., Inc.*, 747 F.2d 511, 515 (9th Cir. 1984). Where the public interest may be affected, the Court must examine each of these three elements in turn. *Sammartano v. First Jud. Dist. Ct.*, 303 F.3d 959, 965 (9th Cir. 2002); see also Caribbean Marine Serv. Co., 844 F.2d at 674 (9th Cir. 1988) (this "traditional test" is typically used in cases involving the public interest).

I. ICANN HAS NOT BREACHED ITS REGISTRAR ACCREDITATION AGREEMENTS WITH PLAINTIFFS.

A preliminary injunction should not issue where plaintiffs are unlikely to prevail on the

merits of the alleged claim. *See Associated Gen. Contractors, Inc. v. Coalition for Econ. Equity*, 950 F.2d 1401, 1405 (9th Cir. 1991) (affirming denial of preliminary injunction because plaintiff had little chance of succeeding on the merits); *Goldie's Bookstore, Inc. v. Super. Ct.*, 739 F.2d 466, 470-72 (9th Cir. 1984) (reversing grant of preliminary injunction given weakness of plaintiffs' section 1983 claim and interests implicated). Plaintiffs cannot demonstrate *any* probability of success on the merits, let alone a "strong" probability, because the record clearly shows that ICANN has not breached the RAA.

Section 4 of the RAA does not require ICANN to initiate a consensus-driven process before amending VeriSign's Registry Agreement to allow for the WLS. Plaintiffs' interpretation of section 4 of the RAA is contrary to the RAA's plain meaning and contrary to ICANN's mission and statements throughout the discussion of the WLS. Plaintiffs' interpretation of subsection 2.3 of the RAA is equally flawed.

A. Section 4 of the Registrar Accreditation Agreement Does Not Require A "Consensus-Driven" Process for Adoption of the WLS.

Plaintiffs assert that ICANN breached its RAA with plaintiffs by failing "to obtain a consensus among Internet stakeholders . . . before the establishment of any policy affecting the allocation of registered domain names, in this case the implementation of the [WLS]." (Motion at 1:6-11.) However, the RAA contains no such requirement. Instead, the RAA requires the consensus development process only when ICANN seeks to impose new obligations on the registrars that are the signatories of the RAA. In all other circumstances, and *a fortiori* here, where ICANN's negotiations with VeriSign over a possible amendment to a wholly different agreement will impose no obligations on plaintiffs or any other registrars, the RAA's consensus policy provisions create no restrictions of any kind on ICANN's conduct or decisions.

Specifically, subsection 4.1 of the RAA, which is the only subsection that sets forth any Consensus Policy *requirement*, applies *only* if and when ICANN seeks to compel registrar action without amending the RAA:

> 4.1 Registrar's Ongoing Obligation to Comply with New or Revised Specifications and Policies. During the Term of this Agreement, Registrar shall comply with the terms of this Agreement on the schedule set forth in Subsection 4.4, with:
>
> > 4.1.1 new or revised specifications (including forms of agreement to which Registrar is a party) and policies established by ICANN as Consensus Policies in the manner described in Subsection 4.3, ... (Emphasis added.)

Nothing in the above-quoted language creates any obligation upon ICANN to act only by consensus where no registrar action is compelled. Indeed, where no registrar action is compelled, subsection 4.1 is irrelevant.[5]

Because subsection 4.1 applies only where ICANN is seeking to compel registrars to comply with some policy without amending the RAA, subsection 4.1 does not govern the process or extent to which ICANN *chooses* to involve the Internet community, including accredited registrars such as plaintiffs, in any of its decision-making activities that do not

seek to compel registrar action. The WLS plainly is one of those activities. The WLS will be effected by an amendment to ICANN's Registry Agreement with third party VeriSign, not an amendment to the RAA. Registrars may choose to offer the WLS service once it is available, but no registrar will be obligated to do so -- just as no registrar is obligated to participate in any current form of "wait-listing" service such as those presently offered by the plaintiffs (and, indeed, most registrars do not offer any form of "wait-listing" service). Because the WLS does not impose any obligations on any registrars (much less purport to amend the RAA), the Consensus Policy provisions of section 4 of the RAA are simply not applicable, and thus the fact that they were not followed cannot, as a matter of law, constitute a breach of the RAA by ICANN.

Although subsection 4.1 is the only subsection of the RAA that sets forth when ICANN must adopt a Consensus Policy (i.e., when it seeks to compel registrar action without amending its contract with each registrar), plaintiffs argue that subsection 4.2.4 somehow imposes an independent obligation on ICANN to develop a Consensus Policy anytime there are "new principles" established for the allocation of domain names. (Motion at 10:19-20.) Plaintiffs' argument ignores the plain language of subsection 4.2, which merely enumerates some topics for which ICANN *may compel* registrar action through new or revised specifications or policies contained in a Consensus Policy:

> 4.2 Topics for New and Revised Specifications and Policies. New and revised specifications and policies may be established on the following topics: . . . .
>
> > 4.2.4 principles for allocation of Registered Names (e.g., first-come/first-served, timely renewal, holding period after expiration).

The plain language of subsection 4.2 does *not* create an independent obligation and require, as plaintiffs urge, that a Consensus Policy process must be implemented any time domain name allocation is affected (and particularly when no registrar action is compelled). *See* Cal. Civ. Code § 1641 ("the whole of the contract is to be taken together, so as to give effect to every part, if reasonably practicable, each clause *helping to interpret* the other.") (Emphasis added.) *See also Fidelity & Deposit Co. v. Curtis Day and Co.*, 1993 WL 128073, 1 (N.D. Cal. 1993) (defendants' argument misconstrued contract term; language in preceding sentences made term entirely inapplicable until condition precedent occurred).

Because no registrar compulsion was or is contemplated by any amendment to its registry agreement with VeriSign, ICANN had no obligation to follow any particular procedure. Although ICANN sought community input in a variety of ways -- because it believed this was useful under the circumstances -- ICANN was not acting "pursuant" to any RAA provision, as plaintiffs contend. (Motion at 6:8 11.)

Plaintiffs argue that ICANN's recognition that some portions of the Internet community might oppose the WLS, and the fact that it sought input from the Internet community, are evidence that ICANN was contractually required to invoke the "Consensus Policy" procedure set forth in subsection 4.3 of the RAA. (Motion at 5:16-6:15.) But this is flatly inconsistent with the plain language of the RAA, and with ICANN's position throughout the WLS discussions.[6] ICANN's website is replete with postings, including analyses by its General Counsel, Committee reports, and Board resolutions that show that ICANN's position has always been that the amendment of its contract with VeriSign to allow for the

WLS is not a consensus policy issue under the RAA. (See Halloran Decl., 35-36, Exs. 3 10.) Moreover, the Names Council, which includes plaintiffs and the rest of the Registrar Constituency, and whose review and recommendations plaintiffs rely on so heavily in their papers, obviously understood this point, since its reports make no mention of the Consensus Policy provisions of the RAA.

B. ICANN's Actions Have Been Consistent with Subsection 2.3 of the Registrar Accreditation Agreement.

Plaintiffs' half-hearted claim that ICANN separately breached the RAA by acting inconsistently with subsection 2.3 (Motion at 12:1-12) also is without merit. Subsection 2.3 imposes a general obligation on ICANN to ensure that registrars have adequate appeal procedures through reconsideration and independent review policies with respect to a registrar's rights, obligations and role. Plaintiffs' argument assumes that registrars have some inherent right or obligation to operate a wait-listing service, which clearly they do not, as reflected by the fact that plaintiffs never submitted their services for ICANN's approval, and the RAA does not address "wait-listing" services.

For this same reason, plaintiffs' argument that they were entitled to an independent review board to evaluate their "protest" to the WLS (Motion at 12:26-28) again assumes the correctness of plaintiffs' argument that the WLS implicates rights and obligations under the RAA in the first instance. As explained above, since the registrars do not have the right to require ICANN to conduct a "Consensus Policy" process every time ICANN wants to amend a registry agreement, the registrars obviously were not entitled to the "independent review board" process with respect to the WLS. (See Halloran Decl., ¶ 35, Ex. 9.)

II. THE HARDSHIP PLAINTIFFS CLAIM FROM POTENTIAL WLS COMPETITION IS NOT IRREPARABLE AND IS OUTWEIGHED BY THE POTENTIAL HARM TO ICANN.

A. Any Potential Injury to Plaintiffs from the Introduction of the WLS Does Not Justify Injunctive Relief.

Plaintiffs argue that a preliminary injunction is necessary because "[i]mplementation of the WLS policy would have an immediate, discernible but unquantifiable adverse impact on plaintiffs' goodwill, reputation, earnings, and market share as well as their ability to maintain their existing customers." (Motion at 13:18-20.) The Ninth Circuit has held, however, that such "[s]ubjective apprehensions and unsupported predictions of revenue loss are not sufficient to satisfy a plaintiff's burden of demonstrating an immediate threat of irreparable harm." *Caribbean Marine Serv. Co. v. Baldrige*, 844 F.2d 668, 675-76 (9th Cir. 1988); *see also L.A. Coliseum*, 634 F. 2d at 1201.

While it may or may not be true that consumers will prefer the WLS to plaintiffs' services, the fact that plaintiffs may make less money after the introduction of this new competition does not mean they have a claim against ICANN, much less a claim that supports injunctive relief. *See L.A. Coliseum*, 634 F.2d at 1202 (reversing district court's grant of preliminary injunction because loss of revenue rarely constitutes irreparable injury). "Mere injuries, however substantial, in terms of money, time and energy necessarily expended . . . are not enough. The possibility that adequate compensatory or other corrective relief will be available at a later date, in the ordinary course of litigation, weighs heavily against

a claim of irreparable harm." *Id*. (citing *Sampson v. Murray*, 415 U.S. 61, 90 (1974); *see also Stanley v. Univ. of So. Cal.*, 13 F.3d 1313, 1320 (9th Cir. 1994) (quoting *Beacon Theaters, Inc. v. Westover*, 359 U.S. 500, 506-07 (1959) (the inadequacy of legal remedies is a prerequisite to the issuance of an injunction).

Plaintiffs' argument that they will suffer harm to the goodwill and reputations of their "well-established" wait-listing businesses is unsupported by credible evidence (as opposed to plaintiffs' conclusory statements), and in any event easily outweighed by the harm to the public interest described in Part III below. (Motion at 14:6-24.) *See Oakland Tribune, Inc. v. Chronicle Publ'g Co.*, 762 F.2d 1374, 1377 (9th Cir. 1985) (holding that conclusory statements by interested parties that plaintiffs would suffer the loss of reputation, competitiveness, and goodwill did not support a finding of irreparable loss). Plaintiff Go Daddy's wait-list service is hardly "well-established"; it was not launched until April 2003, only a few months ago.[7] (See Parsons Decl., ¶ 5.) And although the service apparently now accounts for $100,000 in revenues per month (id. at ¶ 5), it remains difficult to comprehend Go Daddy's argument that, with revenues of $10 million in 2001 and over 300 employees, it will be unable to handle customer inquiries regarding the WLS and will suffer harm to its reputation. (Id. at ¶ 3; Halloran Decl. at ¶ 48, Ex. 17.) Plaintiffs have likewise made no factual showing to support their contentions that introduction of the WLS would somehow cause their wait-listing services to be "unavailable," as opposed to unattractive, to interested customers. The alleged harm to plaintiffs' goodwill and reputation is unsupported and a mere recasting of their claimed potential monetary injury in different terms; it does not support injunctive relief. *See L.A. Coliseum*, 634 F. 2d at 1202 (plaintiffs' claimed loss of substantial goodwill and market value were "but monetary injuries which could be remedied by a damage award.").

The cases plaintiffs cite are easily distinguished. In Gilder v. PGA Tour, Inc., 936 F.2d 417, 425 (9th Cir. 1991), the Ninth Circuit upheld an injunction to prevent the PGA from banning an existing product. Unlike the situation in Gilder, an injunction here would prevent the introduction of a new product and competitor simply to protect the products offered by plaintiffs and others like them. Moreover, the product the PGA would have banned was used by several golf professionals, whose individual livelihoods depended on the continued availability of the product. In contrast, plaintiffs will continue to be able to offer their wait-list services after the introduction of the WLS, and plaintiffs do not show that their companies (as opposed to their wait-list services) would not survive the introduction of the WLS.[8]

Because any conceivable harms are fully calculable and compensable by money damages, the motion for a preliminary injunction should be denied.

B. Requiring ICANN To Obtain Consensus Before it Affects Domain Name Allocation Is Contrary to ICANN's Mission and Inconsistent With Its Ability to Function Effectively.

Plaintiffs seek an injunction that would interpret the RAA to require ICANN to "obtain a consensus among Internet stakeholders . . . before the establishment of any policy affecting the allocation of registered domain names, in this case the implementation of the [WLS]." (Motion at 1:6-11.) This interpretation of the agreement has no connection to reality and would be contrary to ICANN's public interest mission.

Under plaintiffs' interpretation, registrar consensus would be required before ICANN could enter into any agreement with a third party that might affect domain name allocation in any respect. This would literally turn upside-down the entire relationship between ICANN and its accredited registrars, giving registrars (whose very existence is predicated upon an ICANN decision to permit them to offer domain name registrations to the public under certain clearly-defined conditions) a veto over any ICANN action that they believed was inconsistent with their private economic interests (as opposed to the public interest that ICANN is established to advance). Moreover, all of ICANN's existing registry agreements -- for example, with respect to the new top level domains in .biz, .name, and .info -- would immediately be legally suspect; none was the product of consensus policymaking, and no one has ever suggested that they had to be.

This would be a dramatic reformation of the RAA and an equally dramatic blow to the effectiveness of ICANN. The contrast between the harm to plaintiffs, which is entirely economic and compensable in damages if and when they were ever to prevail on the merits, and the potential harm to ICANN of the entry of an injunction on the basis of the arguments presented here, is stark. Since similar consensus policy provisions also appear in many other ICANN agreements -- all also limited to those situations where ICANN seeks to compel action or conduct by the signatory to the agreement without having to negotiate an amendment to that agreement -- presumably all those other actors would also have a similar veto over ICANN actions that might adversely affect their economic interests. (*See* Halloran Decl., ¶ 49.) The result, quite logically, would be institutional paralysis, and the potential end of ICANN as an effective organization for coordinating certain technical and related policy issues for the Domain Name System ("DNS"). (Id.)

ICANN is a body that seeks to develop consensus wherever possible. (Id.) Indeed, that is its principal reason for existence. (Id.) ICANN maintains open and transparent processes; it regularly posts on the Internet its minutes, transcripts of its meetings, and other important information. Indeed, its website contains virtually a day-to-day description of ICANN's activities. [9]

Because the Internet is a global resource, it is extremely difficult as a practical matter, and highly undesirable as a conceptual matter, for the nations of the world to seek individually to set policy for important technical elements of the Internet such as the DNS. (Id.) Thus, the realistic options for appropriate coordination of technical aspects of the Internet are a multinational treaty organization or a global private sector organization like ICANN, where governments and private actors come together to attempt where possible to create consensus policies that will allow the Internet to continue to grow as an engine of global commerce and communication. (*Id.*) For now, the world has chosen the private sector route, on the theory that if that can succeed, it will be more efficient and effective than a treaty organization. (*Id.*)

If plaintiffs' view was to prevail, and ICANN were prevented from taking any significant actions unless it was able to achieve a consensus from all of the many constituencies that participate in ICANN, it seems inevitable that ICANN would fail. It would be particularly ironic if ICANN's failure would be precipitated by a judicial rewriting of its contractual relationships -- contracts that ICANN did in fact draft in the first instance and compel each registrar to sign as a condition of receiving accreditation -- generated by a fear of new competition that exists within a small subset of the ICANN community and an

even smaller subset of the overall Internet community. Nothing in the RAA requires or justifies this result.

