Reconsideration Request Form

Pursuant to Article IV, Section 2 of the Bylaws for the Internet Corporation for Assigned Names and Numbers, Medistry LLC, the applicant for .MED, hereby requests reconsideration of various actions and inactions of ICANN staff related to the Expert Determination in *Alain Pellet v. Medistry LLC*, ICC Case No. EXP/403/ICANN/20 (community objection to .MED) ("*Medistry* Determination").

The Expert in the *Medistry* Determination sustained the objection to Medistry's application despite the fact that the filing of the objection contradicted ICANN policies and procedures, and the objection met none of the required criteria relevant to the merits. Accordingly, the Expert responsible for the *Medistry* Determination "failed to follow the established policies or processes in reaching the expert determination," and, therefore, "ICANN staff failed to follow its policies or processes in accepting that determination."[1]

In particular and at the outset, the Expert failed to enforce the policy requiring at least one comment opposing the application before an objection by the Independent Objector may be lodged or sustained. Because there is not, and never was, such a public comment against Medistry's application, the Expert should have dismissed the objection without ever considering the merits. This clear contradiction of ICANN policy is, by itself, enough to make the *Medistry* Determination invalid, and requires the BGC to grant this Request for Reconsideration.

Additionally, however, the Expert also failed to follow the established policies requiring the objector to bear the burden of proof, and further failed to follow the

[1] *See*, Recommendation of the Board Governance Committee, Reconsideration Request 13-16, p. 6, 8 Jan. 2014, *available at* http://www.icann.org/en/groups/board/governance/reconsideration/determination-sport-08jan14-en.pdf (citing Recommendation of the Board Governance Committee, Reconsideration Request 13-5, p. 4, 1 Aug. 2013, *available at* http://www.icann.org/en/groups/board/governance/reconsideration/recommendation-booking-01aug13-en.pdf).

established policies requiring a clearly delineated community, targeted by .MED, that substantially opposed and would be harmed by its delegation. Instead, the Expert sustained the objection despite the complete lack of proof on any of these four standards.

Sustaining the objection in contradiction to the policies established for such objections also contradicted fundamental ICANN policies requiring fairness, non-discriminatory treatment, neutral application of established policies, and openness, transparency and predictability.

1. Requester Information

Name: Medistry LLC

Address: Contact Information Redacted

Email: Contact Information Redacted

Phone Number (optional):

2. Request for Reconsideration of (check one only):

___ **Board action/inaction**

_**X**_ **Staff action/inaction**

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

Medistry LLC (Medistry) seeks reconsideration of the following actions or inactions of ICANN staff:

1. The action of the Expert in failing to follow ICANN policy requiring that there be a public comment in opposition to an application before an objection by the Independent Objector can be lodged or sustained;[2]
2. The inaction of the Expert in failing to follow ICANN processes by requesting additional evidence or holding a hearing regarding a material fact and thereby

[2] Expert Determination in *Alain Pellet v. Medistry LLC*, ICC Case No. EXP/403/ICANN/20 (community objection to .MED, application ID 1-907-38758), 30 Dec. 2013, ¶¶ 73-74, *available at* http://newgtlds.icann.org/sites/default/files/drsp/10jan14/determination-1-1-907-38758-en.pdf [hereinafter *Medistry* Determination] [Attachment 1]; gTLD Applicant Guidebook, v. 2012-06-04, Module 3.2.5, *available at* http://newgtlds.icann.org/en/applicants/agb/objection-procedures-04jun12-en.pdf [hereinafter Guidebook].

wrongly allowing the Objection against Medistry's application to proceed to a determination on the merits;[3]

3. The actions of the Expert in failing to follow ICANN policies regarding the standards for evaluating an objection on the merits;[4]

4. The action of ICANN staff in, apparently, accepting the *Medistry* Determination despite its violation of ICANN policies, including the policy requiring a pre-existing public comment in opposition to the application before an objection by the Independent Objector can be lodged or sustained;

5. The action of the Independent Objector in failing to follow ICANN policy by filing a community objection without the requisite public comment in opposition, and the inaction of ICANN staff in allowing the invalid objection to proceed;[5]

6. The inaction of the ICC in failing to ensure compliance with ICANN policies and processes by the Expert appointed to decide the *Medistry* Determination; and

7. The inaction of ICANN staff in failing to ensure that the New gTLD Dispute Resolution Process (DRSP) complied with ICANN policies.

Each of these actions and inactions is described in more detail below, in particular in response to questions 8 and 10.

4. Date of action/inaction:

The Expert Determination in *Medistry* is dated 30 December 2013. The Determination was posted to ICANN's New gTLD microsite on 10 January 2014; this posting appears to constitute ICANN's acceptance of the Determination.

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

The ICC notified Medistry of the Expert Determination on 2 January 2014. The decision was posted to ICANN's New gTLD microsite on 10 January 2014.

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

[3] *Medistry* Determination, ¶ 6 [Attachment 1]; Guidebook, Module 3.4.6; New gTLD Dispute Resolution Procedure, Arts. 19-20, *available at* http://newgtlds.icann.org/en/applicants/agb/dispute-resolution-procedure-04jun12-en.pdf [hereinafter Procedure].

[4] *Medistry* Determination [Attachment 1]; Guidebook, Module 3.5.4.

[5] The IO, like the ICC and the other Dispute Resolution Service Providers (DRSPs) for the new gTLD program, is a third party authorized by ICANN to carry out certain actions in compliance with ICANN policy. Accordingly, ICANN's determination that the reconsideration process can properly be invoked for challenges to the actions of the DRSP applies with equal force to challenges to actions of the IO.

The actions and inactions materially affect Medistry because they prevent Medistry from operating the applied-for .MED gTLD.

