

February 14, 2014

Dear ICANN Board Governance Committee Representatives:

I write on behalf of Kosher Marketing Assets LLC (“KMA”) with respect to pending Reconsideration Request Number 14-4 concerning the recent International Chamber of Commerce (“ICC”) Expert Determination in *Union of Orthodox Jewish Congregations of America vs. Kosher Marketing Assets LLC*, EXP/424/ICANN/41 (Jan. 14, 2014). For the reasons enumerated below, KMA respectfully requests that the Board Governance Committee reject Reconsideration Request Number 14-4.

## **Introduction**

KMA is the sole applicant for the .KOSHER new gTLD string. In opposition to that application, the Union of Orthodox Jewish Congregations of America (“OU”) filed a formal community objection against KMA. On January 14, 2014, the ICC Expert Panelist ruled in favor of KMA and dismissed the same objection filed by the OU.

Undeterred, the OU has filed the instant Reconsideration Request, demanding that ICANN refuse to accept the Expert Panel determination. Their request is premised on two flawed arguments. First, in weighing community objections, the OU insists ICC Expert Panelists and ICANN rely solely on content within the four corners of each new gTLD application, thus ignoring clarifying statements by applicants and the import of public interest commitments added by ICANN and contained within Specification Eleven. Second, despite the best efforts of ICANN in crafting and mandating Specification Eleven, the OU plainly denies that it is sufficient, particularly in conjunction with the Public Interest Commitment Dispute Resolution Procedure (“PICDRP”), to instill openness and nondiscrimination within the new gTLD program.

Both positions are without merit and display a misguided understanding with respect to the community objection process and Specification Eleven at best, and a distrust and disregard for the new gTLD program at worst. First, there are simply no policies in the new gTLD program that limit the facts that Expert Panelists may consider. To the contrary, considerations are permissive in that an expert panel “may refer to and base its findings upon the statement and documents submitted and any rules or principles that it determines to be applicable.” See New gTLD Dispute Resolution Procedure Art. 20(b). Second, Specification Eleven was crafted by ICANN to function for its clearly stated purposes, namely *inter alia* so that registries operate “in a transparent manner consistent with general principles of openness and non-discrimination

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by establishing, publishing and adhering to clear registration policies,” and to prohibit exclusive eligibility criteria for generic strings. See Registry Agreement, Specification Eleven, ¶¶ 3(c) and 3(d) (November 20, 2013).

## ***Clarifying Statements Made By KMA Were Properly Considered By The Expert Panel.***

The OU exhibits a mistaken comprehension of the community objection process in its attempts to condemn the Expert Panel and ICANN for properly considering “statements made [by KMA] in the objection proceeding,” and correctly concluding that the Specification Eleven and the PICDRP “provide a forum for enforcing Applicant statements in an adversarial proceeding.” According to the OU, in an inexplicable interpretation of the Dispute Resolution Procedure, community objection proceedings and KMA’s averments were “non-public” and somehow also non-binding. See Reconsideration Request § 9, pp. 17-20.

First, there are simply no policies restricting an Expert Panel’s ability to consider additional principles or statements outside the four corners of each new gTLD application. To the contrary, the Guidebook is clear that the Expert Panel “may refer to and base its findings upon the statement and documents submitted and any rules or principles that it determines to be applicable.” See New gTLD Dispute Resolution Procedure Art. 20(b). The OU’s claim is baseless, which is evident from its failure to cite even a shred of support for such a limitation.

The clarifying statements made by KMA, to which the OU so strongly objects, in the Expert Panel’s own words, were simply that “responsibility for verification will lie with the prospective registrant’s own kosher certification organization,” thus vitiating the OU’s unfounded assertion that “only [KMA] will verify eligibility and will be able to determine arbitrarily what registrants will have access to .KOSHER domains.” See *OU vs. KMA*, EXP/424/ICANN/41 at ¶¶ 78-79 (Jan. 14, 2014). The Expert Panel concludes that “[t]he assurances given on behalf of [KMA] in these proceedings appear convincing and made in good faith.” “More importantly,” the Panel continued, “they have been given in the context of adversarial proceedings, the outcome of which will be public, in response to specific concerns of the [OU] and with a view to achieving rejection of the Objection,” thus “prevent[ing KMA] from renege[ing] on the assurances given in these proceedings.” *Id.* at ¶ 87.

Second, phrases used by the OU in its Reconsideration Request, such as “non-public” and “non-binding”, are utter mischaracterizations of the community objection process. See Reconsideration Request § 9, pp. 17-20. The ICC Rules for Expertise simply impose a confidentiality obligation on the Expert Panelist. Even the OU cannot avoid conceding that the Expert Panel’s “recitation of [KMA] assurances in the expert determination” are indeed public. See *id.* at § 9, note 39, p. 19. The Expert Panel determination in *OU vs. KMA* was published by

both the ICC and ICANN and remains publicly available pursuant to the Guidebook. See Dispute Resolution Procedure Art. 21(g). Ironically, the desperate attempt by the OU to distinguish between KMA's verbatim assurances and the Expert Panel's recitation is belied by its own reliance on the same in their Reconsideration Request.