In short, plaintiffs are not likely to succeed on the merits of their action. For this reason alone, their motion should be denied.

III. THE PUBLIC INTEREST, WHICH ICANN SEEKS TO ADVANCE, WOULD NOT BE SERVED BY THE ISSUANCE OF AN INJUNCTION.

Because the injunction plaintiffs seek would affect the public, this Court must examine whether the public interest would be advanced or impaired by the issuance of the requested injunction. See Caribbean Marine Serv. Co., 844 F.2d at 674 (reversing injunction based in part on district court's failure to identify and weigh the public interests at stake); L.A. Coliseum, 634 F.2d at 1200. There is no doubt that the public interest will be impaired if a preliminary injunction issues in this case.

Plaintiffs argue that the public interest falls in *their* favor because "the WLS preempts the competitive process that currently exists and allows only VeriSign to control when, and now if, domain names expire." [10] (Motion at 12:19-25.) Plaintiffs argue that WLS would be a monopoly and, thus, anticompetitive. This is truly disingenuous. What is really at stake here is the continued ability of multiple economic actors to individually sell the same product over and over again, as opposed to the circumstance where a higher quality product (because it is guaranteed) is sold only once. These plaintiffs will have the opportunity, if they choose, to sell WLS subscriptions. But because VeriSign, the registry, will accept only one subscription per name, it will be more difficult for plaintiffs to continue to sell multiple "reservations" for the same name.

The antitrust laws are designed to "protect competition, not competitors." *U.S. v. Syufy Enterprises*, 903 F.2d 659, 668 (9th Cir. 1989). The only members of the "public" who might be injured are plaintiffs. Plaintiffs' waitlisting business involves selling an opportunity for a potential registrant to get in line, along with however many others to whom other registrars have sold the same opportunity to get in line for the very same domain name. It is no doubt in plaintiffs' economic interest to try to prevent this from changing, as evidenced by the effort they are putting into this litigation, but this is hardly evidence of harm to the public interest, in this case properly represented by ultimate consumers of the products in question.

The introduction of the WLS will not require or compel the elimination of the current services offered by plaintiffs, and they are free to continue to seek to sell those non-guaranteed chances to anyone who will buy them. What plaintiffs fear is that consumers will recognize that those products have become relatively less attractive to the new WLS product, and that they will instead prefer a WLS subscription. But the fact that consumers may find the WLS -- with its guarantee of access if and when the desired name becomes available -- to be more attractive than current services is obviously a pro-competitive, not an anti-competitive, result. In fact, consumers will be better off, not worse off, with the introduction of a new competitive alternative, which offers some features, such as the guarantee of access to a newly available name, that are simply not available today.

Plaintiffs' position is strikingly similar to that of the defendants in *Regents of the Univ. of Cal. v. Am. Broad. Cos.*, 747 F.2d 511, 512 (9th Cir. 1984). In that case, the defendants

argued unsuccessfully that a contract's exclusivity provision should be enforced to prevent competition in the broadcast of college football games. In weighing the public interest, the Ninth Circuit, citing the Supreme Court's decision in *NCAA v. Regents*, 468 U.S. 85, 104 (1984), found that "the public interest is served by preserving the competitive influence of consumer preference in the college broadcast market." The defendants should not be permitted, the Court held, to "unilaterally determine that the public would not have the choice of viewing an admittedly popular college football game." *See Regents*, 747 F.2d at 521.

As in *Regents*, the public interest here clearly weighs against, not for, the injunctive relief requested. The introduction of the WLS will not force any of the plaintiffs out of business; it will not eliminate the existing products from the competitive marketplace; and it will give consumers a new alternative that will *dramatically simplify* the system of acquiring deleted domain names, offering an option that is in the aggregate less expensive, more understandable and more certain.

Because it is clear that the public interest would not be served by the issuance of an injunction, plaintiffs' motion should be denied.

IV. IF A PRELIMINARY INJUNCTION ISSUES, PLAINTIFFS SHOULD BE REQUIRED TO POST A SIGNIFICANT SECURITY BOND.

"No restraining order or preliminary injunction shall issue except upon the giving of security by the applicant, in such sum as the court deems proper." Fed. R. Civ. P. 65(c). While plaintiffs contend no bond is needed (and cite to a case in which no bond was requested), a bond is both necessary and appropriate here because the issuance of a preliminary injunction would cause a very significant disruption in ICANN's operations and contractual relations, as described above and in the accompanying Halloran Declaration. Indeed, the consequences may be catastrophic. As a result, a very significant bond would be required to protect the interests of the global Internet community, and to compensate for the potentially significant harm that might result from even a temporary imposition of injunctive relief in this matter. Under these circumstances, a bond in the amount of $25 million or more would not be inappropriate.

CONCLUSION

Plaintiffs' motion for injunctive relief should be denied because plaintiffs' interpretation of the parties' contract is wrong on its face, and there is no threat of irreparable harm. Instead, the issuance of an injunction would harm consumers, prevent new competition, and potentially strike a fatal blow to the ICANN experiment in private-sector coordination of the Internet, a global public resource.

Dated: September 15, 2003

JONES DAY

By:_____
Jeffrey A. LeVee

Attorneys for Defendant
INTERNET CORPORATION FOR
ASSIGNED NAMES AND NUMBERS

Notes:

1. In addition to ICANN approval, any material change in the VeriSign registry agreement also requires approval by the U.S. Department of Commerce. (*See* declaration of Daniel E. Halloran ("Halloran Decl."), ¶ 18.)

2. It is perhaps instructive that the comments from registrars tracked fairly directly with whether the commenting registrar offered a product that would be threatened by the new product (the Wait Listing Service, or "WLS") proposed by VeriSign. Those registrars who offered wait-listing types of services opposed WLS; other registrars that did not offer wait-listing services supported WLS. (*See* Stahura Ex. 3, pp. 17-18.)

3. Numerous documents posted on ICANN's website demonstrate without a doubt that neither ICANN nor the Names Council, which includes the Registrar Constituency (of which plaintiffs are a part), has ever taken the position that an amendment to VeriSign's Registry Agreement to allow the WLS requires a Consensus Policy under the terms of the RAA. (Halloran Decl., ¶ 35.) For example, ICANN's General Counsel recommended, in his first analysis of VeriSign's request for an amendment to its Registry Agreement, "that the Board establish the following procedure for obtaining public comment to illuminate its consideration of [the WLS]" -- because no such procedure existed at the time. (Id.. Ex. 3 (emphasis added).) Subsequently, the Transfers Task Force issued a Final Report, which was adopted by the Names Council (which includes the Registrar Constituency), that assumed that the Consensus Policy procedure of the RAA did not apply. (Id., Ex. 4.) The General Counsel's second analysis of the WLS, which detailed the various steps ICANN was voluntarily taking to develop consensus on the WLS (if a consensus was possible), makes no reference to an RAA requirement. (Id., Ex. 5.) The Board's final resolution approving the WLS, which sets forth a thorough discussion of why the Board reached its decision on the WLS makes no mention of a contractually required consensus policy process. (Id., Ex. 6.) ICANN's Reconsideration Committee later, in response to a request for reconsideration by one of the plaintiffs that for the first time raised this issue, explicitly stated that the WLS was not a consensus policy issue, a decision that ICANN's Board subsequently adopted. (Id., Exs. 7, 10.) Furthermore, plaintiffs did not adopt this position when, in March 2001, ICANN sought public comment on a different set of modifications to VeriSign's registry agreements. See id., 37, Exs. 11-13.

4. ICANN noted in its opposition to the motion for temporary restraining order that it had not yet reached a definitive agreement with VeriSign and that the Department of Commerce had not, therefore, approved the amendment to VeriSign's registry agreement. This status remains true today, as Mr. Halloran explains in his declaration, although ICANN remains hopeful that these matters will be resolved by October 27, 2003, which is the date by which VeriSign hopes to begin the WLS service. If not, VeriSign will not be able to offer that service at that time, consistent with its registry agreement with ICANN. Plaintiffs' suggestions that ICANN has somehow "manufactured" evidence for the purposes of this litigation are obviously false and unwarranted, and ICANN will not indulge them further. *See* Halloran Decl. at ¶ 44.

5. Likewise, where no registrar action is compelled, ICANN is not required, contrary to

plaintiffs' argument, to divulge its contract negotiations with third parties or to submit such decisions to an Independent Review Panel. (Motion at 12:11-13:14.) Any such obligations only arise in the context of a Consensus Policy, which the present conduct at issue is demonstrably not.

6. Although ICANN's General Counsel recommended that ICANN seek community input on this issue, his advice to the Board did not even reference the terms of the RAA, because that agreement was not relevant to the evaluation of the WLS. (Stahura Decl. at ¶ 17, Ex. 4.)

7. Thus, this service was established 8 months after the Board decision to proceed with negotiations to amend VeriSign's Registry Agreement to allow for the WLS.

8. *Regents of the Univ. of Cal. v. Am. Broad. Cos.*, 747 F.2d 511 (9th Cir. 1984) does not support plaintiffs' position either. In *Regents*, the Ninth Circuit granted a preliminary injunction to avoid *restricting* consumer choice in the television viewing of football games. Here, plaintiffs seek an injunction to prevent consumer access to a new service option. And whereas the plaintiff in *Rent-A-Center, Inc. v. Canyon Television and Appliance Rental, Inc.*, 944 F.2d 597 (9th Cir. 1991), sought an injunction to enforce a covenant not to compete, plaintiffs here seek an injunction that would, in essence, *create* a covenant not to compete.

9. Plaintiffs criticize ICANN for not publishing its negotiations with VeriSign concerning the WLS, but it obviously would handicap ICANN in its contract negotiations if each aspect of those negotiations was conducted in public. Nonetheless, openness and transparency are part of ICANN's core values (*see* Halloran Decl., Ex. 14 (ICANN Bylaws)), and most of ICANN's other activities are, in fact, published on ICANN's website, as a perusal of www.icann.org shows.

10. As plaintiffs well know, the WLS has nothing to do with when or if domain names expire.

Reconsideration Request

Union of Orthodox Jewish Congregations of America, *et al.*

Annex Q

Jimenez v. Quarterman,
555 U.S. 113 (2009)

129 S.Ct. 681
Supreme Court of the United States

Carlos JIMENEZ, Petitioner,
v.
Nathaniel QUARTERMAN, Director,
Texas Department of Criminal Justice,
Correctional Institutions Division.

No. 07–6984. | Argued Nov. 4, 2008. | Decided Jan. 13, 2009.

Synopsis

Background: Following affirmance of state conviction for felony burglary, and exhaustion of state postconviction remedies, state prison inmate sought federal habeas relief. The United States District Court for the Northern District of Texas dismissed petition as untimely under Antiterrorism and Effective Death Penalty Act (AEDPA), and the United States Court of Appeals for the Fifth Circuit, Jerry E. Smith, Circuit Judge, 2007 WL 5022509, denied inmate's application for certificate of appealability (COA). Certiorari was granted.

[Holding:] The United States Supreme Court, Justice Thomas, held that state court's grant of right to file out-of-time direct appeal resets date when conviction becomes "final" under AEDPA.

Reversed and remanded.

West Headnotes (2)

[1] Habeas Corpus
Pursuit of other remedies

197 Habeas Corpus
197III Jurisdiction, Proceedings, and Relief
197III(A) In General
197k603 Limitations, Laches or Delay
197k603.9 Pursuit of other remedies
(Formerly 197k603)

When state court grants criminal defendant right to file out-of-time direct appeal during state collateral review, before defendant has first sought federal habeas relief, conviction is not yet "final" so as to trigger Antiterrorism and Effective Death Penalty Act's (AEDPA) one-year limitations period for federal habeas review; date of finality, and commencement of limitations period, is conclusion of out-of-time direct appeal, or expiration of time for seeking review of that appeal. 28 U.S.C.A. § 2244(d)(1)(A).

778 Cases that cite this headnote

[2] Habeas Corpus
Pursuit of other remedies

197 Habeas Corpus
197III Jurisdiction, Proceedings, and Relief
197III(A) In General
197k603 Limitations, Laches or Delay
197k603.9 Pursuit of other remedies
(Formerly 197k603)

Mere possibility that state court may reopen direct review of criminal conviction does not render conviction and sentence that are no longer subject to direct review non-"final" for purposes of Antiterrorism and Effective Death Penalty Act's (AEDPA) one-year limitations period for federal habeas review. 28 U.S.C.A. § 2244(d)(1)(A).

524 Cases that cite this headnote

****681 *113 *Syllabus* [*]**

[*] The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Timber & Lumber Co.*, 200 U.S. 321, 337, 26 S.Ct. 282, 50 L.Ed. 499.

After petitioner's state conviction for burglary became final on October 11, 1996, the state appellate court held in state habeas proceedings that petitioner had been denied his right to appeal and granted him the right to file an out-of-time appeal. He filed the appeal, his conviction was affirmed, and

his time for seeking certiorari in this Court expired on January 6, 2004. Petitioner filed a second state habeas application on December 6, 2004, which was denied 355 days later, on June 29, 2005. He then filed a federal habeas petition on July 19, 2005, relying on 28 U.S.C. § 2244(d)(1)(A) to establish its timeliness. Section 2244(d)(1)(A) provides that the one-year limitations period for seeking review under the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) begins on "the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review." Petitioner argued that his judgment became final on January 6, 2004, when time expired for seeking certiorari review of the decision in his out- ****682** of-time appeal, and that his July 19, 2005, petition was timely because the calculation of AEDPA's 1–year limitation period excludes the 355 days "during which [his] properly filed application for State post-conviction ... review ... [was] pending," § 2244(d)(2). The District Court disagreed, ruling that the proper start date for calculating AEDPA's 1–year limitations period under § 2244(d)(1)(A) was October 11, 1996, when petitioner's conviction first became final. The District Court dismissed the federal habeas petition as time barred. The Fifth Circuit denied petitioner's request for a certificate of appealability.

Held: Where a state court grants a criminal defendant the right to file an out-of-time direct appeal during state collateral review, but before the defendant has first sought federal habeas relief, his judgment is not "final" for purposes of § 2244(d)(1)(A) until the conclusion of the out-of-time direct appeal, or the expiration of the time for seeking certiorari review of that appeal. This Court must enforce plain statutory language according to its terms. See, *e.g.*, *Lamie v. United States Trustee*, 540 U.S. 526, 534, 124 S.Ct. 1023, 157 L.Ed.2d 1024. Under § 2244(d)(1)(A)'s plain language, once the Texas Court of Criminal Appeals reopened direct review of petitioner's ***114** conviction on September 25, 2002, the conviction was no longer final for § 2244(d)(1)(A) purposes. Rather, the order granting an out-of-time appeal restored the pendency of the direct appeal, and petitioner's conviction was again capable of modification through direct appeal to the state courts and to this Court on certiorari review. Therefore, it was not until January 6, 2004, when time for seeking certiorari review of the decision in the out-of-time appeal expired, that petitioner's conviction became "final" through "the conclusion of direct review or the expiration of the time for seeking such review" under § 2244(d)(1)(A). The Court rejects respondent's argument that using the later date created by the state court's decision to reopen direct review, thus resetting AEDPA's 1–year limitations period, undermines the policy of finality that Congress established in § 2244(d)(1). See *Carey v. Saffold*, 536 U.S. 214, 220, 122 S.Ct. 2134, 153 L.Ed.2d 260. Pp. 684 – 687.