Medistry has already invested substantial time, effort, and money in applying for the .MED gTLD, including the effort and expense of developing the concept and applying for the gTLD, the $185,000 application fee, the effort and expense of maintaining its application, and the fees associated with responding to objections, including the objection at issue here. These investments will be rendered futile if Medistry's application is improperly rejected.

Moreover, Medistry applied for the new gTLD bound by the Cleveland Clinic's charitable commitment and mission that mandates serving the public to provide community benefit—such benefit encompasses not only regional public health, but expands across the full spectrum of global public health.[6] Improperly rejecting Medistry's application will deprive Medistry of that opportunity.

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

As operated by Medistry, .MED would benefit the global Internet community by establishing a trusted space for reliable health information, and would also benefit medical and health professionals by providing research and education to improve patient treatment. Thus, depriving Medistry of the opportunity to operate .MED also adversely affects the global Internet community, and in particular, medical professionals.

Additionally, ICANN's failure to follow its policies creates unfairness, inconsistency and unpredictability, and thus calls into question the legitimacy of the new

[6] Application Submitted to ICANN by: Medistry LLC for .MED, Application No. 1-907-38758, *public version available at* https://gtldresult.icann.org/application-result/applicationstatus/applicationdetails:downloadapplication/216?t:ac=216 [hereinafter .MED Application] [Attachment 2].

gTLD process. This adversely affects all applicants for new gTLDs.

8. Detail of Board or Staff Action – Required Information

I. MEDISTRY'S APPLICATION FOR .MED

Between 12 January and 30 May 2012, ICANN accepted applications for new generic Top-Level Domains (gTLDs or TLDs). The Cleveland Clinic, a world-class, not-for-profit, multispecialty hospital and academic center, partnered with a management team with experience operating a TLD, and created Medistry LLC to apply for .MED. .MED is intended to be a trusted Internet space that provides reliable health-related information as an extension of the Clinic's commitment to education and communication.

Medistry's .MED application explained these goals and how they would be accomplished.[7] During ICANN's public comment period, only one comment was submitted that related to the substance of Medistry's application. That comment, submitted by the National Association of Boards of Pharmacy (NABP), did not oppose Medistry's application, but merely expressed the opinion that certain safeguards ought to be created in any health-related gTLDs.[8]

Additionally, ICANN's Government Advisory Committee (GAC) formally advised ICANN that it believed statements made in all new gTLD applications should be "be transformed into binding contractual commitments," and further identified specific

[7] .MED Application [Attachment 2].

[8] Public Comment 8u7jazet submitted on behalf of the National Association of Boards of Pharmacy, 9 Aug. 2012, *available at* https://gtldcomment.icann.org/comments-feedback/applicationcomment/commentdetails/5006 [hereinafter "NABP Comment"] [Attachment 3]. The only other comment that referenced Medistry was unrelated to the substance of the application; instead, it commented on a previous business dispute involving one of the company's owners. *See* Public Comment kswu7m9h submitted on behalf of the .JOBS Charter Compliance Coalition, 25 Sept. 2012, *available at* https://gtldcomment.icann.org/comments-feedback/applicationcomment/commentdetails/9238 [Attachment 4]. Neither the IO nor the Expert rely on (or even mention) this comment, nor could this comment be considered opposition to Medistry's .MED application. Moreover, the dispute was resolved before the IO's objection was decided.

proposed gTLDs, including .MED, that should be subjected to additional safeguards.[9] In response, ICANN established a new policy allowing applicants to submit "Public Interest Commitments" (PICs) that would be incorporated in registry agreements to provide additional assurance that application commitments would be binding. Medistry complied, submitting PICs formalizing the commitments in its .MED application. ICANN also established a set of PICs that would be incorporated in the registry agreements for the specific strings identified by the GAC, including .MED.[10] These PICs addressed areas of concern raised in the NABP comments.[11]

II. THE INDEPENDENT OBJECTOR'S COMMUNITY OBJECTION

Seemingly without considering the Cleveland Clinic's plans for .MED, or the global reputation of the Clinic, or the requirement for public opposition to Medistry's application, the Independent Objector (IO) filed an objection arguing that delegating .MED to Medistry would be detrimental to the "medical community."[12] The objection was filed on 12 March 2013.

On 22 May 2013, Medistry filed a response.[13] Among other things, this response demonstrated that the NABP did not, in fact, oppose a .MED gTLD operated by

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[9] GAC Communiqué – Toronto, Canada, 17 October 2012, *available at* https://gacweb.icann.org/download/attachments/27132070/FINAL_Toronto_Communique_20121017.pdf?version=1&modificationDate=1354149148000&api=v2; GAC Communiqué – Beijing, People's Republic of China, 11 April 2013, *available at* https://gacweb.icann.org/download/attachments/27131917/Beijing%20Communique%20april2013_Final.pdf?version=1&modificationDate=1385487299278&api=v2 [hereinafter "Beijing Communiqué"].

[10] *See* Letter from Stephen D. Crocker (Chair, ICANN Board of Directors) to Heather Dryden (Chair, Governmental Advisory Committee), 29 Oct. 2013, *available at* http://www.icann.org/en/news/correspondence/crocker-to-dryden-3-29oct13-en.pdf.

[11] *See* Specification 11: Public Interest Commitments, submitted for .MED by Medistry LLC, *available at* https://gtldresult.icann.org/application-result/applicationstatus/applicationdetails:downloadpicposting/216?t:ac=216 [Attachment 5]; *see also* Applicant's Response to Objection in ICC Case No. EXP/403/ICANN/20, 22 May 2013, p. 10 [hereinafter Response] [Attachment 6].

[12] Community Objection filed by the Independent Objector against .Med (Application ID 1-907-38758), 12 March 2013 [hereinafter Objection] [Attachment 7].