Finally, the Expert Panel correctly based its finding that the .KOSHER new gTLD application created no "likelihood of material detriment" on both KMA's new gTLD application and KMA's clarifying statements to the Expert Panel. Moreover, in a telling misrepresentation by omission, the OU neglected to include in its Reconsideration Request the Expert Panel's ruling that KMA's "intention to use the TLD in an improper manner is not even proven by the statements in the application." See *OU vs. KMA, EXP/424/ICANN/41* at ¶ 79 (Jan. 14, 2014). Thus, contrary to the OU's assertions, the Expert Panel determination was based on both the .KOSHER new gTLD application, as well as KMA's clarifying statements.

***Specification Eleven Provides Adequate Safeguards Against The Material Detriment Alleged, Namely Discrimination.***

The OU again exhibits - its erroneous comprehension regarding Specification Eleven in conjunction with the PICDRP, essentially appealing its failed arguments to the Board Governance Committee—arguments which the Expert Panel has already explicitly rejected. Indeed, although clearly irrational, the OU appears to demand that the Board Governance Committee admit that Specification Eleven is not fit to task in obliging registries to operate in a transparent manner consistent with general principles of openness and non-discrimination by establishing, publishing and adhering to clear registration policies, as well as prohibiting exclusive eligibility criteria for generic strings.

Astounded by the OU's mental gymnastics, the Expert Panelist stated, "The Expert cannot accept the [OU] argument that openness and non-discrimination obligations laid down in [Article 3(c)] would not prevent [KMA] from resorting to restrictive criteria, if it applied them openly and even-handedly." "That argument," the Expert Panel concluded, "presupposes an interpretation of Article 3(c) that would render it completely meaningless and is therefore untenable." *Id.* at ¶ 83. This OU argument failed to befuddle the Expert Panel. And this attempt to re-litigate the identical issue before the Board Governance Committee is simply inappropriate.

Moreover, OU reliance on the GAC Buenos Aires Communiqué is disingenuous and deceitful. Contrary to OU allegations that the Communiqué "voiced concern" regarding "the very limited nature of the language" in Specification Eleven (Reconsideration Request § 9, p. 21), the plain language of the letter requests a briefing on "whether the Board considers that the existing PIC

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specifications (including 3c) [to] fully implements [its] advice.” See GAC, Buenos Aires Communiqué at ¶III(1)(a)(i)(1) (November 20, 2013). The letter is devoid any specific “concern” or reference to “very limited” language, as suggested in the Reconsideration Request. Truly, the OU is likely conflating the Buenos Aires Communiqué with its own lobbying efforts, which have only attempted to create disinformation and ambiguity regarding Specification Eleven. See Letter from Lawrence E. Strickling to Dr. Stephen D. Crocker (February 4, 2014) (“Stakeholders have raised concerns with us about the lack of clarity on the status of this issue ... e.g. .kosher”).

ICANN has confirmed, and the KMA concurs, that the existing PIC Specification fully implements the GAC’s Beijing advice on restricted access registries when considered in conjunction with the other protections in the New gTLD Registry Agreement. See Letter from Dr. Stephen D. Crocker to Heather Dryden (February 10, 2014).

## **Conclusion**

At best, the arguments presented in Reconsideration Request 14-4 exhibit a flawed comprehension regarding the new gTLD program. At worst, they exhibit a distrust of ICANN and a disdain for the new gTLD program and the .KOSHER new gTLD application.

KMA is simply working in good faith to serve the Orthodox Kosher community—attempting navigate an evolving new gTLD program and the difficult balance between a TLD that is open to all possible uses of the term KOSHER versus a TLD with unduly restrictive eligibility criteria, arriving at a TLD that appropriately represents, incorporates and benefits the Orthodox Kosher certification industry. The OU has repeatedly and shamelessly sought to attack and twist the language in KMA’s new gTLD application—language which articulately reflects that natural tension. This includes words and phrases like “personally visited,” “customers of OK,” “rigorous certification,” and “closely affiliated organizations.” In short, KMA provided clarifying statements and established its good faith intent to the satisfaction of the community objection Expert Panel. However, the OU, relentless in its misguided efforts, now seeks to re-litigate the merits of that just determination.

KMA remains happy and more than willing to resolve any problems ICANN sees in the .KOSHER gTLD application via an application amendment or even a new public interest commitment. However, KMA has remained reluctant to undertake any such modifications absent a settlement agreement in place with the OU. KMA has already repeatedly offered in good faith to file a new public interest commitment, in connection with a settlement addressing the OU’s apparent concerns, but the OU has rejected all offers outright. In the Expert Panel’s words, “[KMA’s] intention to take the broader interests of the community into consideration is

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borne out by its offers to cooperate with the [OU] in the operation of the domain and give to them an equal partnership.” See *OU vs. KMA*, EXP/424/ICANN/41 at ¶ 81 (Jan. 14, 2014). Regrettably, KMA fears there may be no possibility for any agreeable application amendments or public interest commitments, given repeated OU contentions regarding their “strong belief that the .KOSHER gTLD should not be owned by any entity,” and “.KOSHER should ideally not exist[.]” See Email from Rabbis Moshe Elefant and Sholem Fishbane to Menachem Levy (10 April 2013); see also Letter from Rabbi Moshe Elefant et al., Solicitation To Join the OU's Objection (undated) (annexed hereto).

In conclusion, for the foregoing reasons, KMA respectfully requests that the Board Governance Committee reject Reconsideration Request Number 14-4.

Respectfully,

Signature: /s/ Brian J. Winterfeldt

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