Reversed and remanded.

THOMAS, J., delivered the opinion for a unanimous Court.

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Opinion

****683** Justice THOMAS delivered the opinion of the Court.

The Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) establishes a 1–year time limitation for a state prisoner to file a federal habeas corpus petition. That year runs from the latest of four specified dates. ***115** 28 U.S.C. § 2244(d)(1). This case involves the date provided by § 2244(d)(1)(A), which is "the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review." Petitioner contends that "the date on which the judgment became final" can be postponed by a state court's decision during collateral review to grant a defendant the right to file an out-of-time direct appeal. The District Court disagreed, holding instead that the date could not be moved to reflect the out-of-time appeal, and that petitioner's

federal habeas petition was untimely for that reason. The United States Court of Appeals for the Fifth Circuit denied a certificate of appealability. See § 2253(c). We now reverse the judgment of the Court of Appeals and remand for further proceedings consistent with this opinion.

I

After petitioner was sentenced for burglary in 1995, his attorney filed an appellate brief with the Texas Court of Appeals pursuant to *Anders v. California*, 386 U.S. 738, 87 S.Ct. 1396, 18 L.Ed.2d 493 (1967), explaining that he was unable to identify any nonfrivolous ground on which to base an appeal.[1] He left a copy of the ***116** brief and a letter (advising petitioner of his right to file a *pro se* brief as set forth in *Anders, id.*, at 744, 87 S.Ct. 1396) at the county jail where he believed petitioner to be. Petitioner, however, had been transferred to a state facility and did not receive the delivery. The Texas Court of Appeals dismissed the appeal on September 11, 1996, and served petitioner with notice of the dismissal at the county-jail address that, again, was the wrong address.

1 Petitioner was indicted in August 1991 for felony burglary of a habitation, in violation of Tex. Penal Code Ann. § 30.02 (Vernon 1989), enhanced by a prior felony conviction for aggravated assault with a deadly weapon under Tex. Penal Code Ann. § 12.42(c) (Vernon 1974). He entered a plea agreement in which he agreed to plead guilty to the burglary and true to the enhancement in exchange for an order of deferred adjudication. In November 1991, the trial court deferred adjudication of the burglary conviction and ordered that petitioner serve five years of deferred-adjudication probation. In March 1995, the State moved to revoke petitioner's probation based on four alleged violations of the conditions of his probation. At a November 1995 hearing, petitioner admitted to two of the violations. The court then heard testimony with respect to the other two violations and found that petitioner had committed those violations as well. The court revoked petitioner's deferred-adjudication probation, adjudicated him guilty of the enhanced burglary, and sentenced him to a 43–year term of imprisonment.

Petitioner eventually learned that his appeal had been dismissed. He filed an application in state court for a writ of habeas corpus pursuant to Tex.Code Crim. Proc. Ann., Art. 11.07 (Vernon 1977), arguing that he was denied his right to a meaningful appeal when he was denied the opportunity to file a *pro se* brief. The Texas Court of Criminal Appeals agreed and, on September 25, 2002, granted petitioner the right to file an out-of-time appeal:

> "[Petitioner] is entitled to an out-of-time appeal in cause number CR–91–0528–B in the 119th Judicial District Court of Tom Green County. [Petitioner] is ordered returned to that point in time at which he may give written notice of appeal so that he may then, with the aid of counsel, obtain a meaningful appeal. ****684** For purposes of the Texas Rules of Appellate Procedure, all time limits shall be calculated as if the sentence had been imposed on the date that the mandate of this Court issues." *Ex parte Jimenez*, No. 74,433 *(per curiam)*, App. 26, 27.

Petitioner thereafter filed the out-of-time appeal. His conviction was affirmed. The Texas Court of Criminal Appeals denied discretionary review on October 8, 2003. Time for seeking certiorari review of that decision with this Court expired on January 6, 2004. On December 6, 2004, petitioner filed a second application for a writ of habeas corpus in state court; it was denied on June 29, 2005.

Petitioner then filed a federal petition for a writ of habeas corpus on July 19, 2005. To establish the timeliness of his ***117** petition, he relied on 28 U.S.C. § 2244(d)(1)(A), which provides "the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review" as the trigger for AEDPA's 1–year limitations period. Petitioner argued that his judgment thus became final on January 6, 2004,[2] when time expired for seeking certiorari review of the decision in his out-of-time appeal. Until that date, petitioner argued, direct review of his state-court conviction was not complete.

2 In the District Court, petitioner contended that this date was January 8, 2004, but petitioner's time for seeking certiorari review actually expired two days earlier.

With January 6, 2004, as the start date, petitioner contended that his July 19, 2005, petition was timely because the statute excludes from the 1–year limitations period "[t]he time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending." § 2244(d)(2). Petitioner had a state habeas application pending from December 6, 2004, through June 29, 2005, so less than one year of included time—specifically, 355 days—passed between January 6, 2004, and July 19, 2005.

The District Court disagreed and dismissed the federal habeas petition as time barred. In the District Court's view, the proper start date for AEDPA's 1–year limitations period was October 11, 1996, when time for seeking discretionary review of the decision in petitioner's first direct appeal expired. The District Court concluded that it could not take into account the Texas court's later decision reopening petitioner's direct appeal because Circuit precedent established that " 'AEDPA provides for only a linear limitations period, one that starts and ends on specific dates, with only the possibility that tolling will expand the period in between.' " Order, Civ. Action No. 6:05–CV–05–C (ND Tex., Oct. 23, 2006), App. 75, 90 (quoting *Salinas v. Dretke*, 354 F.3d 425, 429 (C.A.5 2004)). Therefore, the District Court reasoned, ***118** the limitations period began on October 11, 1996, and ended on October 11, 1997, because petitioner had not sought any state or federal collateral review by that date.

The Court of Appeals denied petitioner's request for a certificate of appealability, finding that he had "failed to demonstrate that reasonable jurists would debate the correctness of the district court's conclusion that the § 2254 petition is time-barred." Order, No. 06–11240, (May 25, 2007), App. 124, 125. We granted certiorari, 552 U.S. 1256, 128 S.Ct. 1646, 170 L.Ed.2d 352 (2008), and now reverse and remand for further proceedings. [3]

3 We do not decide whether petitioner is entitled to a certificate of appealability on remand because we are presented solely with the Court of Appeals' decision on the timeliness of the petition under 28 U.S.C. § 2244(d). "When the district court denies a habeas petition on procedural grounds without reaching the prisoner's underlying constitutional claim," as here, a certificate of appealability should issue only when the prisoner shows both "that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right *and* that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." *Slack v. McDaniel*, 529 U.S. 473, 484, 120 S.Ct. 1595, 146 L.Ed.2d 542 (2000) (emphasis added). We make no judgment regarding the merits of petitioner's federal constitutional claims.

****685 II**

As with any question of statutory interpretation, our analysis begins with the plain language of the statute. *Lamie v. United States Trustee*, 540 U.S. 526, 534, 124 S.Ct. 1023, 157 L.Ed.2d 1024 (2004). It is well established that, when the statutory language is plain, we must enforce it according to its terms. See, *e.g.*, *Dodd v. United States*, 545 U.S. 353, 359, 125 S.Ct. 2478, 162 L.Ed.2d 343 (2005); *Lamie, supra*, at 534, 124 S.Ct. 1023; *Hartford Underwriters Ins. Co. v. Union Planters Bank, N. A.*, 530 U.S. 1, 6, 120 S.Ct. 1942, 147 L.Ed.2d 1 (2000); *Caminetti v. United States*, 242 U.S. 470, 485, 37 S.Ct. 192, 61 L.Ed. 442 (1917).

[1] The parties agree that the statutory provision that determines the timeliness of petitioner's habeas petition is 28 U.S.C. § 2244(d)(1)(A). That subsection defines the starting ***119** date for purposes of the 1–year AEDPA limitations period as "the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review." The only disputed question before us is whether the date on which direct review became "final" under the statute is October 11, 1996, when petitioner's conviction initially became final, or January 6, 2004, when the out-of-time appeal granted by the Texas Court of Criminal Appeals became final. We agree with petitioner that, under the plain meaning of the statutory text, the latter date controls.

Finality is a concept that has been "variously defined; like many legal terms, its precise meaning depends on context." *Clay v. United States*, 537 U.S. 522, 527, 123 S.Ct. 1072, 155 L.Ed.2d 88 (2003). But here, the finality of a state-court judgment is expressly defined by statute as "the conclusion of direct review or the expiration of the time for seeking such review." § 2244(d)(1)(A).

With respect to postconviction relief for federal prisoners, this Court has held that the conclusion of direct review occurs when "this Court affirms a conviction on the merits on direct review or denies a petition for a writ of certiorari." *Id.*, at 527, 528–532, 123 S.Ct. 1072 (interpreting § 2255, ¶ 6(1)). We have further held that if the federal prisoner chooses not to seek direct review in this Court, then the conviction becomes final when "the time for filing a certiorari petition expires." *Id.*, at 527, 123 S.Ct. 1072. In construing the similar language of § 2244(d)(1)(A), we see no reason to depart from this settled understanding, which comports with the most natural reading of the statutory text. See *Lawrence v. Florida*, 549 U.S. 327, 332–335, 127 S.Ct. 1079, 166 L.Ed.2d 924 (2007) (citing *Clay, supra*, at 528, n. 3, 123 S.Ct. 1072). As a result, direct review cannot conclude for purposes of § 2244(d)(1)(A) until the "availability of direct appeal to the state courts," *Caspari v. Bohlen*, 510 U.S. 383, 390, 114 S.Ct. 948, 127 L.Ed.2d 236 (1994), and to this Court, *Lawrence, supra*, at

332–333, 127 S.Ct. 1079, has been exhausted. Until that time, the "process of direct review" has not "com[e] to an end" and "a presumption of finality and legality ***120** " cannot yet have "attache[d] to the ****686** conviction and sentence," *Barefoot v. Estelle*, 463 U.S. 880, 887, 103 S.Ct. 3383, 77 L.Ed.2d 1090 (1983).

[2] Under the statutory definition, therefore, once the Texas Court of Criminal Appeals reopened direct review of petitioner's conviction on September 25, 2002, [4] petitioner's conviction was no longer final for purposes of § 2244(d)(1)(A). Rather, the order "granting an out-of-time appeal restore [d] the pendency of the direct appeal," *Ex parte Torres*, 943 S.W.2d 469, 472 (Tex.Crim.App.1997), and petitioner's conviction was again capable of modification through direct appeal to the state courts and to this Court on certiorari review. Therefore, it was not until January 6, 2004, when time for seeking certiorari review in this Court expired, that petitioner's conviction became "final" through "the conclusion of direct review or the expiration of the time for seeking such review" under § 2244(d)(1)(A).

4 We do not here decide whether petitioner could have sought timely federal habeas relief between October 11, 1997, when the 1–year limitations period initially expired, and September 25, 2002, when the state court ordered that his direct review be reopened. Were such a petition timely, though, it would not be through application of § 2244(d)(1)(A) because we have previously held that the possibility that a state court may reopen direct review "does not render convictions and sentences that are no longer subject to direct review nonfinal," *Beard v. Banks*, 542 U.S. 406, 412, 124 S.Ct. 2504, 159 L.Ed.2d 494 (2004). We do not depart from that rule here; we merely hold that, where a state court has in fact reopened direct review, the conviction is rendered nonfinal for purposes of § 2244(d)(1)(A) during the pendency of the reopened appeal.

Respondent objects, observing that the Court has previously acknowledged Congress' intent "to advance the finality of criminal convictions" with the "tight time line" of § 2244(d)(1)(A), *Mayle v. Felix*, 545 U.S. 644, 662, 125 S.Ct. 2562, 162 L.Ed.2d 582 (2005), which "pinpoint[s]" a uniform federal date of finality that does not "vary from State to State," *Clay, supra*, at 530, 531, 123 S.Ct. 1072. In respondent's view, permitting a state court to reopen direct review, and thus reset AEDPA's 1–year limitations period, undermines the policy of finality that Congress established ***121** in § 2244(d)(1). But it is the plain language of § 2244(d)(1) that pinpoints the uniform date of finality set by Congress. And that language points to the conclusion of direct appellate proceedings in state court. The statute thus carries out "AEDPA's goal of promoting 'comity, finality, and federalism' by giving state courts 'the first opportunity to review [the] claim,' and to 'correct' any 'constitutional violation in the first instance.' " *Carey v. Saffold*, 536 U.S. 214, 220, 122 S.Ct. 2134, 153 L.Ed.2d 260 (2002) (quoting *Williams v. Taylor*, 529 U.S. 420, 436, 120 S.Ct. 1479, 146 L.Ed.2d 435 (2000); *O'Sullivan v. Boerckel*, 526 U.S. 838, 844–845, 119 S.Ct. 1728, 144 L.Ed.2d 1 (1999); citation omitted). The statute requires a federal court, presented with an individual's first petition for habeas relief, to make use of the date on which the entirety of the state direct appellate review process was completed. Here, that date was January 6, 2004.

* * *

Our decision today is a narrow one. We hold that, where a state court grants a criminal defendant the right to file an out-of-time direct appeal during state collateral review, but before the defendant has first sought federal habeas relief, his judgment is not yet "final" for purposes of § 2244(d)(1)(A). In such a case, "the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review" must reflect the conclusion of the out-of- ****687** time direct appeal, or the expiration of the time for seeking review of that appeal. Because the Court of Appeals denied a certificate of appealability based on a contrary reading of the statute, we reverse the judgment and remand the case for further proceedings consistent with this opinion.

It is so ordered.

Parallel Citations

129 S.Ct. 681, 172 L.Ed.2d 475, 77 USLW 4035, 09 Cal. Daily Op. Serv. 467, 2009 Daily Journal D.A.R. 555, 21 Fla. L. Weekly Fed. S 577

Reconsideration Request

Union of Orthodox Jewish Congregations of America, *et al.*

Annex R

Storey v. Cello Holdings, L.L.C.,
347 F.3d 370 (2d Cir. 2003)

KeyCite Yellow Flag - Negative Treatment
Distinguished by Dembin v. LVI Services, Inc., D.Conn., March 18, 2013

347 F.3d 370
United States Court of Appeals,
Second Circuit.

Lawrence STOREY, Plaintiff—Appellee,
v.
CELLO HOLDINGS, L.L.C., Cello Music and Film Systems, Inc., Defendants—Appellants,
Herrick, Feinstein LLP and Odin, Feldman & Pittleman, P.C., Appellants.

Docket No. 02–7281. | Argued: May 7, 2003. | Decided: Oct. 9, 2003.

Internet domain-name registrant sued holder of trademark in business name similar to domain name under Anticybersquatting Consumer Protection Act (ACPA), seeking re-transfer of domain name that arbitration panel had ordered registrant to transfer to trademark holder, and declaration that registrant's use of domain name was lawful. The United States District Court for the Southern District of New York, Chin, J., 182 F.Supp.2d 355, granted summary judgment for registrant. Trademark rights-holder appealed. The Court of Appeals, Sotomayor, Circuit Judge, held that: (1) Southern District of New York was proper forum for registrant's action; (2) trademark holder abandoned claim that district court lacked in personam jurisdiction; (3) registrant did not waive claim that trademark holder was barred by res judicata from seeking transfer of domain name in arbitration proceeding; (4) trademark holder's claim, in arbitration, that registrant's offer to sell domain name violated ACPA was not barred by res judicata; and (5) district court abused its discretion in imposing Rule 11 sanctions against trademark holder.

Vacated and remanded.