[13] Response [Attachment 6]

Medistry. Additionally, Medistry's response demonstrated that the IO had not met the burden of proof required by ICANN's New gTLD Applicant Guidebook on any of the four factors required to sustain an objection.

On 21 June 2013, the sole member of the Expert Panel was appointed to decide the Objection.[14] The Panel was fully constituted on 31 July 2013.[15]

The IO subsequently requested permission to file an additional written statement. Following additional communications, both the IO and Medistry filed additional statements on 12 and 23 August 2013, respectively.[16]

III. THE EXPERT DETERMINATION

Following the submissions, the Expert determined that no hearing was necessary.[17]

The Expert Determination is dated 30 December 2013 and was transmitted to the parties on 2 January 2014. The Expert summarily concluded that the IO had standing by virtue of his role. The Expert also concluded that the objection met all four standards established by the Guidebook for a community objection.[18]

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[14] *Medistry* Determination, ¶ 5 [Attachment 1].
[15] *Id.*
[16] *See* Additional Statement of the Independent Objector in ICC Case No. EXP/403/ICANN/20, 12 Aug. 2013 [Attachment 8]; Additional Statement of Medistry in ICC Case No. EXP/403/ICANN/20, 23 Aug. 2013 [Attachment 9]
[17] *Medistry* Determination, ¶ 5 [Attachment 1].
[18] *Medistry* Determination [Attachment 1]; Guidebook, Module 3.5.4. The Expert failed to follow ICANN policies in reaching the determination on all four standards. However, for the purposes of this Request for Reconsideration, Medistry focuses on the *Medistry* Determination's discussion of the third and fourth standards. Medistry in no way concedes any arguments related to the Expert's failure to apply ICANN policies regarding the existence of a sufficiently delineated community targeted by the .MED string. In particular, Medistry notes that the Expert himself expressed doubts as to whether it would be possible to determine whether certain entities were included in the community, *see Medistry* Determination, ¶ 51, and that the Expert deciding the Independent Objector's community objection against .HEALTHCARE, which proposed the same defining factors for the community, determined that there was no sufficiently delineated community. *Alain Pellet v. Silver Glen, LLC*, ICC Case No. EXP/405/ICANN/22 (community objection to .HEALTHCARE, application ID 1-1492-32589), 9 January 2014, ¶¶ 60-75, *available at* http://www.iccwbo.org/Data/Documents/Buisness-Services/Dispute-Resolution-Services/Expertise/ICANN-New-gTLD-Dispute-Resolution/EXP_405-ICANN_22_Expert-determination/.

Accordingly, the Expert determined that the objection prevailed and that Medistry's .MED application should be rejected.

9. What are you asking ICANN to do now?

Medistry asks that ICANN overturn or refuse to accept the *Medistry* Determination;[19] conclude that the IO's community objection against Medistry's .MED application did not and cannot meet the required criteria and therefore must be rejected; and allow Medistry's application for .MED to proceed.

Alternatively Medistry asks that ICANN stay any action on the *Medistry* Determination, and:

> Refer the Independent Objector's community objection against Medistry's .MED application back to the Standing Committee of the Centre for appointment of a new Expert Panel for *de novo* review and determination;[20] or
>
> Refer the Independent Objector's community objection against Medistry's .MED application back to an accountability mechanism established by ICANN to deal with incorrect, inconsistent, or otherwise improper determinations by the DRSP bodies; or
>
> Refer the Independent Objector's community objection against Medistry's .MED application to the ICANN Board's New gTLD Program Committee for further evaluation consistent with, *inter alia*, the evidence; ICANN policies, including the Applicant Guidebook; Medistry's Public Interest Commitments; and the ICANN Board's action in response to the GAC's Beijing Communiqué.

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.

Medistry has invested substantial time, effort, and resources in its application for .MED because it wants to create an on-line space that can serve as a valuable source of health information and education. The *Medistry* Determination, if allowed to stand,

[19] Again, Medistry understands that ICANN's posting of the *Medistry* Determination to the New gTLD Microsite constitutes ICANN's acceptance of that determination in accord with the Guidebook's statement that such determinations are "advice that ICANN will accept." Guidebook, Module 3.4.6.

[20] The New gTLD Dispute Resolution Procedures prohibit a rehearing of the objection by the same panelist. *See* Procedures, Art. 13(e).

would unjustly deprive Medistry of the opportunity to create .MED and render Medistry's investment futile, contrary to numerous ICANN policies.

Reconsideration is necessary to prevent these harms and to avoid further violations of ICANN policies. ICANN has determined that:

> the reconsideration process can properly be invoked for challenges to expert determinations rendered by panels formed by third party dispute resolution service providers, such as the ICC, where it can be stated that the Panel failed to follow the established policies or processes in reaching the expert determination, or that staff failed to follow its policies or processes in accepting that determination.[21]

In this instance, the Expert repeatedly failed to follow policies as established in the Guidebook and in ICANN's Bylaws and Articles of Incorporation.

Most importantly, as explained in Section I below, the Expert ignored ICANN policy prohibiting the IO from filing an objection unless there was at least one public comment opposing the relevant application. As there was no such comment opposing Medistry's application, the IO's community objection never should have been filed, let alone sustained, and this Request should be granted on that basis alone. Additionally, as explained in Section II, the Expert did not impose the correct burden of proof on the IO. Indeed, the Expert did not require the IO to provide <u>any</u> proof on the four relevant standards, but instead sustained the objection on nothing more than the IO's unsubstantiated assertions and speculations. Moreover, in deciding the merits, the Expert failed to apply the four standards established by ICANN, but instead interposed his own, entirely made up, standards. As the difference between the standards established by

[21] *See, e.g.*, Recommendation of the Board Governance Committee, Reconsideration Request 13-16, p. 6, 8 Jan. 2014, *available at* http://www.icann.org/en/groups/board/governance/reconsideration/determination-sport-08jan14-en.pdf (citing Recommendation of the Board Governance Committee, Reconsideration Request 13-5, p. 4, 1 Aug. 2013, *available at* http://www.icann.org/en/groups/board/governance/reconsideration/recommendation-booking-01aug13-en.pdf).

