Resp. Ex. 1

INTERNATIONAL CENTRE FOR DISPUTE RESOLUTION

INDEPENDENT REVIEW PROCESS
Case No. 01-14-0000-9604

MERCK KGaA
(Claimant)

-v-

Internet Corporation for Assigned Names and Numbers
(Respondent)

FINAL DECLARATION OF THE INDEPENDENT REVIEW PROCESS PANEL

Section I – Procedural History

1. The Claimant, Merck KGaA ("Merck"), of Frankfurter Straße 250 64293 Darmstadt, Germany, is represented in this matter by Bettinger Schneider Schramm, Cuvilliesstraße 14, 81679 Munich, Germany.

2. The Respondent, Internet Corporation for Assigned Names and Numbers ("ICANN"), of Suite 300 12025 E. Waterfront Dr., Los Angeles, CA 90094, USA, is represented in this matter by Jones Day, 555 South Flower Street Fiftieth Floor Los Angeles, CA 90071, USA.

3. A Notice of Independent Review dated July 17, 2014 was filed by Merck with the International Centre for Dispute Resolution, together with its Request.

4. ICANN filed its Response on August 29, 2014.

5. The Panel held a preliminary hearing call on April 1, 2015 and issued the following direction by email thereafter:

> ***Merck KGaA V. ICANN - Case 01-14-0000-9604***
>
> *The Preliminary Hearing Call in this matter took place at 9am, Pacific Time, on April 1, 2015, and was duly notified and convened. Counsel (Bettinger, with Gray, for Merck KGaA; LeVee for ICANN) for both parties made observations on the procedure to be adopted in this Independent Review Process. At the conclusion of the Preliminary Hearing Call the parties were asked whether there was anything further they wished to raise, and the answer from each side was no.*
>
> *The Panel (Dinwoodie, Matz, and Reichert) now, bearing these observations in mind together with the materials already filed by the parties to date,* ***issues the following directions****:*
>
> *1. Merck KGaA shall file its Reply Submission on May 20, 2015.*
>
> *2. ICANN shall file its Rejoinder Submission on July 8, 2015.*
>
> *3. A page limit of 20 pages applies to both Submissions (the page limit does not apply to matters such as tables of contents).*

4. The Submissions should only attach any additional evidentiary exhibit which is strictly necessary for the purpose of reply/rejoinder. Also, the parties must focus their Submissions on matters which are strictly for the purposes of reply/rejoinder, and not seek to reformulate the case as already presented.

5. If there is any dispute as to acronyms or other defined terms, the Submissions should clearly flag these in order that there is no misunderstanding.

6. As soon as possible after July 8, 2015, the Panel will communicate with the parties as to the next stages of this Independent Review Process.

As noted on the Preliminary Hearing Call by the ICDR representative, communications will now take place directly between the Panel and the parties, with a copy at all times to the ICDR.

For and on behalf of the Panel.

Klaus Reichert SC

6. On May 20, 2015, Merck filed its Reply.

7. On July 9, 2015, ICANN filed its Rejoinder.

8. On July 12, 2015, the Panel issued the following direction by email:

Dear Counsel,

The Panel has considered the submissions received.

Having considered the submissions made to date, do the parties wish to have an oral hearing? If the answer from a party is yes, we would like to know the likely duration of such a hearing, and whether there is a preference for it to be conducted in person, or by telephone.

Once we have received your responses to the foregoing we will consider the future conduct of this matter and revert to the parties.

We do not set a particular deadline for your responses, rather we ask that you reply as soon as possible.

Klaus Reichert

9. On July 14, 2015, ICANN indicated that it believed that a hearing by telephone would be useful.

10. On July 21, 2015, Merck indicated that a hearing would be unnecessary.

11. On July 21, 2015, the Panel issued the following direction by email:

> *Dear Counsel,*
>
> *Noting Article 4 of the Supplementary Procedures for Internet Corporation for Assigned Names and Numbers (ICANN) Independent Review Process ("the Procedures"), the Panel has determined that a telephone hearing will not be necessary.*
>
> *Noting Article 11 of the Procedures, we invite each side to submit their respective claims for costs by July 29, 2015. Thereafter an opportunity will be afforded to each side to comment on the claim for costs of the other.*
>
> *Klaus Reichert*

12. On July 28, 2015, Merck stated that ICANN should be held responsible for (a) the fees and expenses of the panelists, and, (b) the fees and expenses of the administrator, the ICDR.

13. On July 28, 2015, ICANN stated that Merck should be held responsible for costs (identifying the same headings as those identified by Merck).