West Headnotes (17)

[1] Trademarks
Internet use; cybersquatting
382T Trademarks
382TIX Actions and Proceedings
382TIX(A) In General
382Tk1557 Jurisdiction
382Tk1560 Internet use; cybersquatting
(Formerly 382k545 Trade Regulation)

Southern District of New York was proper forum for Internet domain-name registrant's action seeking re-transfer of domain name that alternative dispute resolution panel had ordered registrant to transfer to holder of trademark in business name similar to domain name, even though trademark holder had not submitted to suit in district under Uniform Domain-Name Dispute-Resolution Policy (UDRP); UDRP required suit in specified jurisdictions merely to stay implementation of arbitration panel's decision, it did not preclude suit in other jurisdictions. Lanham Trade–Mark Act, § 32(2)(D)(v), 15 U.S.C.A. § 1114(2)(D)(v).

8 Cases that cite this headnote

[2] Federal Courts
Waiver of Error in Appellate Court
170B Federal Courts
170BVIII Courts of Appeals
170BVIII(K) Scope, Standards, and Extent
170BVIII(K)7 Waiver of Error in Appellate Court
170Bk915 In general

Holder of trademark in business name abandoned claim that district court lacked in personam jurisdiction over trademark holder in action by Internet domain-name registrant, under Anticybersquatting Consumer Protection Act (ACPA), seeking re-transfer of domain name similar to trademark holder's business name, which arbitration panel had ordered registrant to transfer to trademark holder; trademark holder failed to raise claim until reply brief on appeal. Lanham Trade–Mark Act, § 32(2)(D)(v), 15 U.S.C.A. § 1114(2)(D)(v).

4 Cases that cite this headnote

[3] Judgment
Nature and elements of bar or estoppel by former adjudication
228 Judgment

228XIII Merger and Bar of Causes of Action and Defenses
228XIII(B) Causes of Action and Defenses Merged, Barred, or Concluded
228k584 Nature and elements of bar or estoppel by former adjudication

Under doctrine of res judicata, or claim preclusion, final judgment on the merits of an action precludes parties or their privies from relitigating issues that were or could have been raised in that action.

21 Cases that cite this headnote

[4] Federal Courts
Trial de novo

170B Federal Courts
170BVIII Courts of Appeals
170BVIII(K) Scope, Standards, and Extent
170BVIII(K)1 In General
170Bk776 Trial de novo

Court of Appeals reviews de novo district court's application of principles of res judicata.

[5] Alternative Dispute Resolution
Objections and exceptions to award, and waiver thereof

25T Alternative Dispute Resolution
25TII Arbitration
25TII(G) Award
25Tk342 Objections and exceptions to award, and waiver thereof
(Formerly 33k46.1 Arbitration)

Internet domain-name registrant did not waive claim that holder of trademark in business name similar to domain name was barred by res judicata from seeking transfer of domain name in arbitration proceeding under Uniform Domain-Name Dispute-Resolution Policy (UDRP) by failing to seek stay of arbitration and allowing arbitration panel to reach decision on merits; UDRP provided for "independent resolution" of dispute in court. Lanham Trade–Mark Act, § 32(2)(D)(v), 15 U.S.C.A. § 1114(2)(D)(v).

2 Cases that cite this headnote

[6] Judgment
Effect of change in law or facts

Judgment
Distinct Causes of Action from Same Act or Transaction

228 Judgment
228XIII Merger and Bar of Causes of Action and Defenses
228XIII(B) Causes of Action and Defenses Merged, Barred, or Concluded
228k585 Identity of Cause of Action in General
228k585(5) Effect of change in law or facts
228 Judgment
228XIII Merger and Bar of Causes of Action and Defenses
228XIII(B) Causes of Action and Defenses Merged, Barred, or Concluded
228k608 Distinct Causes of Action from Same Act or Transaction
228k609 In general

Claims arising subsequent to prior action need not, and often could not, have been brought in that prior action; accordingly, they are not barred by res judicata regardless of whether they are premised on facts representing continuance of same course of conduct.

21 Cases that cite this headnote

[7] Judgment
Effect of change in law or facts

228 Judgment
228XIII Merger and Bar of Causes of Action and Defenses
228XIII(B) Causes of Action and Defenses Merged, Barred, or Concluded
228k585 Identity of Cause of Action in General
228k585(5) Effect of change in law or facts

Where facts that have accumulated after first action are enough on their own to sustain second action, new facts clearly constitute new "claim," and second action is not barred by res judicata.

12 Cases that cite this headnote

[8] Judgment
Involuntary dismissal or nonsuit in general

Judgment
Effect of change in law or facts

228 Judgment

228XIII Merger and Bar of Causes of Action and Defenses
228XIII(A) Judgments Operative as Bar
228k570 Judgment on Discontinuance, Dismissal, or Nonsuit
228k570(4) Involuntary dismissal or nonsuit in general
228 Judgment
228XIII Merger and Bar of Causes of Action and Defenses
228XIII(B) Causes of Action and Defenses Merged, Barred, or Concluded
228k585 Identity of Cause of Action in General
228k585(5) Effect of change in law or facts

Claim by holder of trademark in business name similar to Internet domain name, that domain name registrant's letter offering to sell domain name to trademark holder was violation of Anticybersquatting Consumer Protection Act (ACPA), was not barred by res judicata despite dismissal with prejudice of trademark holder's prior action alleging trademark dilution and ACPA violations, since letter postdated dismissal of first action. Lanham Trade–Mark Act, § 43(d), 15 U.S.C.A. § 1125(d).

6 Cases that cite this headnote

[9] Federal Civil Procedure

Reasonableness or bad faith in general; objective or subjective standard

170A Federal Civil Procedure
170AXX Sanctions
170AXX(B) Grounds for Imposition
170Ak2767 Unwarranted, Groundless or Frivolous Papers or Claims
170Ak2769 Reasonableness or bad faith in general; objective or subjective standard

Standard for triggering award of attorney fees under Rule 11 is objective unreasonableness. Fed.Rules Civ.Proc.Rule 11, 28 U.S.C.A.

24 Cases that cite this headnote

[10] Federal Courts

Allowance of remedy and matters of procedure in general

170B Federal Courts
170BVIII Courts of Appeals
170BVIII(K) Scope, Standards, and Extent
170BVIII(K)4 Discretion of Lower Court
170Bk813 Allowance of remedy and matters of procedure in general

Court of Appeals reviews district court's imposition of Rule 11 sanctions for abuse of discretion. Fed.Rules Civ.Proc.Rule 11, 28 U.S.C.A.

4 Cases that cite this headnote

[11] Federal Courts

Extent of Review Dependent on Nature of Decision Appealed from

170B Federal Courts
170BVIII Courts of Appeals
170BVIII(K) Scope, Standards, and Extent
170BVIII(K)1 In General
170Bk763 Extent of Review Dependent on Nature of Decision Appealed from
170Bk763.1 In general

When reviewing Rule 11 sanctions, Court of Appeals must ensure that any sanctions decision is made with restraint. Fed.Rules Civ.Proc.Rule 11, 28 U.S.C.A.

7 Cases that cite this headnote

[12] Federal Courts

Abuse of discretion

170B Federal Courts
170BVIII Courts of Appeals
170BVIII(K) Scope, Standards, and Extent
170BVIII(K)4 Discretion of Lower Court
170Bk812 Abuse of discretion

District court necessarily abuses its discretion if it bases its ruling on erroneous view of law or on clearly erroneous assessment of evidence.

1 Cases that cite this headnote

[13] Federal Civil Procedure

Unwarranted, Groundless or Frivolous Papers or Claims

170A Federal Civil Procedure
170AXX Sanctions
170AXX(B) Grounds for Imposition
170Ak2767 Unwarranted, Groundless or Frivolous Papers or Claims
170Ak2768 In general

With regard to factual contentions, Rule 11 sanctions may not be imposed unless particular allegation is utterly lacking in support. Fed.Rules Civ.Proc.Rule 11, 28 U.S.C.A.

30 Cases that cite this headnote

[14] Federal Civil Procedure

Anti-trust or trade regulation cases

170A Federal Civil Procedure
170AXX Sanctions
170AXX(B) Grounds for Imposition
170Ak2767 Unwarranted, Groundless or Frivolous Papers or Claims
170Ak2771 Complaints, Counterclaims and Petitions
170Ak2771(4) Anti-trust or trade regulation cases

District court abused its discretion in imposing Rule 11 sanctions on holder of trademark in business name similar to Internet domain name, for factual allegations lacking evidentiary support, in action by domain name registrant under Anticybersquatting Consumer Protection Act (ACPA), seeking re-transfer of domain name that arbitration panel had ordered registrant to transfer to trademark holder; although some of trademark holder's factual contentions were more suspect than others, they were not utterly lacking in support. Lanham Trade–Mark Act, § 32(2)(D)(v), 15 U.S.C.A. § 1114(2)(D)(v); Fed.Rules Civ.Proc.Rule 11(b)(3), 28 U.S.C.A.

16 Cases that cite this headnote

[15] Federal Civil Procedure

Notice and hearing

170A Federal Civil Procedure
170AXX Sanctions
170AXX(E) Proceedings
170Ak2828 Notice and hearing

At minimum, notice requirement of Rule 11 mandates that subject of sanctions motion be informed of specific conduct or omission for which sanctions are being considered so that subject of sanctions motion can prepare a defense; only conduct explicitly referred to in instrument providing notice is sanctionable. Fed.Rules Civ.Proc.Rule 11(c)(1)(A), 28 U.S.C.A.

14 Cases that cite this headnote

[16] Federal Civil Procedure

Grounds for Imposition

170A Federal Civil Procedure
170AXX Sanctions
170AXX(B) Grounds for Imposition
170Ak2765 In general

Merely incorrect legal statements are not sanctionable under Rule 11. Fed.Rules Civ.Proc.Rule 11(b)(2), 28 U.S.C.A.

[17] Federal Civil Procedure

Anti-trust or trade regulation cases

170A Federal Civil Procedure
170AXX Sanctions
170AXX(B) Grounds for Imposition
170Ak2767 Unwarranted, Groundless or Frivolous Papers or Claims
170Ak2771 Complaints, Counterclaims and Petitions
170Ak2771(4) Anti-trust or trade regulation cases

District court abused its discretion in imposing Rule 11 sanctions on holder of trademark in business name similar to Internet domain name, for advancing unwarranted legal arguments, in action by domain name registrant under Anticybersquatting Consumer Protection Act (ACPA), seeking re-transfer of domain name that arbitration panel had ordered registrant to transfer to trademark holder; although all of trademark holder's arguments may not ultimately have prevailed, none were patently contrary to existing law, especially as it existed at time trademark holder's papers were signed, or so lacking in merit as to amount to frivolous argument for extension of existing law. Lanham Trade–Mark Act, § 32(2)(D)(v), 15 U.S.C.A. § 1114(2)(D)(v); Fed.Rules Civ.Proc.Rule 11(b)(2), 28 U.S.C.A.

8 Cases that cite this headnote

Attorneys and Law Firms

***372** Franklin H. Stone, Law Office of Franklin H. Stone, Brooklyn, NY, for defendants-appellants Cello Holdings, L.L.C. and Cello Music and Film Systems, Inc.

Elkan Abramowitz (Geri S. Krauss, Elizabeth Small, and Marianne Yen, of counsel), Morvillo, Abramowitz, Grand, Iason & Silberberg, P.C., New York, NY, for appellants Herrick, Feinstein LLP and Odin, Feldman & Pittleman, P.C.

James G. McCarney (Thomas E. Engel, of counsel), Engel & McCarney, New York, NY, for plaintiff-appellee.

Before: MESKILL, JACOBS, and SOTOMAYOR, Circuit Judges.

Opinion

SOTOMAYOR, Circuit Judge.

Broadly framed, this appeal implicates the contentious and ongoing conflict between trademark rights-holders and Internet domain-name registrants. Where the former seek to prevent consumer confusion by policing others' use of the trademarks that identify their goods, services or identities, the latter have acquired ***373** rights in domain names, which may be identical or confusingly similar to trademarks, through a first-come, first-serve process that does not consider trademark rights. Plaintiff-appellee Lawrence Storey seeks a declaration that his use of the domain name "cello.com" is lawful, while defendants-appellants Cello Holdings, L.L.C. and Cello Music and Film Systems, Inc. (collectively "Cello") assert that their uncontested rights to use the trademark "cello" in connection with the sale of audio equipment make their claim to the registration of "cello.com" superior to Storey's claim. Relying on the Anticybersquatting Consumer Protection Act ("ACPA"), Pub.L. No. 106–113, 113 Stat. 1501 (1999), Cello accuses Storey of "cyberpiracy," "cybersquatting," or "domain-name hijacking," rhetoric that suggests the illegal possession or occupation of property belonging to Cello under the trademark laws. Storey, in turn, paints Cello's litigious conduct as "reverse domain-name hijacking" or the overreaching use of the mechanisms established to remedy cybersquatting against a registrant with a legitimate interest in his domain name.

As this dispute comes before us on appeal, however, the issues are largely procedural and primarily concern the impact of the extended litigation that has already occurred between the parties on the arguments that the parties presented to the district court. An initial action (the "First Action") brought by Cello against Storey was dismissed "with prejudice," but a subsequent alternative dispute-resolution panel, operating under the terms of the Uniform Domain–Name Dispute–Resolution Policy ("UDRP"), ordered the domain name "cello.com" transferred to Cello. Storey then filed a complaint (the "Instant Action") in the United States District Court for the Southern District of New York (Chin, *J.*), bringing a cause of action under the ACPA as provided in 15 U.S.C. § 1114(2)(D)(v), and seeking re-transfer of the domain name and a declaration that his use of "cello.com" is lawful. Storey argued, *inter alia*, that the transfer ordered by the UDRP panel was improper because Cello was barred from bringing its claims before that panel because the First Action had been dismissed with prejudice. Cello, in turn, argued that the district court lacked subject matter jurisdiction to review the panel's decision and was an improper forum under the UDRP, and, alternatively, that *Storey* was barred from bringing the Instant Action because the UDRP panel decision, which had considered and rejected Storey's *res judicata* defense, was binding. The district court ruled in Storey's favor, holding that the preclusive effect of the First Action barred Cello "from reasserting its claims in the arbitration proceedings." *Storey v. Cello Holdings, L.L.C.*, 182 F.Supp.2d 355, 362 (S.D.N.Y.2002).

This appeal, accordingly, addresses the effect that the two prior proceedings—the First Action and the UDRP administrative proceeding—have on Storey's claim for relief under § 1114(2)(D)(v) in the Instant Action. We easily conclude that the district court had subject matter jurisdiction over Storey's claim inasmuch as the ACPA provides for federal jurisdiction over claims brought under § 1114(2)(D)(v). *See* 15 U.S.C. § 1121(a). We also reject Cello's argument that the Southern District of New York was an inappropriate venue for Storey's claim.

Turning to the merits of the district court's ruling, we vacate the judgment of the district court, noting two errors in its analysis. First, the district court erred in focusing on whether Cello was barred from bringing the UDRP administrative proceeding because the issue in the Instant Action is neither the *res judicata* effect of ***374** the First Action on the UDRP panel, nor the *res judicata* effect of the UDRP proceeding on the Instant Action. The district court appears to have believed that the Instant Action involved review or enforcement of the UDRP panel decision. Because a domain-name registrant's claim under § 1114(2)(D)(v) does not involve review of a

UDRP decision, the district court's inquiry should have been on Cello's right in the Instant Action to contest the lawfulness of Storey's use of "cello.com" directly under the ACPA. Second, we hold that the *res judicata* effect of the First Action is not dispositive in the Instant Action as Cello may have a claim premised on facts arising after the First Action. The "bad faith intent to profit" element of a trademark rights-holder's ACPA claim may be premised on the domain-name registrant's ongoing use of the domain name. In this respect ACPA rights differ from traditional property rights in land, to which ownership of a domain name is often analogized. The judgment in the First Action, therefore, does not bar Cello from arguing that Storey's use of "cello.com" is unlawful insofar as Cello relies on conduct post-dating the First Action to make its claim.