ICANN and the standards applied by the Expert is most obvious with regard to the Expert's determinations that there was substantial community opposition and that there was a likelihood of material detriment to a significant portion of the community, the discussion in Sections III and IV focus on those two violations. Finally, Section V demonstrates that failure to follow the specific policies just described results in further contradiction of ICANN policies regarding fairness, nondiscrimination and transparency.

I. THE EXPERT FAILED TO APPLY ICANN POLICY REQUIRING A PUBLIC COMMENT OPPOSING AN APPLICATION

The IO failed to follow ICANN policy by objecting to Medistry's application despite the fact that there was no comment opposing it, and the Expert perpetuated that failure by allowing the IO's invalid objection to proceed to a determination on the merits.

The relevant Guidebook policy requires that:

> In light of the public interest goal [behind the establishment of the IO] the IO shall not object to an application unless at least one comment in opposition to the application is made in the public sphere.[22]

The Expert ignored this policy altogether and instead determined that the IO's objection could proceed simply because of the IO's unique role.[23]

With no comments opposing Medistry's application, the IO never should have filed the objection, and the Expert should have rejected it without any consideration of the merits. As this policy was not followed, the *Medistry* Determination should be considered void, and the BGC should therefore overturn or refuse to accept the Expert Determination, independent of any other consideration.

[22] Guidebook, Module 3.2.5. Regardless of whether this policy is considered to be a requirement for standing, a requirement for admissibility, a condition precedent, or something else, the policy is clear and requires that there be a public comment opposing an application before the IO can file a valid objection. Here, none exists, and therefore the objection should never had been filed and should have been rejected.
[23] *Medistry* Determination, ¶¶ 6, 16 [Attachment 1].

Despite ignoring the fundamental requirement of an opposition comment, in reviewing the merits of the objection, the Expert concluded that a comment from the NABP (merely suggesting safeguards for health-related gTLDS) "expressed opposition against" and showed "resistance to" Medistry's .MED application.[24]

However, as shown by the plain language of the NABP's comment, and as further evidenced by the NABP's recent letter, this conclusion is plainly incorrect. Instead of opposing Medistry's .MED application, the NABP merely advised that "all medical themed gTLDs . . . should have certain safeguard mechanisms . . . in order to ensure patient safety and legitimate use of domain names."[25] NABP's letter unequivocally states:

> In submitting th[e] comment, NABP did not oppose Medistry's application to be the Registry Operator for the .MED TLD, nor take any position as to whether Medistry's .MED application contained appropriate safeguards.[26]

This letter is an explicit statement that the NABP's previous suggestion of safeguards for health-related gTLDs does not constitute, and never constituted, opposition to Medistry's .MED application. This lack of opposition was obvious in the plain language of the NABP's original comment, but, given the Expert's mistake of fact, the NABP has now reiterated its position. Because the NABP's comment did not express opposition to Medistry's .MED application, it cannot have satisfied the condition precedent for the IO's objection, as required by the Guidebook.

Remarkably, the Expert also concluded that the opposition of the American Hospital Association (AHA) to other health-related gTLDs could be considered relevant

[24] *Medistry* Determination, ¶ 74 [Attachment 1].
[25] Letter from Carmen A Catizone (Executive Director/Secretary, NABP) to Joe Turk (Sr. Director, Information Technology, Cleveland Clinic), 10 Jan. 2014 [hereinafter "NABP Letter"] [Attachment 10]; *see also* NABP Comment [Attachment 3].
[26] NABP Letter (emphasis added) [Attachment 10].

to determining opposition the Medistry's .MED, despite the fact that the AHA has provided an explicit statement that it does not, and never did, oppose Medistry's application.[27]

The conclusion that neither the NABP nor the AHA opposed Medistry's application was clear from the information available to the Expert, including Medistry's statements submitted to the Expert explaining why these comments did not represent opposition; but to the extent that the Expert believed it was not clear, the proper procedure was to seek additional evidence or call a hearing.[28] Yet the Expert did neither; accordingly, his failure to correctly apply the required policy cannot be excused, especially considering that it could have been avoided through following the proper processes at his disposal.

This failure to apply the required policy is not only clearly contradictory, unfair and discriminatory, but because it prevents applicants or others from determining in advance what policies will apply, is also contrary to ICANN policies requiring fairness, non-discriminatory treatment, and neutral application of documented policies, including, *inter alia*:

- Module 3.2.5 of the Guidebook, which requires the Independent Objector to act "solely in the best interests of the public who use the global Internet;"
- Section 2.4.4 of the New gTLD Procedures, which require that the dispute resolution process must operate "in the interests of fairness and equivalent treatment for all;"
- Bylaws, Art. 1, § 2(8), which requires ICANN to "mak[e] decisions by applying documented policies neutrally and objectively, with integrity and fairness;
- Bylaws, Art. 2, § 3, requiring ICANN to act in a non-discriminatory manner; and
- Articles of Incorporation, para. 4, requiring ICANN to "operate for the benefit of the Internet community as a whole, carrying out its activities in conformity with

[27] Letter from Melinda Reid Hatton (Senior Vice President & General Counsel, AHA) to Joe Turk (Sr. Director, Information Technology, Cleveland Clinic), 14 Jan. 2014 [hereinafter "AHA Letter"] [Attachment 11].
[28] Procedures, Arts. 18-19.

relevant principles of international law and applicable international conventions and local law."