14. On July 28, 2015, the Panel issued the following direction by email:

> *Dear Parties,*
>
> *Thank you both for your letters on costs.*
>
> *We now ask each side for any final observations they might wish to make on costs in light of the letters received today. The deadline is 4 August 2015.*
>
> *Klaus Reichert*

15. On July 31, 2015, Merck stated that it had no comment on ICANN's letter regarding costs. ICANN did not make any final observations on costs.

Section II – The Panel's Authority

16. The Panel's authority and mandate is as follows (from Article IV, Section 3.4 of ICANN's Articles of Incorporation and Bylaws):

> *Requests for such independent review shall be referred to an Independent Review Process Panel ("IRP Panel"), which shall be charged with comparing contested actions of the Board to the Articles of Incorporation and Bylaws, and with declaring whether the Board has acted consistently with the provisions of those Articles of Incorporation and Bylaws. The IRP Panel must apply a defined standard of review to the IRP request, focusing on:*
>
> *a did the Board act without conflict of interest in taking its decision?;*
> *b did the Board exercise due diligence and care in having a reasonable amount of facts in front of them?; and*
> *c did the Board members exercise independent judgment in taking the decision, believed to be in the best interests of the company?*

17. The analysis which the Panel is mandated to undertake is one of comparison. More particularly, a contested action [1] of the Board is compared to the Articles of Incorporation and Bylaws in order to ascertain whether there is consistency. The analysis required for a comparison exercise requires careful assessment of the action itself, rather than its characterization by either the complainant or ICANN. The Panel, of course, does take careful note of the characterizations that are advanced by the Claimant and ICANN.

18. As regards the substantive object of the comparison exercise, namely, whether there was consistency as between the action and the Articles of Incorporation and Bylaws, the parameters of the evaluation for consistency are informed by the final part of Article IV, Section 3.4, which is explicit

[1] The Panel is of the view that inaction, depending upon the circumstances, may constitute an action within the meaning of Article IV, Section 3.4.

in focusing on three specific elements. The phrase "defined standard of review" undoubtedly relates to the exercise of comparison for consistency, and informs the meaning of the word "consistent" as used in Article IV, Section 3.4. The mandatory focus on the three elements (a-c) further informs the exercise of comparison.

19. The parties dwell in various ways on whether the Panel's approach is deferential or *de novo*. The Panel does not find this debate to be of assistance as it diverts attention from the precise parameters of its authority, namely, to do exactly what it is mandated to do by Article IV, Section 3.4.

20. Nothing in the language of Article IV, Section 3.4, suggests that there be any deference afforded to the contested action. Either the action was consistent with the Articles of Incorporation and Bylaws, or it was not.

21. Discussion as regards whether the Panel should engage in a *de novo* standard of review is also apt to mislead. However, it is clear that the Panel may not substitute its own view of the merits of the underlying dispute.

22. In summary, the Independent Review Process is a bespoke process, precisely circumscribed. The precise language used in Article IV, Section 3.4 requires the party seeking to contest an action of the Board to identify exactly such action, and also identify exactly how such action is not consistent with the Articles of Incorporation and Bylaws. Thus, a panel is required to consider only the precise actions contested. Such a contesting party also bears the burden of persuasion.

Section III – Analysis

23. The **first contested action**, as characterized and raised by Merck in paragraph 46 of the Request is:

> *The ICANN Board has accepted three expert determinations which suffer from palpable mistakes and manifest disregard of its own LRO standards, without due diligence and care to prevent the acceptance of such determinations, resulting in fundamental unfairness and a failure of due process for the Claimant.*

24. Merck says that this is a violation of ICANN's Articles of Incorporation and Bylaws, Article I, Section 2.8, which provide as follows:

> *In performing its mission, the following core values should guide the decisions and actions of ICANN..... 8. Making decisions by applying documented policies neutrally and objectively, with integrity and fairness.*

25. The Panel will first describe, based on its appreciation of the materials put before it, the background leading up to the initiation of this Independent Review Process.

26. Merck is a long-established pharmaceutical and chemical business in Germany. In 1917 its then American business (now Merck & Co., Inc. ("MSD")) was separated from it by the Trading with the Enemy Act arising from the entry of the United States as a belligerent into World War I. The co-existence of Merck and MSD has been the subject of a number of formal agreements over the years, and also a number of disputes.