The district court also granted Storey's motion for sanctions against both Cello and its counsel under Fed.R.Civ.P. 11(b). Due in part to the lack of well-established law in this area and due in part to the limited scope of the notice Cello and its counsel received, we also vacate the Rule 11 sanctions.

BACKGROUND

A. The parties

In 1997, Storey registered the domain name[1] "cello.com" with Network Solutions, Inc. ("NSI"), a domain-name registrar,[2] as part of an attempt to register approximately twenty musical-instrument domain names. Cello Holdings, a Delaware limited liability company, registered the trademark "Cello" on the federal register for use in the audio equipment business in 1995. Cello Music and Film Systems, Inc. sold high-quality audio equipment, although it had allegedly ceased operations by the time the Instant Action was initiated.

1 A "domain name" is an "alphanumeric designation" that is "part of an electronic address on the Internet." 15 U.S.C. § 1127. Internet users seeking to access particular information on the World Wide Web may use a domain name "much like a telephone number ... to reach a particular Web site." *Sallen v. Corinthians Licenciamentos LTDA*, 273 F.3d 14, 18 (1st Cir.2001). Rights to exclusive use of domain names have value because domain names may provide an intuitive method to for Internet users to access relevant information.

2 "NSI is one of several domain-name registrars accredited by the Internet Corporation for Assigned Names and Numbers ('ICANN'), a not-for profit corporation that administers the domain-name system pursuant to a Memorandum of Understanding with the United States Department of Commerce." *Sallen*, 273 F.3d at 20. "Registrars assign specific [domain names] to 'registrants,' [and] ensure that each registered [domain name] is unique ...." *Parisi v. Netlearning, Inc.*, 139 F.Supp.2d 745, 746 n. 3 (E.D.Va.2001).

B. The First Action

In 1997, Cello brought the First Action against Storey, initially alleging only trademark dilution. After discovery and while cross-motions for summary judgment were pending, the ACPA was signed into law, and Cello sought to add an ACPA claim. After requesting and receiving additional briefing on the ACPA, the district court held that genuine issues of material fact existed as to all the elements of Cello's trademark and ACPA claims, and granted ***375** Cello leave to amend its complaint, *see Cello Holdings, L.L.C. v. Lawrence–Dahl Cos.*, 89 F.Supp.2d 464, 472–75 (S.D.N.Y.2000), which Cello did.

On August 15, 2000, shortly before the case was scheduled for trial, the district court issued an order stating the following:

> It having been reported to this Court that the above entitled action has been settled, IT IS ORDERED that this action be, and the same hereby is, discontinued with prejudice but without costs; provided, however, that if settlement is not consummated within thirty days of the date of this order, either party may apply by letter within the 30–day period for restoration of the action to the calendar of the undersigned, in which event the action will be restored.

Neither party applied for restoration within the thirty day period. Correspondence from Cello's counsel to Storey's counsel, dated August 16, 2000, suggests that both parties received this order, states that the parties had informed Judge Chin that they believed they had "reached an agreement for voluntarily [sic] dismissal of this action," and offers to draft "some general release language." It also reports a conversation that occurred between Cello's counsel and Judge Chin's courtroom deputy as follows: "[The courtroom deputy] asked if I thought we could work out the issues within thirty days. I told him that I thought we could. He said that was

good, because he was going to have Judge Chin issue a 'thirty-day order.' "

The information conveyed to the district court by Cello's counsel that led to this thirty-day order, however, may not have been an accurate description of the agreement between the parties. In its January 24, 2002 Opinion in the proceedings now on appeal, the district court described the events leading to its August 15, 2000 order as follows: "Cello's counsel advised the Court that the case had been 'settled.' In fact, as the Court has now learned, the First Action had not actually 'settled,' but instead Cello had merely decided to discontinue its claims. The parties did not enter into a settlement agreement." *Storey,* 182 F.Supp.2d at 358. Cello contends that, although "[a]ttempts were made to negotiate a settlement agreement, ... [n]o agreement ... was reached other than to enter a voluntary dismissal of the First Action."

C. The September 25 Letter

On September 25, 2000, after the thirty-day window for restoration of the First Action had passed, Storey's counsel sent a letter (the "September 25 Letter") to "Cello Limited," an affiliate of Cello Holdings and a licensee of the "cello" mark. The letter stated the following:

> We represent Lawrence Storey, the owner of the domain name "cello.com" in which you may have an interest. We recently successfully concluded trademark litigation in which Mr. Storey's ownership interest was challenged by Cello Holdings, LLC and Cello Music and Films Systems, Inc. Mr. Storey is now offering the domain name for sale.
>
> Please contact my associate ... if you have any interest.

D. The UDRP proceedings

Like all domain-name registration agreements, Storey's registration agreement with NSI incorporated the terms of the UDRP, [3] *available at* ***376** http://www.icann.org/dndr/udrp/policy.htm, which, in Paragraph 4 (entitled "*Mandatory Administrative Proceeding* ") required Storey to submit to an administrative proceeding to resolve any so-called "cybersquatting" disputes—disputes brought by a third party with trademark rights in a mark that is similar to a domain name in order to seek transfer of the domain-name registration. Paragraphs 4(a)-(c) of the UDRP establish the substantive elements that the trademark-rights-holder/complainant must prove to prevail on a cybersquatting claim in a UDRP administrative proceeding: the domain name is "identical or confusingly similar to" the mark; the registrant has "no rights or legitimate interests in respect of the domain name"; and the "domain name has been registered and is being used in bad faith."

3 "[R]egistrars have agreed, or have been required by ICANN, to incorporate the UDRP into registration agreements ... and registrants must accept the UDRP's terms in order to register a domain name." *Sallen,* 273 F.3d at 20 (citation omitted). The agreement between Storey and NSI states that Storey consents to application of the "dispute policy in effect at the time of the dispute." In October, 2000, that policy was the UDRP as approved by the ICANN on October 24, 1999. Storey does not contest that he is bound by the terms of this version of the UDRP.

On October 10, 2000, Cello Holdings filed a complaint under the UDRP (the "UDRP Administrative Proceeding") with eResolution, a dispute resolution agency designated by Storey's agreement with NSI, seeking transfer of the domain name "cello.com" In a section seeking information on "Other Proceedings," the complaint referenced the First Action, noting that "Cello Holdings LLC voluntarily dismissed the case last month so as to avail itself of this dispute resolution policy which was not available at the time of the 1997 filing, thereby saving significant time and expense over the continued litigation." The complaint did not refer to the September 25 Letter.

Storey filed a response in UDRP Administrative Proceeding, arguing first that the "proceeding is barred by the previous discontinuance with prejudice of complainant's identical claims" in the First Action "by the doctrine of *res judicata*," and, in the alternative, that the claim asserted in the UDRP complaint "is in any event wholly lacking in merit."

On December 21, 2000, a decision was issued in the UDRP Administrative Proceeding, directing that "cello.com" be transferred to Cello Holdings. Addressing Storey's *res judicata* defense, the decision noted that Storey's "assertions are at variance with this Tribunal's reading of the evidence he submitted and are expressly rejected," and that "as [Storey] has made no attempt to enjoin the actions of eResolution or this Tribunal, a claim that jurisdiction is absent or that [Storey] has not consented to participate in these proceedings is likewise unpersuasive."

E. Filing the Instant Action

On January 10, 2001, Storey filed the Instant Action against both Cello parties in the District Court for the Southern District of New York, which was assigned to Judge Chin after it was determined to be similar to the First Action. Pursuant to the ACPA, 15 U.S.C. § 1114(2)(D)(v), Storey sought relief "declaring [his] use of the 'cello.com' domain name lawful" and "awarding injunctive relief reactivating the domain name 'cello.com' for plaintiff's [sic] Storey's benefit."

F. Transfer of the domain name

UDRP Paragraph 4(k) provides that a domain-name registrar will implement a UDRP panel's decision and transfer the domain name ten business days after being notified of the decision unless it receives notice that the domain-name registrant has "commenced a lawsuit against the complainant in a jurisdiction to which the ***377** complainant has submitted under *Paragraph 3(b)(xiii)* of the Rules of Procedure." NSI received notification that the UDRP panel had rendered its decision on December 27, 2000, and informed Storey and Cello Holdings that the domain name would be transferred on January 11, 2001.[4] Storey filed the Instant Action in the Southern District of New York on January 10, 2001, and NSI implemented the transfer of "cello.com" to Cello Holdings as ordered by the panel.

4 NSI also informed Storey that the panel decision would be implemented unless an action was brought in Chatsworth, California or Fairfax County, Virginia.

On February 1, 2001, NSI filed a Registrar Certificate tendering control and authority over the "cello.com" domain name to the district court and reciting that no further transfers would occur pending the district court's further order.

G. Virginia state court action

On February 28, 2001, Cello filed a motion to confirm the arbitration award in the Circuit Court of Fairfax County, Virginia. On May 9, 2001, the Virginia court stayed the action pending a resolution of the Instant Action in the Southern District of New York, reasoning that the Southern District "is a more appropriate forum to hear and decide the merits of Mr. Storey's claim of *res judicata* as the [First Action] was heard and resolved in that Court."

H. Pleadings and motions in the Instant Action

On March 7, 2001, Cello filed an answer, signed by both Herrick, Feinstein LLP and Odin, Feldman & Pittleman, P.C., setting forth legal defenses, factual contentions, and denials.

At the initial conference on April 6, 2001, the district court "raised the issue of whether Cello was barred from seeking the relief it obtained in the arbitration proceedings because of the *res judicata* effect of the dismissal with prejudice of the First Action." *Storey*, 182 F.Supp.2d at 361. In a letter dated April 13, 2001 from Herrick, Feinstein LLP (the "April 13 Letter"), Cello raised a defense to this *res judicata* argument, alleging that the September 25 Letter "was the basis for the arbitration" and that "[s]ince this letter post dates the [First Action] ... [the letter] is the basis of a new cause of action."

On May 16, 2001, Storey moved for an order imposing sanctions under Fed.R.Civ.P. 11(b)(1)-(4) on both Cello and its counsel, and stated that the sanctions would be predicated on "a frivolous answer denying the material allegations of the complaint." Cello did not withdraw its answer. In June and July of 2001, cross-motions for summary judgment were filed, and further briefing on the sanctions motions occurred in late July and early August.

I. District court opinion and judgment in the Instant Action

In a January 23, 2002 Opinion, the district court ruled in Storey's favor on the *res judicata* issue, holding that "Cello was barred from reasserting its claims in the arbitration proceedings." *Storey*, 182 F.Supp.2d at 362. The district court reasoned that "the dismissal of the First Action [was] 'with prejudice' " and that "[t]he relief Cello sought in the arbitration proceeding was precisely the relief Cello had sought in the First Action—transfer of the registration to the domain name 'cello.com' from Storey to Cello—for precisely the same reasons—the alleged confusion between Cello's mark 'Cello' and 'cello.com.' " *Id.* The district court rejected Cello's argument that Cello "brought the arbitration proceedings because Storey engaged in a ***378** 'new act of cybersquatting' when his attorneys wrote the September 25th Letter." *Id.* The district court concluded that "[t]he September 25th Letter was not an act of 'cybersquatting' " and rather was "simply a reassertion by Storey of his rights to the domain name that had been confirmed by the dismissal of the First Action 'with prejudice.' " *Id.* at 363. In sum, "[t]he September 25th Letter was not a new transaction creating a new claim, for Cello had already given up any claim to rights in the domain name in question." *Id.*

The district court also imposed sanctions against both Cello and its counsel, appellants Herrick, Feinstein LLP and Odin, Feldman & Pittleman, P.C. (collectively, the "Sanctioned Counsel"), listing eight factual assertions or denials that were lacking evidentiary support or unwarranted on the evidence, and five legal arguments or defenses not objectively reasonable and without reasonable basis in law. *See id.* at 366–69. It also held that Cello filed its answer and defenses with the improper purpose of harassing Storey, causing unnecessary delay, and needlessly increasing litigation costs. *See id.* at 369. Finally, the district court concluded "that 'unusual circumstances' exist that warrant the award to Storey of reasonable attorney's fees and costs incurred as the result of the Rule 11 violations." *Id.*

On February 15, 2002, the district court entered judgment for Storey on the merits and ordered that "all right, title and interest in the domain name 'cello.com' be and hereby is vested in plaintiff Lawrence Storey, and that ... [NSI] is directed to transfer ownership of the domain name 'cello.com' to plaintiff Lawrence Storey within 30 days." As Rule 11 sanctions, the district court ordered Cello and the Sanctioned Counsel, jointly and severally, to pay $18,000 in attorneys' fees plus the costs of the district court action.

DISCUSSION

The issues addressed in the Instant Action are strongly influenced by the two prior proceedings, namely the First Action and the UDRP Administrative Proceeding. The district court concluded that the First Action barred Cello from bringing the UDRP Administrative Proceeding and that Storey was therefore entitled to the domain name "cello.com." In contrast, we conclude that the UDRP panel decision is relevant only insofar as it permits Storey to file the Instant Action under the ACPA cause of action provided in § 1114(2)(D)(v). For substantially the same reason, we reject Cello's argument that the UDRP panel's rejection of the *res judicata* defense has any bearing on our consideration of this issue on appeal. Instead, the only *res judicata* question is whether the First Action bars Cello from contesting Storey's use of "cello.com," and, as a result, entitles Storey to the relief he seeks here.

Turning to the merits of the *res judicata* issue, we note that the ACPA treats rights to registration and use of a domain name as contingent upon the registrant's ongoing use of the domain name without a "bad faith intent to profit" from a mark. *See* 15 U.S.C. § 1125(d)(1)(A)(i). We therefore disagree with the district court's conclusion that the Instant Action, predicated in part on the September 25 Letter, is "simply a reassertion by Storey of his rights to the domain name that had been confirmed by the dismissal of the First Action 'with prejudice.' " *Storey*, 182 F.Supp.2d at 363. Because Cello's ACPA cause of action is predicated on conduct that post-dated the First Action, we hold that *res judicata* does not bar the Instant Action.

I. Subject Matter Jurisdiction

Cello first argues that the district court lacked subject matter jurisdiction to hear ***379** Storey's complaint in the Instant Action because the First Action does not provide jurisdiction and the Southern District of New York is not an appropriate venue under the UDRP to review a transfer order. Upon *de novo* review of the district court's conclusions of law, *see In re Vogel Van & Storage, Inc.*, 59 F.3d 9, 11 (2d Cir.1995), we hold that the district court properly concluded that it had jurisdiction over the Instant Action.