The Expert's failure to follow ICANN policy requiring a public comment opposing an application before an objection by the IO can be lodged or sustained is, in and of itself, sufficient reason to grant this Request. As there was no comment opposing Medistry's application for .MED, the IO's objection was invalid from the outset, and the *Medistry* Determination sustaining that Objection is likewise invalid and should never have been accepted by ICANN. For that reason alone, ICANN must grant the remedy requested herein.

II. THE EXPERT FAILED TO APPLY ICANN'S BURDEN OF PROOF POLICIES

The Expert Determination is also flawed throughout because it fails to impose the proper burden of proof on the IO. The Guidebook policy, reiterated several times, is that:

- "[t]he objector bears the burden of proof in each case;"[29]
- "the objector must prove" that each of the required tests for an objection have been met;[30] and
- "[t]he Objector bears the burden of proving that its Objection should be sustained in accordance with the applicable standards."[31]

But the Expert failed to impose any requirement that the objector prove the elements of the objection, or even require the objector to provide any evidence. Instead, the Expert relied on nothing more than unsupported and counterfactual assertions, concluding that the IO's allegations were "proof." For example, although Medistry stated that neither the NABP nor the AHA opposed Medistry's application, the Expert clearly did not require the IO to prove such opposition—nor could the IO have proved it, as the

[29] Guidebook, Module 3.5.
[30] *Id.*
[31] Procedures, Art. 20(e).

recent letters clearly demonstrate.[32] Additionally, the Expert determined that, in the absence of conclusive proof that the AHA did not object to Medistry's application, the AHA's objection to other .MED applications could still be evidence of community opposition to Medistry's application. This reasoning reversed the burden of proof, imposing it on Medistry instead of the IO. Moreover, as the comments cited by the Expert were submitted before Medistry agreed to PICs, ICANN policies required the IO to prove that the application, as amended through the PIC processes established by ICANN, was subject to substantial community opposition; instead, the Expert completely disregarded the possibility that the PICs resolved the previous issues.[33]

Another example of the Expert's failure to require proof from the IO is the Expert's conclusion that raising "doubts" as to whether Medistry's .MED application would be operated in the interest of the alleged medical community sufficed to prove the likelihood of harm.[34] Not only does this reverse the burden of proof, but the Expert's "doubts" are based on no evidence outside of the IO's assertions and speculation. The Objector's burden of proof cannot be met if the Objector provides zero evidence.[35]

These examples are indicative of the Expert's treatment of the burden of proof throughout his consideration of the case; on every element where proof was required, the Expert ruled for the IO despite the complete lack of proof. Even if the Expert was unwilling to reject the objection because the IO failed to provide the required proof, the Expert could have sought further information on his own initiative, by, for example,

[32] NABP Letter [Attachment 10], AHA Letter [Attachment 11].
[33] *Medistry* Determination, ¶ 85.
[34] *Medistry* Determination, ¶ 101 [Attachment 1].
[35] For further evidence of the importance of evidence, see New gTLDs Proposed Final Applicant Guidebook: Public Comment Summary, 21 Feb. 2011, *available at* http://archive.icann.org/en/topics/new-gtlds/summary-analysis-proposed-final-guidebook-21feb11-en.pdf.

contacting the NABP or the AHA, or asking Medistry for additional information, or holding a hearing.[36] But the Expert did nothing. As a result, the Expert Determination completely failed to apply the Guidebook policy requiring objectors to prove each element of the objection.

Other applicants for new gTLDs prevailed against objections because the evaluating Expert applied the correct standard of proof. For example, one panel rejected an objection for failure to prove detriment where the allegations of harm were "generalized," not "concrete," and "speculative and basically unsubstantiated."[37] Yet these are precisely the types of allegations sustained by the Expert in the *Medistry* Determination. For an Expert to apply an entirely different standard than the one required by the Guidebook, and for various expert panels to apply differing standards, is not only unfair and discriminatory, but because it prevents applicants or others from determining in advance what standards will apply, is also contrary to ICANN policies requiring transparency, accountability, and neutral application of documented policies.

Thus, in addition to violating the Guidebook policies addressing the burden of proof, the Expert failed to comply with ICANN policies requiring fairness, non-discriminatory treatment, and neutral application of policies, including, *inter alia*:

- Section 2.4.4 of the New gTLD Procedures, which require that the dispute resolution process must operate "in the interests of fairness and equivalent treatment for all;"
- Bylaws, Art. 1, § 2(8), requiring ICANN to "mak[e] decisions by applying documented policies neutrally and objectively, with integrity and fairness;
- Bylaws, Art. 2, § 3, requiring ICANN to act in a non-discriminatory manner; and
- Articles of Incorporation, para. 4, requiring ICANN to "operate for the benefit of

[36] Procedure, Arts. 18-19.
[37] *See, e.g.*, Expert Determination in *Fairsearch.org v. Charleston Road Registry Inc.*, ICC Case No. EXP/493/ICANN/110 (community objection to .FLY, application ID 1-1141-48206), 3 Sept. 2013, ¶ 54, *available at* http://newgtlds.icann.org/sites/default/files/drsp/25sep13/determination-1-1-1141-48206-en.pdf.

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."

III. THE EXPERT FAILED TO APPLY ICANN POLICIES REQUIRING SUBSTANTIAL COMMUNITY OPPOSITION

Guidebook policy unequivocally states that an objector must prove there is:

> substantial opposition to the gTLD application from a significant portion of the community.[38]

Clearly, as the NABP is not and never was opposed to Medistry's .MED application, as confirmed by the recent letter, there is not a scintilla of evidence of any community opposition, let alone "substantial" opposition from "a significant portion of the community."

Both the IO and the Expert rely on comments submitted regarding other health-related applications and various GAC advice to provide "context" demonstrating additional opposition.[39] But, as already noted, the AHA does not oppose Medistry's application, notwithstanding its opposition to other applicants. The AHA's recent letter could not be more clear:

> AHA affirmatively filed Public Comments objecting to HEXAP SAS, DocCheck AG, and Charleston Road Registry related to any of these three entities operating the gTLD string .MED for the reasons outlined in AHA's Public Comments. AHA purposefully did not file a similar Public Comment related to Medistry LLC. Any other interpretation of AHA's Public Comments . . . , and any purported expansion of those Public Comments to apply to any other party[] are mistakes of fact.[40]

As with the NABP letter, this letter is an explicit statement from the AHA, offered to correct the Expert's mistake of fact, that it does not and never has opposed Medistry's

[38] Guidebook, Module 3.2.1.
[39] *Medistry* Determination, ¶¶ 78-80.
[40] AHA Letter [Attachment 11] (emphasis added).

application.

Given that each application is different, even before this letter, there was no basis for assuming that the AHA failed to comment on Medistry's application out of oversight instead of out of a purposeful decision—especially after Medistry informed the Expert of this fact.

Moreover, the Expert's focus on GAC statements as evidence of opposition does not comply with the Guidebook standards because the GAC is not a part of the alleged community. The Guidebook specifically requires opposition come from the targeted community to sustain a community objection.[41] GAC statements are not opposition from the relevant community, and are thus outside of the scope of a community objection.[42]

Leaving aside comments from non-community entities or entities that commented only on other health-related gTLDS, and even ignoring the mistake of fact regarding NABP's and AHA's opposition, the Expert still failed to apply the appropriate policies to determine if there was sufficient community opposition.

Instead, the Expert established his own, entirely made-up standard to determine that the community opposition was so "important" or "of such a basic nature" that it overcame numerical deficiencies.[43] The Expert here concluded that his review of the four required standards was not limited to the factors listed for each in the Guidebook. Even assuming this is correct, the listed factors provide the only guidance as to what the four

[41] Guidebook, Modules 3.2.1, 3.5.4 The language of the Guidebook is clear and unambiguous, reiterating that there must be opposition "from a significant portion of the community," and that the opposition must come from "within the community."

[42] Such statements may be relevant to determinations of objections based on public interest concerns. In this case, the IO also objected to Medistry's .MED application on the basis of public interest, citing as part of the objection the GAC statements. That objection was rejected by the appropriate panel. Expert Determination in *Alain Pellet v. Medistry LLC*, ICC Case No. EXP/414/ICANN/31 (limited public interest objection to .MED, application ID 1-907-38758), 19 Dec. 2013, ¶¶ 73-74, *available at* http:// newgtlds.icann.org/sites/default/files/drsp/10jan14/determination-2-1-907-38758-en.pdf [Attachment 12].

[43] *Medistry* Determination, ¶¶ 71, 78-79, 87 [Attachment 1].

standards mean. Accordingly, the types of factors the Expert may consider must be similar to the types of factors enumerated in the Guidebook; otherwise, the Expert is applying a completely different standard. The Expert is not free to make up whatever standard he or she chooses for determining whether community opposition is substantial. Yet that is what the Expert has done.

Attempting to determine whether there is substantial opposition "from a significant portion of the community" inherently requires determination of the amount of opposition.[44] The Guidebook makes it clear that the types of factors an Expert may consider in this determination relate not to the substance of the opposition, but rather to quantifying the amount of opposition: for example, the number of expressions of opposition, the portion of the community represented by those expressions, and the amount of cost and effort such entities are willing to expend. Even if substantial opposition is not strictly numerical, there must nonetheless be some evidence that a significant portion—for example a particularly representative portion, or a particularly diverse portion—is opposed. The Expert's determination that "substantial" opposition can be determined merely based on the Expert's conclusion that the concerns are particularly "important" if those concerns are not also widely shared is based on considerations wholly outside of the scope of the standard and does not comply with the policies in ICANN's Guidebook.

By comparison, although the Objector in the .HALAL and .ISLAM objections argued that the question of religion was a particularly "sensitive" one—and although it is generally accepted that religious freedom and freedom of expression are particularly important—the Expert did not consider the importance of the opposition expressed in

[44] Guidebook, Module 3.5.4.

determining that there was insufficient opposition from within the community.[45]

As already noted, the failure to apply the required standards is also unfair and discriminatory, and prevents applicants or others from determining in advance what standards will apply, and thus violates, *inter alia*:

- Section 2.4.4 of the New gTLD Procedures, which require that the dispute resolution process must operate "in the interests of fairness and equivalent treatment for all;"
- Bylaws, Art. 1, § 2(8), requiring ICANN to "mak[e] decisions by applying documented policies neutrally and objectively, with integrity and fairness;
- Bylaws, Art. 2, § 3, requiring ICANN to act in a non-discriminatory manner; and
- Articles of Incorporation, para. 4, requiring 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."

IV. THE EXPERT FAILED TO FOLLOW ICANN POLICIES REQUIRING LIKELIHOOD OF COMMUNITY DETRIMENT

ICANN policies require the IO to prove a likelihood of material harm. Instead of inquiring, in any way, whether the alleged harms were likely, the Expert simply asserted that "a low level of likelihood" is sufficient, and then concluded that because the alleged risks "cannot be reasonably denied to exist," no further proof was needed.[46] According to the Expert, any risk that is not "improbable" is sufficient reason to reject Medistry's application. Given that this is the first time that ICANN has engaged in a process that will drastically alter the number of TLDs, it is not improbable that any new gTLD will be detrimental in some sense, as many who are opposed to new gTLDs generally have

[45] Expert Determination in *Telecommunications Regulatory Authority of the United Arab Emirates v. Asia Green IT System Bilgisayar San. ve Tic. Ltd.*, ICC Case No. EXP/430/ICANN/47 (community objection to .ISLAM, application ID 1-2130-23450), 24 Oct. 2013, ¶¶ 85-108, 125, *available at* http://newgtlds.icann.org/sites/default/files/drsp/04nov13/determination-1-1-2131-60793-en.pdf; Expert Determination in *Telecommunications Regulatory Authority of the United Arab Emirates v. Asia Green IT System Bilgisayar San. ve Tic. Ltd.*, ICC Case No. EXP/427/44 (community objection to .HALAL, application ID 1-2131-60793) 24 Oct. 2013, ¶¶ 93-115, 132, *available at* http://newgtlds.icann.org/sites/default/files/drsp/04nov13/determination-1-1-2131-60793-en.pdf.