A. The First Action as a source of subject matter jurisdiction

Cello argues that the district court lacked jurisdiction because "[t]he only jurisdictional nexus ... presented on the face of Storey's complaint ... stems solely from the First Action." *Cf. Rivet v. Regions Bank of Louisiana*, 522 U.S. 470, 478, 118 S.Ct. 921, 139 L.Ed.2d 912 (1998) (holding that "claim preclusion by reasons of a prior federal judgment is a defensive plea that provides no basis for removal" or federal subject matter jurisdiction under the well-pleaded complaint rule); *Peacock v. Thomas*, 516 U.S. 349, 355, 116 S.Ct. 862, 133 L.Ed.2d 817 (1996) ("[C]laims alleged to be factually interdependent with and, hence, ancillary to claims brought in an earlier federal lawsuit will not support federal jurisdiction over a subsequent lawsuit."). While we do not take issue with this general principle, Cello's argument is meritless because Storey's complaint is premised on his federal right to bring a cause of action under 15 U.S.C. § 1114(2)(D)(v), which expressly provides: "A domain name registrant whose domain name has been suspended, disabled, or transferred ... may ... file a civil action to establish that the registration or use of the domain name by such registrant is not unlawful under this Act." Storey's complaint thus has its own, independent basis for federal subject matter jurisdiction. *See* 15 U.S.C. § 1121(a); 28 U.S.C. § 1331.

B. Jurisdiction "under the UDRP"

[1] Labeling UDRP Paragraph 4(k) a "contractual forum selection clause," Cello next argues that the Southern District of New York was not a permissible forum in which to challenge the UDRP award transferring Storey's rights in "cello.com." Insofar as Cello argues that the domain-name registrant's agreement to submit to the "mandatory administrative proceedings" under UDRP Paragraph 4 limits the jurisdictions in which a domain-name registrant can bring a federal suit under § 1114(2)(D)(v), we disagree.

Referring to the domain-name registrar, here NSI, as "we," Paragraph 4(k) of the UDRP states the following:

> The mandatory administrative proceeding requirements set forth in *Paragraph 4* shall not prevent either [the registrant] or the complainant from submitting the dispute to a court of competent jurisdiction for independent resolution .... If an Administrative Panel decides that [the registrant's] domain name registration should be canceled or transferred, we will wait ten (10) business days ... after we are informed ... of the Administrative Panel's decision before implementing that decision. We will then implement the decision unless we have received from [the registrant] during that ten (10) business day period official documentation ... that [the registrant has] commenced a lawsuit against the complainant in a jurisdiction to which the complainant has submitted under *Paragraph 3(b)(xiii)* of the Rules of Procedure.... If we receive such documentation within the ten (10) business day period, we will not implement the Administrative Panel's decision ....

[2] Cello argues that only the jurisdictions to which it, the complainant, has ***380** "submitted" are permissible jurisdictions for the Instant Action, and that the Southern District of New York is not one of them.[5] This argument, however, ignores the first sentence of Paragraph 4(k), which states that the existence of UDRP proceedings against Storey does not prevent him from seeking "independent resolution" of "the dispute" in "a court of competent jurisdiction." The jurisdictional restrictions in UDRP Paragraph 4(k) thus address the limitations on the registrar's obligations that arise in response to a lawsuit; they do not the affect jurisdictions in which the complainant may seek an "independent resolution" from the courts. Only if a domain-name registrant seeks to delay implementation of a UDRP panel's decision is he or she obliged to commence his or her lawsuit against the complainant within the ten-day window and to bring it in a court to whose jurisdiction the complainant has submitted contractually. As the UDRP provides no definition for "court of competent jurisdiction" as a term of art, we give the term its plain meaning, namely a court that has jurisdiction to hear the claim brought before it. We see no reason why the Southern District of New York is not such a court.[6]

5 Paragraph 4(k) notes that "[i]n general, [the] jurisdiction [to which the complainant has submitted] is either the location of [the registrar's] principal office or of [the registrant's] address." Cello identifies these jurisdictions as Fairfax County, Virginia, the location of the principal office of NSI, *and* Chatsworth, California, the location of Storey's residence as listed in NSI's Whois database. Although a question may exist as to whether Cello has "submitted" to jurisdiction in both these jurisdictions, Cello clearly has not "submitted" to jurisdiction in New York.

6 Cello also argues that the district court lacked *in personam* jurisdiction, but it does so for the first time on appeal in its reply brief. In its answer, Cello objected to personal jurisdiction and venue based on Cello Holding's lack of contacts with New York, but Cello did not raise this argument in its summary judgment briefing. More importantly, Cello did not raise a personal jurisdiction argument in its initial brief before this Court. Although Cello challenged the "jurisdictional nexus to the Southern District of New York presented on the face of Storey's complaint," it did so only in the course of its argument on subject matter jurisdiction and the well-pleaded complaint rule, a doctrine specific to subject matter jurisdiction. Cello's brief mentions neither "personal" nor "*in personam* " jurisdiction, and it cites no case law addressing the contacts to New York State necessary to establish personal jurisdiction. We therefore conclude that Cello has abandoned its lack of personal jurisdiction defense. *See* Fed. R.App. P. 28(a)(9); *LoSacco v. City of Middletown*, 71 F.3d 88, 92–93 (2d Cir.1995) (holding that an issue is abandoned where not raised in appellate brief).

II. *Res Judicata*

[3] Cello next argues that the district court erred in holding that the judgment in the First Action served as *res judicata* to establish Storey's rights to the domain name "cello.com" in the Instant Action. "Under the doctrine of *res judicata*, or claim preclusion, '[a] final judgment on the merits of an action precludes the parties or their privies from relitigating issues that were or could have been raised in that action.' " [7] *St. Pierre v. Dyer*, 208 F.3d 394, 399 (2d Cir.2000) (quoting *Federated Dep't Stores, Inc. v. Moitie*, 452 U.S. 394, 398, 101 S.Ct. 2424, 69 L.Ed.2d 103 (1981)); *see also Maharaj v. Bankamerica Corp.*, 128 F.3d 94, 97 (2d Cir.1997) ("[O]nce a final judgment has been entered on the ***381** merits of a case, that judgment will bar any subsequent litigation by the same parties or those in privity with them concerning 'the transaction, or series of connected transactions, out of which the [first] action arose.' " (quoting *Restatement (Second) of Judgments* § 24(1) (1982))).

7 Although this formulation of the doctrine of *res judicata* is frequently quoted in this Circuit, it is potentially misleading insofar as its reference to "issues" potentially confuses *res judicata* with the related doctrine of *collateral estoppel*. *Res judicata* bars the relitigation of claims or causes of action that were or could have been raised in a prior action.

As set out above, Storey first asserted *res judicata* unsuccessfully as a defense to the UDRP Administrative Proceeding. In the Instant Action, Storey again asserts that the First Action has *res judicata* effect to establish his claim to the domain name. Although *res judicata* is normally applied as a defense to a claim, Storey's *res judicata* argument here is part of his claim as a plaintiff: Storey seeks to establish that his use of "cello.com" is lawful vis-a-vis Cello because Cello is barred from asserting rights to "cello.com." [8]

8 To establish that Storey's registration is unlawful under the ACPA, Cello would bring a claim under 15 U.S.C. § 1125(d), entitled "Cyberpiracy prevention," which provides a trademark owner a cause of action against a domain-name registrant who has acquired rights in a domain name to free ride on the strength of the trademark. Section 1125(d)(1)(A) lists its basic elements:

> A person shall be liable in a civil action by the owner of a mark ... if, without regard to the goods or services of the parties, that person -
>
> (i) has a bad faith intent to profit from that mark ...; and
>
> (ii) registers, traffics in, or uses a domain name that —(I) in the case of a [distinctive] mark ... is identical or confusingly similar to that mark; [or] (II) in the case of a famous mark ... is identical or confusingly similar to or dilutive of that mark ....

[4] We review *de novo* the district court's application of the principles of *res judicata*. *See Boguslavsky v. S. Richmond Secs., Inc.*, 225 F.3d 127, 129–30 (2d Cir.2000).

A. Effect of the UDRP Administrative Proceeding

[5] Preliminarily, Cello argues that Storey effectively waived his *res judicata* argument by failing to seek a stay of arbitration and by instead "allowing the [UDRP] arbitrators to reach a decision on the merits of his jurisdictional defense." *Cf. Halley Optical Corp. v. Jagar Int'l Marketing*, 752 F.Supp. 638, 639 (S.D.N.Y.1990) ("Under 9 U.S.C. § 4, the proper procedure for a party to challenge whether it is subject to an arbitration agreement is to move the district court for a stay of arbitration."). We disagree. UDRP Paragraph 4(k) provides for "independent resolution" of the parties' dispute in the courts, and this provision is incompatible with Cello's argument that Storey's litigation strategy before the UDRP administrative panel has diminished Storey's ability to present his case in the Instant Action. Unlike traditional binding arbitration proceedings, UDRP proceedings are structured specifically to permit the domain-name registrant two bites at the apple. The UDRP administrative proceedings are "mandatory," but only in the sense that all registrants are obliged by virtue of the agreement to recognize the validity of a proceeding initiated by a third-party claimant. UDRP proceedings, however, need not be the exclusive remedy: an administrative proceeding does not preclude the registrant from vindicating his rights under the ACPA or trademark law in court. *Cf. Parisi*, 139 F.Supp.2d at 751 ("Although the UDRP describes the process as 'mandatory' in the sense that a registrant's refusal to participate may lead to an uncontested loss of the domain name, the process is not 'mandatory' in the sense that either disputant's legal claims accrue only after a panel's decision."). We therefore hold that Storey's presentation of the *res judicata* defense to a UDRP administrative proceeding does not prevent Storey from raising ***382** the issue in this suit for relief under § 1114(2)(D)(v).

For much the same reasons that we find that the UDRP panel's resolution of the *res judicata* question has no bearing on our consideration of that issue on appeal, we believe

that the district court erred in focusing its analysis on whether Cello was barred by *res judicata* from initiating the UDRP Administrative Proceeding. *See Storey*, 182 F.Supp.2d at 361–62. This formulation of the *res judicata* issue misconstrues Storey's action and the importance of the UDRP Administrative Proceeding.

Storey's complaint in the Instant Action alleges a cause of action pursuant to 15 U.S.C. § 1114(2)(D)(v), which states:

> A domain name registrant whose domain name has been suspended, disabled, or transferred under a policy described under clause (ii)(II) may, upon notice to the mark owner, file a civil action to establish that the registration or use of the domain name by such registrant is not unlawful under this Act. The court may grant injunctive relief to the domain name registrant, including the reactivation of the domain name or transfer of the domain name to the domain name registrant.

In 15 U.S.C. § 1114(2)(D)(ii)(II), the term "policy" is defined to refer to any "reasonable policy by [a] registrar ... prohibiting the registration of a domain name that is identical to, confusingly similar to, or dilutive of another's mark." Neither party contests that the UDRP is a policy within the scope of § 1114(2)(D)(ii)(II).

Storey's claim, therefore, seeks to demonstrate that his registration and use of "cello.com" "is not unlawful under this Act," namely under the ACPA, [9] vis-a-vis Cello's trademark rights in the mark "cello." Although UDRP Paragraphs 4(a)-(c) establish the substantive elements that a complainant must prove to prevail in a UDRP administrative proceeding, the administrative panel's consideration of these contractual criteria does not affect the district court's determination of whether Storey's registration and use of "cello.com" is lawful under the ACPA.

9 Other Circuits that have addressed the issue have diverged on whether the term "Act" refers to the ACPA in particular or to the Lanham Act in general. *Compare Sallen*, 273 F.3d at 18 (describing § 1114(2)(D)(v) as a suit seeking "a declaration of nonviolation of the ACPA"), *with Barcelona.com, Inc. v. Excelentisimo Ayuntamiento De Barcelona*, 330 F.3d 617, 627–28 & n. 2 (4th Cir.2003) (defining "this Act" as the Trademark Act as codified in Chapter 22 of Title 15). Because our holding would be identical regardless of our choice, as the Lanham Act includes the ACPA, we assume but do not decide that "this Act" refers to the ACPA.

The ACPA provides an allegedly aggrieved trademark owner a cause of action similar to, yet distinct from, the threshold for an administrative remedy under UDRP Paragraphs 4(a)-(c). We agree with the First and Fourth Circuits that a claim brought by a domain name registrant under § 1114(2)(D)(v) seeks "a declaration of nonviolation of the ACPA," not requiring (or permitting) review of the UDRP panel's application of the UDRP's cybersquatting standard, but instead "trump[ing] the panel's finding of noncompliance." *Sallen*, 273 F.3d at 18, 27; *accord Hawes v. Network Solutions, Inc.*, 337 F.3d 377, 386 (4th Cir.2003) ("[A]n action brought under § 1114(2)(D)(v) on the heels of an administrative proceeding [under the UDRP]... is independent of, and involves neither appellate-like review of nor deference to, the underlying proceeding."). [10]

10 We are aware that some courts have intimated that a § 1114(2)(D)(v) claim involves "judicial review" of the UDRP panel decision. *See Dluhos v. Strasberg*, 321 F.3d 365, 373 (3d Cir.2003) (concluding that the Federal Arbitration Act does not apply to "judicial review" of UDRP panel decisions under § 1114(2)(D)(v)); *Parisi*, 139 F.Supp.2d at 753 (same); *cf. id.* at 752 ("[I]t is clear that ICANN intended to ... ensur[e] a 'clear mechanism' for 'seeking judicial review of a decision of an administrative panel canceling or transferring the domain name.' " (quoting ICANN, *Staff Report on Implementation Documents for the Uniform Dispute Resolution Policy* (September 29, 1999), *available at* http://www.icann.org/udrp/staff–report–29sept99.htm)).

***383** The decision issuing from the UDRP Administrative Proceeding is relevant, therefore, only insofar as it triggered Storey's right to sue under § 1114(2)(D)(v). [11] *See Barcelona.com*, 330 F.3d at 626 (noting that a UDRP panel decision "is relevant only to serve as the reason for [registrant's] bringing an action under § 1114(2)(D)(v)").

11 The text of the statute could be read to provide Storey with a cause of action only after the domain name has been transferred. *See* 15 U.S.C. § 1114(2)(D)(v) (creating a cause of action where the "domain name has been suspended, disabled, or transferred"). We agree, however, with the First and Fourth Circuits that § 1114(2)(D)(v) encompasses situations in which a UDRP

> panel has ruled against a domain name and has ordered transfer or deactivation, but in which the order has not yet been implemented because of the Paragraph 4(k) waiting period. *See Barcelona.com*, 330 F.3d at 627 (noting that a "suit for declaratory judgment and injunctive relief under § 1114(2)(D)(v) appears to be precisely the mechanism designed by Congress to empower a party whose domain name is subject to a transfer order ... to prevent the order from being implemented"); *Sallen*, 273 F.3d at 25 n. 11 (holding that a suit may be brought under § 1114(2)(D)(v) prior to transfer because a transfer order from a UDRP panel makes transfer of the domain name "inevitable unless a court action is filed").

B. Effect of the First Action

Accordingly, the question to which we now turn is whether Cello is barred by the *res judicata* effect of the First Action from arguing that Storey's registration is unlawful under the ACPA; if so, Storey is entitled to an order that the domain name be returned to him. If not, however, Storey is entitled to the relief he seeks only if Cello's ACPA claim fails on its merits.

[6] Claims arising subsequent to a prior action need not, and often perhaps could not, have been brought in that prior action; accordingly, they are not barred by *res judicata* regardless of whether they are premised on facts representing a continuance of the same "course of conduct":

> That both suits involved 'essentially the same course of wrongful conduct' is not decisive. Such a course of conduct ... may frequently give rise to more than a single cause of action.... While the [prior] judgment precludes recovery on claims arising prior to its entry, it cannot be given the effect of extinguishing claims which did not even then exist and which could not possibly have been sued upon in the previous case.

Lawlor v. Nat'l Screen Serv. Corp., 349 U.S. 322, 327–28, 75 S.Ct. 865, 99 L.Ed. 1122 (1955); *see also Maharaj*, 128 F.3d at 97 ("as a matter of logic, when the second action concerns a transaction occurring after the commencement of the prior litigation, claim preclusion does not generally come into play"); *SEC v. First Jersey Securities, Inc.*, 101 F.3d 1450, 1464 (2d Cir.1996) ("If the second litigation involved different transactions, and especially subsequent transactions, there generally is no claim preclusion.").