[46] *Medistry* Determination, ¶ 98 [Attachment 1].

argued. The Expert's analysis therefore deprives this fourth standard of all meaning, and therefore fails to apply the standard established by ICANN. This is supported by the fact that provisions of the Guidebook relating to string similarity specify that likelihood means "probable, not merely possible."[47] There is no reason to conclude that the meaning of "likelihood" varies from one category of objection to another.

Additionally, the Expert utterly failed to consider whether the harm would be "material." His logic, never fully explained, appears to be that if the interests that might be harmed are "important" or "significant," then the harm is material. But important interests may still be subject to non-material harms; by failing to engage in any analysis of the materiality of the harm, the Expert has failed to apply the required standard.

Using these improperly low standards, the Expert simply accepts various unsupported assertions by the IO as "proof" of the likelihood of detriment. And the IO's assertions are not based on any concerns actually expressed by the alleged community—even the NABP comment, the sole comment from the community that addresses Medistry's application, does not address whether a .MED gTLD would cause reputational or economic harm to any community. Nor is there any evidence or analysis—no research, survey, studies, statistics, or even expert opinion—of whether the issues raised by the NAPB, such as misuse of sensitive medical information, would result in any loss of reputation to the community as a whole.

The Expert also accepts, with no evidence, that a .MED gTLD operated without broad community participation will necessarily damage those who are excluded. The medical profession's use of Internet communications simply does not mean that exclusion from one health-related gTLD will interfere with core community activities.

[47] Guidebook, Module 3.5.1.

The IO and the Expert seem to take as a given that exclusion from a particular community-related gTLD is automatically a harm to community members, without any analysis of the likely importance of various gTLDs, the specific policies that could be implemented, or whether the likely existence of multiple health-related gTLDs mitigates any detriment.

Moreover, even if delegating a gTLD to a particular applicant without guaranteed community participation can be considered detrimental, such detriment is clearly not sufficient to sustain an objection. The Guidebook clearly states that "an allegation of detriment that consists only of the applicant being delegated the string instead of the objector will not be sufficient."[48] The same logic holds when the complaint is merely that the string will be delegated to the applicant instead of to "the community."[49]

Other Experts have concluded that mere assertions that, for example, unlicensed or fraudulent activity may occur in the applied-for gTLD, is not evidence that community members will be harmed "simply because of the possibility that [bad] operators may register under the same gTLD."[50]

Yet again, the failure to apply the required standards is also unfair and discriminatory, and prevents applicants or others from determining in advance what standards will apply, and thus violates, *inter alia*:

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[48] *Id.*, Module 3.5.4; *see also* New gTLD Draft Applicant Guidebook Version 4: Public Comment Summary and Analysis, 12 Nov. 2010, p. 10, *available at* http://archive.icann.org/en/topics/new-gtlds/summary-analysis-agv4-12nov10-en.pdf.

[49] *See, e.g.*, Expert Determination in *The International Lesbian Gay Bisexual Trans and Intersex Association v. United TLD Holdco* (community objection to .GAY, application ID 1-1039-47682), ICC Case No. EXP/394/ICANN/11, ¶ 23, *available at* http://newgtlds.icann.org/sites/default/files/drsp/25nov13/determination-1-1-1039-47682-en.pdf.

[50] Expert Determination in *European State Lotteries and Toto Association v. Affilias Ltd* (community objection to .LOTTO, application ID 1-868-7904), ICC Case No. EXP/422/ICANN/39, ¶ 9.17, *available at* http://newgtlds.icann.org/sites/default/files/drsp/16dec13/determination-1-1-868-7904-en.pdf.

- Section 2.4.4 of the New gTLD Procedures, which require that the dispute resolution process must operate "in the interests of fairness and equivalent treatment for all;"
- Bylaws, Art. 1, § 2(8), requiring ICANN to "mak[e] decisions by applying documented policies neutrally and objectively, with integrity and fairness;
- Bylaws, Art. 2, § 3, requiring ICANN to act in a non-discriminatory manner; and
- Articles of Incorporation, para. 4, requiring 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."

V. ICANN'S FAILURE TO ENSURE CONSISTENT AND FAIR EXPERT DETERMINATIONS VIOLATES ICANN POLICIES

As the above demonstrates, the failure of Expert Panels to follow the policies and procedures established by ICANN have resulted in repeated inconsistencies, subjecting applicants to different standards resulting in unpredictable decisions.