[7] Application of this unremarkable principle is complicated by the at-times-difficult determination of what degree of conduct is necessary to give rise to a new "claim," particularly where ongoing conduct ***384** is involved. Where the facts that have accumulated after the first action are enough on their own to sustain the second action, the new facts clearly constitute a new "claim," and the second action is not barred by *res judicata*. *See, e.g.*, *Lawlor*, 349 U.S. at 328, 75 S.Ct. 865 (noting that "the conduct presently complained of was all subsequent to the [prior] judgment"); *Interoceanica Corp. v. Sound Pilots, Inc.*, 107 F.3d 86, 90 (2d Cir.1997) (holding that ocean voyages occurring after an initial suit based on previous voyages were distinct transactions giving rise to a separate cause of action for breach of contract); *First Jersey Secs., Inc.*, 101 F.3d at 1464 ("The claim that First Jersey defrauded customers in the sale, purchase and repurchase of certain securities in 1975–1979 is not the same as the claim that First Jersey defrauded customers in the sale, purchase, and repurchase of other securities in 1982–1985.").

Slightly more problematic are those situations involving claims under statutes that regulate ongoing conduct. In those circumstances, prior actions may not have *res judicata* effect on subsequent actions where the subsequent actions address new factual predicates, even when the legal issues raised in both actions are closely related. *Cf. Cellar Door Prods., Inc. v. Kay*, 897 F.2d 1375, 1378 (6th Cir.1990) (concluding that "[e]ach time [an allegedly anticompetitive] arrangement precluded [plaintiff] from competitively bidding for an event, a cause of action may have accrued to" plaintiff); *Harkins Amusement Enters., Inc. v. Harry Nace Co.*, 890 F.2d 181, 183 (9th Cir.1989) (noting that "[f]ailure to gain relief for one period of time does not mean that the plaintiffs will necessarily fail for a different period of time" and that "[t]he defendants by winning [the prior action] did not acquire immunity in perpetuity from the antitrust laws"); *Spiegel v. Continental Illinois Nat'l Bank*, 790 F.2d 638, 644–46 (1986) (refusing to bar a second suit which, like the first suit, was based on allegations of mail fraud when two letters were mailed after the first action had been filed).

Finally, however, claim preclusion may apply where some of the facts on which a subsequent action is based post-date the first action but do not amount to a new claim. In *Waldman v. Village of Kiryas Joel*, 207 F.3d 105, 112–14 (2d Cir.2000), for example, this Court recently held that a plaintiff did not allege sufficient post-first-action conduct to avoid claim preclusion in a second action, where the first action was between the same parties and had been dismissed with prejudice. In his first action, the plaintiff sued the village for discriminatory enforcement of the zoning code, *id.* at 107; in his second action, "he sought total dissolution of

the village" under the Establishment Clause, *id.* at 108. The plaintiff included allegations of some conduct that occurred after the first action and argued that his second action was "really 'based upon' things that have happened since the filing of the prior suit[ ]." *Id.* at 112–13. Although recognizing that "legally significant acts occurring *after* the filing of a prior suit" will prevent the application of *res judicata*, *id.* at 113, we held that the facts post-dating the first action did "not create a 'new' cause of action that did not exist when the prior suits were brought," *id.* at 112, because "[t]he new allegations made in the present complaint do not, either by themselves or to any degree not already demonstrated by the overlapping facts, establish the sort of pervasive and otherwise irremediable entanglement between church and state that would justify a drastic remedy like the dissolution of the Village," *id.* at 113. Thus, we concluded, "it is simply not plausible to characterize Waldman's claim as one based in any significant way ***385** upon the post-[first-action] facts." *Id.* at 113. *Cf. NLRB v. United Techs. Corp.*, 706 F.2d 1254, 1260 (2d Cir.1983) (concluding that *res judicata* turned in part on "whether facts essential to the second [action] were present in the first").

[8] Applying these principles, it is clear that had Cello not alleged any facts subsequent to the First Action on which to premise its § 1125(d) claim, the *res judicata* issue could be quickly resolved in favor of Storey. [12] Cello, however, argues that its ACPA cybersquatting claim against Storey is premised at least in part on Storey's "new act of cybersquatting" embodied in the September 25 Letter, and that *res judicata* does not apply because the letter was sent after final judgment in the First Action. The district court dismissed this argument by reasoning that "[t]he September 25th Letter was not an act of 'cybersquatting,' " "Cello had already given up any claim to rights in the domain name in question," and the Instant Action was "simply a reassertion by Storey of his rights to the domain name.' " *Storey*, 182 F.Supp.2d at 363.

12 We reject Cello's contention that *res judicata* cannot apply because the dismissal with prejudice of the First Action does not constitute a judgment on the merits. Cello bases this argument on its allegations that the parties only agreed to discontinue the litigation and that it intended to obtain a dismissal without prejudice. Cello, however, received the thirty-day order and was on notice of the impending dismissal with prejudice; counsel's "inadvertent" error (if it was error) to allow a judgment with prejudice to be entered does not prevent that judgment from being "on the merits." *See Samuels v. Northern Telecom, Inc.*, 942 F.2d 834, 836–37 (2d Cir.1991) (holding that counsel's "inadvertent or inartful" inclusion of a premature Title VII claim in a complaint and his consent to a dismissal with prejudice barred plaintiff's subsequent attempt to bring the Title VII claim). Furthermore, according to the district court, any alleged misstatement leading to the thirty-day order came from Cello's counsel. *See Storey*, 182 F.Supp.2d at 362.

In so holding, the district court erroneously conceived of the lawfulness of a domain-name registrant's use of a domain name to be a permanent determination that, once made, cannot be disturbed. [13] Section 1125(d)(1)(B)(i)(VI) demonstrates, however, that Congress intended the cybersquatting statute to make rights to a domain-name registration contingent on ongoing conduct rather than to make them fixed at the time of registration. If another party has trademark rights in a mark that is similar to the domain name, the domain-name registrant must use the name without a "bad faith intent to profit," § 1125(d)(1)(A)(i), to maintain its registration rights. Although many of the factors ***386** included in § 1125(d)(1)(B)(i)(I)-(IX), which provide a non-exhaustive list of nine factors to consider in arriving at a finding of fact concerning the registrant's "bad faith intent to profit" from the trademark owner's mark, call the court's attention to facts as they existed at the time the domain name was registered, subsection (VI) focuses the court's attention on the domain-name registrant's ongoing use of the domain name:

13 In other words, the district court treated a registrant's right to use a domain name as akin to a property interest, fixed by events that occurred at a specific point in the past, and shielded from subsequent attack by *res judicata*. *See Nevada v. United States*, 463 U.S. 110, 129 n. 10, 103 S.Ct. 2906, 77 L.Ed.2d 509 (1983) ("The policies advanced by the doctrine of *res judicata* perhaps are at their zenith in cases concerning real property, land and water."); *Arizona v. California*, 460 U.S. 605, 620, 103 S.Ct. 1382, 75 L.Ed.2d 318 (1983) ("Our reports are replete with reaffirmations that questions affecting titles to land, once decided should no longer be considered open."). Such an assumption is unsurprising given the pervasive analogies to real property in the "cybersquatting" language used to describe disputes over the "ownership" of domain names. Such an assumption may also have resulted from the district court's focus on the confusion element in § 1125(d)(1)(A)(ii) to the exclusion of the bad-faith element in § 1125(d)(1)(A)(i). *See Storey*, 182 F.Supp.2d at 362 ("The relief Cello

> sought in the arbitration proceeding was precisely the relief Cello had sought in the First Action—transfer of the registration to the domain name 'cello.com' from Storey to Cello—for precisely the same reasons—the alleged confusion between Cello's mark 'Cello' and 'cello.com.' ").

> In determining whether a person has a bad faith intent ... a court may consider ... the person's offer to transfer, sell, or otherwise assign the domain name to the mark owner or any third party for financial gain without having used, or having an intent to use, the domain name in the bona fide offering of any goods or services, or the person's prior conduct indicating a pattern of such conduct.
> § 1125(d)(1)(B)(i)(VI).

The September 25 Letter, then, presents a fact that a court may consider in determining whether Storey has a "bad faith" intent to profit from Cello's mark: the letter is a targeted offer to sell "cello.com" to the mark owner or a third party for financial gain. As this Court held in *Waldman*, however, the question is not merely whether Cello alleges some facts subsequent to the First Action that are relevant to its claim. Rather, the question presented is whether the September 25 Letter constitutes the basis for a new cause of action, and whether it is "plausible to characterize" Cello's § 1125(d) implicit claim demonstrating the unlawfulness of Storey's use of "cello.com" in the Instant Action "as one based in any significant way" on the September 25 Letter. *Waldman*, 207 F.3d at 113. We hold that such a characterization is possible because Storey's right to use "cello.com" was not permanently fixed by the dismissal of the First Action; instead, it is contingent on his ongoing legal use of that domain name. Thus, Cello may bring an ACPA cause of action based on the September 25 letter and is not barred by *res judicata*, even though the legal theory on which the new ACPA claim is based is similar to that on which the First Action was premised. [14] We emphasize, however, that we do not determine that the September 25 Letter alone is legally sufficient to establish a "bad faith intent to profit." [15] This question must be addressed by the district court on remand.

14 We acknowledge that the announcement of what constitutes a legally sufficient predicate for a cybersquatting claim is difficult due to the relative infancy of the statutory scheme at issue. Whether conduct relevant to § 1125(d)(1)(B)(i)(VI) can alone sustain a reasonable inference of "bad faith intent to profit" from a mark remains uncharted territory under the ACPA. If, in the course of developing case law on the "bad faith" element of a cybersquatting claim, this Court were to conclude that intent at registration was the predominant factor, our *res judicata* holding might warrant revisiting. Without a claim argued on the merits below and directly presenting this issue, however, we cannot at the present time state that attempts to sell a domain name for financial gain without engaging in a bona fide offering of goods are insufficient to permit a fact-finder to infer a "bad faith intent to profit."

15 Likewise, we do not reach the merits of Storey's defenses to an allegation of "bad faith intent to profit" from Cello's mark. For example, Storey argued in the UDRP proceeding that it had no "bad faith intent to profit" from Cello because twenty other federal registrations incorporating "cello," Cello has no greater interest in "cello.com" than any of these other trademark rights-holders, and Storey had no intent to profit from Cello in particular.

While our holding makes a prior judgment in favor of a domain-name registrant a less powerful tool to stave off subsequent ***387** suits by a trademark owner than if we held that *res judicata* barred Cello's arguments in the Instant Action, we do not leave domain-name registrants without recourse to the tools of preclusion that lessen the burdens of successive litigation. In cases where the merits of the first action were actually litigated and resolved in the domain-name registrant's favor, *collateral estoppel* may apply to bar relitigation of the confusion issue in § 1125(d)(1)(A)(ii), even if *res judicata* does not apply to bar the entire claim. *Cf. United Techs. Corp.*, 706 F.2d at 1260–64 (holding that *collateral estoppel* barred subsequent suit even when *res judicata* did not apply). Moreover, we do not anticipate that our decision today will create substantial uncertainty for settling litigants, because even claims based on ongoing conduct ordinarily can be extinguished so long as the settlement agreement is clearly drafted. [16]

16 While we recognize that the district court believed —apparently based on Cello's representations—that a settlement agreement had been reached, and entered its 30 day order accordingly, the absence of an agreement among the parties requires us to rely on *res judicata* alone, which cannot bar Cello's new ACPA cause of action to the extent it is based on conduct that occurred after the First Action.

III. Rule 11 Sanctions

[9] Under Fed.R.Civ.P. 11(b), whenever a signed pleading or "other paper" is submitted to the court, an attorney certifies:

(1) [the paper] is not being presented for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation;

(2) the claims, defenses, and other legal contentions therein are warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law;

(3) the allegations and other factual contentions have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery; and

(4) the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on a lack of information or belief.

"[T]he standard for triggering the award of fees under Rule 11 is objective unreasonableness," *Margo v. Weiss*, 213 F.3d 55, 65 (2d Cir.2000), and is not based on the subjective beliefs of the person making the statement.

[10] **[11]** **[12]** We review a district court's imposition of Rule 11 sanctions for abuse of discretion. *Schlaifer Nance & Co. v. Estate of Warhol*, 194 F.3d 323, 333 (2d Cir.1999). This deferential standard is applicable to the review of Rule 11 sanctions because, as in many other contexts, the district court is "[f]amiliar with the issues and litigants" and is thus "better situated than the court of appeals to marshal the pertinent facts and apply [a] fact-dependent legal standard." *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 402, 110 S.Ct. 2447, 110 L.Ed.2d 359 (1990). When reviewing Rule 11 sanctions, however, "we nevertheless need to ensure that any [sanctions] decision is made with restraint." *Schlaifer Nance & Co.*, 194 F.3d at 334; *cf. Mackler Prods., Inc. v. Cohen*, 146 F.3d 126, 128 (2d Cir.1998) (noting that one "troublesome aspect of a trial court's power to impose sanctions ... is that the trial court may act as accuser, fact finder and sentencing judge"). "A district court would necessarily abuse its discretion if it based its ruling on an erroneous view of the law or on a clearly erroneous ***388** assessment of the evidence." *Cooter & Gell*, 496 U.S. at 405, 110 S.Ct. 2447; *see also Schlaifer Nance & Co.*, 194 F.3d at 333.

The district court held that Cello and the Sanctioned Counsel violated Rule 11 in three distinct ways: (A) by making unsupported factual contentions and unwarranted denials of factual contentions in violation of Rule 11(b)(3) and (4); (B) by putting forward objectively unreasonable legal arguments and defenses in violation of Rule 11(b)(2);[17] and (C) by submitting its answer for an improper purpose in violation of Rule 11(b)(4). We consider each of the three categories of sanctions in turn, and hold that the district court abused its discretion in all of them.[18]

17 The district court recognized that Cello could not be subject to monetary sanctions for a violation of Rule 11(b)(2). *See* Fed.R.Civ.P. 11(c)(2)(A) & Advisory Comm. Notes to 1993 Amendments.

18 Because we vacate all sanctions, we also vacate the district court's imposition of attorney's fees.

A. Factual contentions and denials

[13] With regard to factual contentions, "sanctions may not be imposed unless a particular allegation is utterly lacking in support." *O'Brien v. Alexander*, 101 F.3d 1479, 1489 (2d Cir.1996) (interpreting the 1993 amendment to Rule 11(b)).

[14] The district court specifically identified eight factual contentions or denials that lacked evidentiary support or that were not warranted on the evidence. Here, we consider them in groups, because, in some instances, the isolation of fragmentary contentions creates the appearance of an unwarranted contention. *Cf. Schlaifer Nance & Co.*, 194 F.3d at 337 (reviewing sanctions imposed under the court's inherent power and under 28 U.S.C. § 1927 and noting that "the facts in their totality belie the conclusion that [plaintiff's] claim lacked a colorable basis"). Although some of the identified factual contentions are more suspect than others, we hold that the district court abused its discretion in imposing sanctions based on these contentions because they are not "utterly lacking in support." *O'Brien*, 101 F.3d at 1489.

1. Reliance on the September 25 Letter in the UDRP proceedings

The district court sanctioned Cello for its representation that "it filed the arbitration proceedings because Storey engaged in a 'new act of cybersquatting.' " *Storey*, 182 F.Supp.2d at 366. Although, as discussed above, the *legal* contention in this statement has more validity than the district court recognized, the district court was understandably troubled by the *factual* contention in this statement. In a letter of April 13, 2001 submitted to the district court, counsel for Cello stated that the September 25 Letter "was the basis for the arbitration," yet neither Cello's answer nor Cello's

UDRP complaint mentions it. In its motion for summary judgment, Cello's counsel likewise contended that "Cello commence[d] its arbitration *predicated* upon" the September 25 Letter. [19] (Def.'s Mem. Supp. Summ. J. at 13) (emphasis added). These representations communicate more than "the subjective reason for the commencement of the arbitration," as ***389** Cello now attempts to construe the statements on appeal; they incorrectly state that the September 25 Letter was a relevant fact in the UDRP Administrative Proceeding.

19 Because essentially the same allegation is contained in Cello's motion for summary judgment, we do not reach the issue whether the April 13 letter qualifies as an "other paper" under Rule 11. *Cf. In re Highgate Equities, Ltd.*, 279 F.3d 148, 153 (2d Cir.2002) (noting that "[c]ourts have been properly reluctant to characterize a letter generally as an 'other paper' on weighing Rule 11 sanctions" (quoting *Legault v. Zambarano*, 105 F.3d 24, 27 (1st Cir.1997))).

[15] Although these statements are highly suspect, they cannot serve as the basis of the sanctions imposed by the district court: Rule 11 contains a notice requirement, and Cello did not receive proper notice of the impending sanctions with regard to these statements. The text of Rule 11 requires that a party's motion initiating the sanctions process "shall describe the specific conduct alleged to violate subdivision (b)." Fed.R.Civ.P. 11(c)(1)(A). Alluding to the due process rights of any person potentially subject to any kind of sanctions, this Circuit has explained that:

> At a minimum, the notice requirement mandates that the subject of a [Rule 11] sanctions motion be informed of: ... [*inter alia*] the specific conduct or omission for which the sanctions are being considered so that the subject of the sanctions motion can prepare a defense. Indeed, only conduct explicitly referred to in the instrument providing notice is sanctionable.

Schlaifer Nance & Co., 194 F.3d at 334 (internal citation omitted). This notice requirement permits the subjects of sanctions motions to confront their accuser and rebut the charges leveled against them in a pointed fashion. Moreover, when Rule 11 sanctions are initiated by the motion of a party, it gives the subject the opportunity to withdraw the potentially offending statements before the sanctions motion is officially filed. *See* Fed.R.Civ.P. Rule 11(c)(1)(A) (providing a "safe harbor" by requiring the motion for sanctions to be served twenty-one days before it can be filed with the court).

Storey's Memorandum in Support of Plaintiff's Motion for Sanctions, the "instrument providing notice" here, references only "a frivolous answer denying the material allegations of the complaint" as the "predicate for the imposition of sanctions under Rule 11." Storey's sanctions motion makes no direct reference to the September 25 Letter, and, as the district court itself noted, there is no mention of the September 25 Letter in Cello's answer. [20] *See Storey*, 182 F.Supp.2d at 359. Accordingly, we conclude that Cello did not receive the requisite notice that sanctions might be imposed because of its contention that the September 25 Letter was the factual predicate of the UDRP Administrative Proceeding.

20 Storey's reply memorandum in support of its motion for sanctions notes that Cello "compounded [its] sanctionable misconduct" in opposing Storey's motion for summary judgment and filing its own cross-motion. Statements first identified in a reply memorandum in support of sanctions, however, usually will not provide the subject of the sanctions motion with sufficient notice, as the subject no longer has the opportunity either to respond or to timely withdraw the statements before the sanctions motion is filed.

2. The scope of the First Action

The district court also sanctioned Cello for its representation in its motion for summary judgment that the First Action addressed only the prior use of "cello.com"; the district court stated that this representation was false because Cello sought prospective relief. *Storey*, 182 F.Supp.2d at 367. Again, however, because this contention was not made in the answer, Rule 11' s notice requirements make it ineligible as a basis for sanctions.

3. Contentions concerning the dismissal order

The district court doubly sanctioned Cello for the following contention in its answer ***390** concerning the August 15, 2000 order dismissing the First Action: "The Order entered by the Court is a matter of public record. The Order was entered pursuant to a settlement agreement, not as a determination on the merits and was without prejudice to the rights of the Defendants herein to assert ownership of the disputed domain name." *Storey*, 182 F.Supp.2d at 366–67.

First, the district court noted that Cello itself argued the opposite when, in its motion for summary judgment, it stated

that "the parties never agreed upon the terms of a settlement." *Id.* at 366. On the same page of the summary judgment motion, however, Cello qualified this statement with the following: "The only agreement, therefore, was to dismiss the First Action which addressed only the prior use of the name." (Def. Mem. Supp. Summ. J. at 3). Furthermore, in the Virginia court proceedings, the parties concurred that at the end of the First Action they had "reached an agreement that [the action] was not going to be pursued any further at that point." Although Cello had sufficient notice to be sanctioned for this statement, its contention that the First Action was dismissed pursuant to an agreement, as tenuous as it is, is not "utterly lacking in support." *O'Brien*, 101 F.3d at 1489.

Second, the district court considered that the contention was factually false because the text of the August 15 order contains the words "with prejudice" and the answer states that the same order was "without prejudice." Here, the district court confused a factual argument with a legal argument. Cello admitted the textual contents of the order as "a matter of public record." As the discussion of the merits above demonstrates, Cello's argument that the judgment in the First Action "was without prejudice to the rights of the Defendants herein to assert ownership of the disputed domain name" is, in a limited fashion, legally accurate. Cello's statement is nothing more than a reformulation of the principle that *res judicata* does not apply to bar the entirety of the current action. Accordingly, this statement is not sanctionable.

4. Objection to the jurisdiction of the UDRP panel

The district court held that Cello's denial in its answer of Storey's assertion that Storey "objected to the jurisdiction of the arbitral panel" was unwarranted on the evidence because Storey's response to Cello's UDRP complaint raised the *res judicata* defense as its first argument. *Storey*, 182 F.Supp.2d at 366. Cello, however, was again making a legal argument, rather than a factual argument concerning the contents of Storey's response papers in the UDRP Administrative Proceeding. Cello was arguing, as it does on appeal in its waiver argument, that Storey's decision to submit papers to the UDRP panel must affect the Instant Action because Storey chose to participate in the proceedings rather than to contest the legal authority of the panel to render a decision. Furthermore, the next sentence in Cello's answer admits precisely the fact the district court believed that Cello was falsely denying: "It is admitted that the [Storey] relied upon the August 15, 2000 Order as a part of his defense" in the UDRP Administrative Proceeding.

5. Nature of the UDRP proceedings

The district court doubly sanctioned the following denial in Cello's answer: "It is denied that the arbitral decision was erroneous. It is denied that an actual case or controversy regarding ownership of the domain name 'cello.com' exists between the parties because the arbitral award is final and binding." The district court concluded ***391** that Cello's denial of an "actual case or controversy" was not warranted by the evidence because Cello itself brought the action in Virginia, indicating it believed that a dispute between the parties existed; the district court also found that Cello's contention that the arbitration award was "final and binding" was factually false. *Storey*, 182 F.Supp.2d at 366–67.

The sanctioned statement is actually a single, non-frivolous legal argument. The contention that there is no "actual case or controversy" between the parties does not necessarily imply that there is no dispute between two parties. Rather, the denial in Cello's answer that there was "an actual case or controversy regarding the ownership of the domain name 'cello.com' " can be read as a short-hand notation for the argument that the district court lacked jurisdiction to review or supersede the UDRP panel's decision on the merits. We read Cello's characterization of the UDRP panel decision as "final and binding" as making the same legal point.

6. Voluntary participation in the UDRP proceedings

Finally, the district court sanctioned Cello for its "assertion that Storey 'voluntarily participated' in the arbitration proceedings to such an extent that he should be deemed to have waived his *res judicata* defense." *Storey*, 182 F.Supp.2d at 367. The district court does not identify the particular pleading or other paper from which it culled this assertion, but we find no mention of Storey's "voluntary participation" in the UDRP proceedings in Cello's answer. Accordingly, to the extent Cello made this representation, we hold that it had insufficient notice as to sanctions concerning this contention. Furthermore, to the extent that this statement is a factual assertion, Storey participated in the UDRP proceedings by submitting an answer, and no allegations of coercion have been made.

B. Legal claims and defenses

[16] Merely incorrect legal statements are not sanctionable under Rule 11(b)(2). Rather sanctionable "legal contentions" must not be "warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of

existing law or the establishment of new law." Fed.R.Civ.P. 11(b)(2).

[17] The district court identified four arguments made by Cello that it believed had no reasonable basis in existing law or fact. *Storey,* 182 F.Supp.2d at 367–69. It concluded that these assertions could not represent nonfrivolous arguments for the establishment of new law because "the legal principles at issue are well settled" and "the facts simply do not support Cello's legal contentions." *Id.* at 367. We hold that the district court abused its discretion in labeling Cello's arguments unwarranted. Although all of Cello's arguments may not ultimately have prevailed, none are patently contrary to existing law, especially as it existed at the time the papers were signed, *see MacDraw, Inc. v. CIT Group Equip. Fin., Inc.,* 73 F.3d 1253, 1260 (2d Cir.1996) (examining the reasonableness of a statement under Rule 11 at the time that it was submitted), nor are they so lacking in merit as to amount to a frivolous argument for the extension of existing law.

1. Storey's Waiver of his* res judicata *argument

As mentioned above, the district court sanctioned Cello for its "assertion that Storey 'voluntarily participated' in the arbitration proceedings to such an extent that he should be deemed to have waived his *res judicata* defense." *Storey,* 182 F.Supp.2d at 367. Notwithstanding that this argument was not in Cello's answer, and that ***392** Cello therefore did not receive proper notice concerning potential sanctions based on this argument, this argument is closely related to other arguments that have been actively litigated in the federal courts over the last two years. Cello argued that because the UDRP proceedings were akin to traditional arbitration proceedings, Storey's decision to file a response in the proceeding, rather than immediately challenge the authority of the arbitration panel, affected Storey's right to argue his case in the federal courts. *Cf. Halley Optical Corp.,* 752 F.Supp. at 639 ("Under 9 U.S.C. § 4, the proper procedure for a party to challenge whether it is subject to an arbitration agreement is to move the district court for a stay of arbitration.") (citations omitted). Since Cello filed its answer, a district court issued an opinion addressing at length whether the Federal Arbitration Act ("FAA") restrictions on judicial review of arbitration awards were applicable to UDRP Paragraph 4 proceedings, *see Parisi,* 139 F.Supp.2d at 749–53, and the Third Circuit reversed a district court which had held that the FAA did apply to judicial review of UDRP proceedings, *see Dluhos,* 321 F.3d at 369–73. Although we concluded above that Cello's arguments do not comport with the UDRP's textual provision for an "independent resolution" of the dispute, the legal principles structuring review of a UDRP panel decision, and their relationship to the law of binding arbitration, were sufficiently unsettled at the time that Cello filed its answer so as to render the district court's decision to sanction the argument an abuse of discretion. This conclusion is further supported by district court's misunderstanding of the relationship between a UDRP proceeding and a registrant's cause of action under § 1114(2)(D)(v) insofar as it held that *res judicata* barred Cello from submitting its complaint to a UDRP panel.

2. The UDRP proceedings were "final and binding"

The district court sanctioned Cello for arguing in its answer that the UDRP panel decision was "final and binding." The same argument just discussed applies here: Cello was arguing that some principles of arbitration law applied to the court's review of a UDRP decision, and such arguments were, especially at the time the answer was filed, not unwarranted given the infancy of the UDRP system and the lack of clear, binding precedent on the issue.

3. Laches and "contractual limitations of actions"

The district court sanctioned Cello because it believed that there was no good faith basis for the answer's assertion of an affirmative defense based on "laches" and "contractual limitations of actions." *See Storey,* 182 F.Supp.2d at 367–68. As discussed above, the sparsity of cases interpreting the UDRP at the time Cello filed its answer makes it difficult to label the simple reservation of an affirmative defense as frivolous.

Additionally, the district court may have misunderstood the complexity of Cello's argument. The district court characterizes Cello's laches argument as unreasonable because documentation from NSI clearly shows that the UDRP Paragraph 4(k) deadline was January 11, 2001, and Storey filed the Instant Action before the deadline on January 10, 2001. Cello's argument, however, was not just that Storey failed to file in time but that Storey failed to do so in a proper forum. The argument that failing to comply with the UDRP Paragraph 4(k) process affected Storey's rights in the Instant Action is weak but it is not objectively unreasonable, again, especially given the lack of judicial interpretation of the UDRP.

393** ***4. Jurisdiction and venue defenses

The district court sanctioned Cello for asserting lack of personal jurisdiction and improper venue as defenses. Because these arguments were not properly raised on appeal, we did not reach them in our review of Cello's jurisdictional objections, but we believe that they are not frivolous. The district court premised its belief that no reasonable basis existed for these defenses on Cello's contacts with New York as a plaintiff in the First Action and on the facts underlying the first action. *See Storey*, 182 F.Supp.2d at 368. Whether a litigant's involvement as a plaintiff in a prior action, or the facts introduced in a prior action, can serve as the basis of personal jurisdiction over that litigant when he is a defendant in a subsequent action, in which the plaintiff's case relies on the *res judicata* effect of the prior action, is a novel issue. We need not resolve it at this time, however, because it is enough for our purposes here to say that the argument is at least non-frivolous.

C. Improper Purpose

Finally, the district court concluded that "Cello acted to harass Storey and to cause both delay and needless increase in the cost of litigation." *Storey*, 182 F.Supp.2d at 369. Although the district court's perception, based on its personal experience with both the First Action and the Instant Action, that "Cello, with substantially greater resources than Storey, sought to wear Storey down," *id.*, may be valid, the district court's conclusion of improper purpose is also clearly predicated on its earlier determinations that Cello's answer was riddled with sanctionable contentions and arguments. *See id.* ("The record includes, as reviewed above, multiple instances of misleading statements and omissions and the assertion of baseless arguments and defenses."). Therefore, because we hold that the district court abused its discretion in its determinations under Rule 11(b)(2)-(4), we arrive at the same conclusion with respect to the district court's sanctions under Rule 11(b)(1). Without objectively unreasonable statements, economic disparity and a greater litigiousness do not alone amount to improper purpose.

CONCLUSION

For the reasons given above, we hold that (1) there is subject matter jurisdiction over Storey's claim against Cello under § 1114(2)(D)(v); (2) the Southern District of New York was an appropriate venue for Storey's claim; (3) Storey did not waive his *res judicata* defense by asserting that defense to the UDRP arbitration panel; (4) the district court erred in focusing on whether *res judicata* barred Cello from bringing the UDRP Arbitration Proceeding; and (5) to the extent the September 25, 2001 letter or other conduct post-dating the First Action amounts to a new claim under the ACPA that did not exist when the First Action was brought, it is not barred by *res judicata* and summary judgment, therefore, was improperly granted on this ground.

Accordingly, we VACATE the judgment of the district court and REMAND for further proceedings under § 1114(2)(D)(v) to determine whether Storey's registration and use of the domain name "cello.com" is lawful under the ACPA or whether Cello's allegations of conduct subsequent to the First Action, the only transactions on which Cello may premise an ACPA claim not barred by *res judicata*, demonstrate that Storey's registration and use of "cello.com" are unlawful.

We also VACATE the Rule 11 sanctions.

Parallel Citations

68 U.S.P.Q.2d 1641