In this particular instance, the inconsistency results in an outcome that is completely opposite to ICANN policies that were enacted in an effort to protect communities potentially affected by new gTLDs. Three applications were submitted for .MED; because two objections were sustained (by the same Expert) on the basis of community detriment, the third .MED application will be delegated without any ICANN review of whether that application sufficiently serves the community. Although the remaining .MED application is a community-based application, that designation is not proof that the applied-for gTLD will serve or benefit the community; that question would not even be addressed until the community priority evaluation. But if there are no other applications, then the remaining application will never be subjected to community evaluation. This result is inconsistent—one gTLD will be delegated by default, with no review of its community policies, whereas others will have been rejected based on just

such a review.[51]

This general, and significant, problem of inconsistency and unpredictability has repeatedly been raised with ICANN. For instance, in November 2013, a number of new gTLD applicants informed ICANN that the Guidebook standards were being incorrectly applied in community objections, noting it was likely that "community objectors will unfairly prevail over applicants who applied as standard applicants in good faith."[52]

Likewise, both ICANN's GNSO and the BGC itself have expressed its concern with "apparent inconsistencies with existing policy" and proposed investigating the matter in more detail.[53]

Yet ICANN has thus far refused to review these inconsistent decisions on the basis that if the "correct procedure" was followed, the outcome should not be questioned. But ICANN's attempt to avoid responsibility for compliance with its substantive policies is, in itself, an impermissible abdication of its responsibilities under its Bylaws and Articles of Incorporation to ensure fairness, non-discrimination, and neutral application of its policies. ICANN cannot allow third parties to which it has delegated authority to continually violate ICANN policies and then disavow any responsibility for remedying the process. That's not how ICANN was structured to work by the community. In fact, that turns the entire ICANN experiment on its head, ensuring increased criticism and

[51] Although it may not be the role of an Expert in a particular case to evaluate the inconsistencies that result from such situations, the fact that such inconsistencies have occurred and ICANN has not reconciled them is not consistent with ICANN's policies, Bylaws and Articles of Incorporation.

[52] Letter from Shweta Sahjwani *et al* to Cherine Chalaby (Chair, ICANN Board NGPC) *et al*, 1 Nov. 2013, *available at* http://www.icann.org/en/news/correspondence/sahjwani-et-al-to-chalaby-et-al-01nov13-en. This is the very situation that may arise with regard to the various .MED applications.

[53] Letter from Jonathan Robinson (Chair, ICANN GNSO Council) to Steve Crocker (Chair, ICANN Board) and Cherine Chalaby (Chair, ICANN Board NGPC), 18 Sept. 2013, *available at* http://gnso.icann.org/en/correspondence/robinson-to-crocker-chalaby-18sep13-en.pdf; Recommendation of the Board Governance Committee, Reconsideration Request 13-10, p.11, 10 Oct. 2013, *available at* http://www.icann.org/en/groups/board/governance/reconsideration/recommendation-commercial-connect-10oct13-en.pdf.

delegitimizing the entire organization.

In this regard, it can be said that both ICANN and the ICC have failed to take the necessary measures to ensure that ICANN policies are followed, whether by failing to ensure the IO's objections complied with ICANN policies, failing to properly train and educate Experts regarding the applicable policies, failing to exercise oversight of Expert Panels to ensure consistency and fairness, or failing to establish a methodology for applicants or others to remedy incorrect decisions.

Thus, in addition to the substantive failures described above, ICANN's failure to remedy the incorrect and inconsistent decisions is a clear violation of policies requiring ICANN to act fairly, transparently, and in a non-discriminatory manner, including:

- Section 2.4.4 of the New gTLD Procedures, which require that the dispute resolution process must operate "in the interests of fairness and equivalent treatment for all;"
- Bylaws, Art. 1, § 2(8), requiring ICANN to "mak[e] decisions by applying documented policies neutrally and objectively, with integrity and fairness.
- Bylaws, Art. 1, § 2(10), requiring ICANN to "[r]emain[] accountable to the Internet community through mechanisms that enhance ICANN's effectiveness."
- Bylaws, Art. 2, § 3, requiring ICANN to act in a non-discriminatory manner.
- Bylaws, Art. 3, § 1, requiring ICANN to "operate to the maximum extent feasible in an open and transparent manner and consistent with procedures designed to ensure fairness."
- Articles of Incorporation, para. 4, requiring 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 . . . through open and transparent processes that enable competition and open entry in Internet-related markets."

For all of these reasons, Medistry requests the relief specified above.

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

____ Yes

_**X**__ No

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? Explain.

N/A

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

Yes; see attached.

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.

__/Brian Johnson/_____ _17 Jan 2014_____

Signature Date

ATTACHMENTS

Attachment 1	Expert Determination in *Alain Pellet v. Medistry LLC*, ICC Case No. EXP/403/ICANN/20 (community objection to .MED, application ID 1-907-38758), 30 December 2013
Attachment 2	Application Submitted to ICANN by Medistry LLC for .MED, Application No. 1-907-38758 (public version)
Attachment 3	Public Comment 8u7jazet submitted on behalf of the National Association of Boards of Pharmacy, 9 Aug. 2012
Attachment 4	Public Comment kswu7m9h submitted on behalf of the .JOBS Charter Compliance Coalition, 25 Sept. 2012
Attachment 5	Specification 11: Public Interest Commitments, submitted for .MED by Medistry LLC
Attachment 6	Applicant's Response to Objection in ICC Case No. EXP/403/ICANN/20 (community objection to .MED, application ID 1-907-38758), 22 May 2013
Attachment 7	Community Objection filed by the Independent Objector against .Med (application ID 1-907-38758), 12 March 2013
Attachment 8	Additional Statement of the Independent Objector in ICC Case No. EXP/403/ICANN/20, 12 August 2013
Attachment 9	Additional Statement of Medistry in ICC Case No. EXP/403/ICANN/20, 23 August 2013
Attachment 10	Letter from Carmen A Catizone (Executive Director/Secretary, NABP) to Joe Turk (Sr. Director, Information Technology, Cleveland Clinic), 10 Jan. 2014
Attachment 11	Letter from Melinda Reid Hatton (Senior Vice President & General Counsel, AHA) to Joe Turk (Sr. Director, Information Technology, Cleveland Clinic), 14 Jan. 2014
Attachment 12	Expert Determination in *Alain Pellet v. Medistry LLC*, ICC Case No. EXP/414/ICANN/31 (limited public interest objection to .MED, application ID 1-907-38758), 19 Dec. 2013