27. Merck and MSD each filed applications with ICANN for new gTLDs incorporating the word "Merck". As a result, Merck and MSD then filed a number of Legal Rights Objections ("LROs") against each other with the WIPO Arbitration and Mediation Centre in accordance with the New gTLD Dispute Resolution Procedure. At the heart of Merck's complaint was the point that MSD apparently was not intending to limit, through

geo-targeting, the potential global reach of its applied-for domains. In contrast, Merck made explicit its intention to use geo-targeting.

28. By Determinations issued in July and September 2013, the Sole Panel Expert rejected the LROs. The following extract from LRO2013-0068 is reflective of the reasoning common to all:

> *The starting point of this case is that Objector and Applicant are both bona fide users of the MERCK trademark, albeit for different territories.*
>
> *The question is whether a bona fide trademark owner that owns trademark rights in certain countries but does not have rights to a certain trademark in all countries of the world, should for that reason be prevented from obtaining a gTLD. In the view of the Panel, such a proposition does not make sense. If the opposite view would be accepted, it would be expected from any trademark owner interested in a gTLD to have trademark registrations in all countries of the world as otherwise another party could register one trademark in an "uncovered" country and thus prevent the first trademark owner from applying for and using its own gTLD.*
>
> *In essence there should not be a significant difference between the criteria for the legal rights objection as included in the Guidebook on the one hand and the provisions included in the Uniform Domain Name Dispute Resolution Policy ("UDRP"). If the applicant for a new gTLD is bona fide, it will not be likely that one of the three criteria will be met. It might be that advantage of the distinctive character or the reputation of the objector's registered trademark is taken, but it is then likely not unfair. It might be that the distinctive character or reputation of the objector's registered trademark is being impaired, but it is likely justified. It might be that a likelihood of confusion between the Disputed gTLD String and the objector's mark is created, but it is not necessarily impermissible.*
>
> *Of course a rejection of the Objection does not preclude Objector from taking regular legal action should the use of the Disputed gTLD String by Applicant be infringing. It is, however, not for this Panel to anticipate on all the possible types of use Applicant could make of the Disputed gTLD.*
>
> *It is also not for this Panel to interpret the existing coexistence agreements and arrangements between the Parties. Should the application of a new gTLD allegedly violate any such agreement or arrangement, it will be for the Parties to settle their dispute by means of the dispute resolution provisions of the contracts governing their relationship or as provided under applicable law.*

For the aforementioned reasons the Panel rejects the Objection.

In reaching the above conclusion, the Panel has considered the following non-exclusive list of eight factors.

The Panel addresses each of them in turn:

i. Whether the applied-for gTLD is identical or similar, including in appearance, phonetic sound, or meaning, to Objector's existing mark.

[Sole Panel Expert analysis follows]

ii. Whether Objector's acquisition and use of rights in the mark has been bona fide.

[Sole Panel Expert analysis follows]

iii. Whether and to what extent there is recognition in the relevant sector of the public of the sign corresponding to the gTLD, as the mark of Objector, of Applicant or of a third party.

[Sole Panel Expert analysis follows]

iv. Applicant's intent in applying for the gTLD, including whether Applicant, at the time of application for the gTLD, had knowledge of Objector's mark, or could not have reasonably been unaware of that mark, and including whether Applicant has engaged in a pattern of conduct whereby it applied for or operates TLDs or registrations in TLDs which are identical or confusingly similar to the marks of others.

[Sole Panel Expert analysis follows]

v. Whether and to what extent Applicant has used, or has made demonstrable preparations to use, the sign corresponding to the gTLD in connection with a bona fide offering of goods or services or a bona fide provision of information in a way that does not interfere with the legitimate exercise by Objector of its mark rights.

[Sole Panel Expert stated that this factor would be discussed together with the factor mentioned under vi.]

vi. Whether Applicant has marks or other intellectual property rights in the sign corresponding to the gTLD, and, if so, whether any acquisition of such a right in the sign, and use of the sign, has been bona fide, and whether the purported or likely use of the gTLD by Applicant is consistent with such acquisition or use.

[Sole Panel Expert analysis follows]

vii. Whether and to what extent Applicant has been commonly known by the sign corresponding to the gTLD, and if so, whether any purported or likely use of the gTLD by Applicant is consistent therewith and bona fide.

[Sole Panel Expert analysis follows]

viii. Whether Applicant's intended use of the gTLD would create a likelihood of confusion with Objector's mark as to the source, sponsorship, affiliation, or endorsement of the gTLD.

[Sole Panel Expert analysis follows]

29. On September 23, 2013, Merck raised with WIPO a number of points of its concern with the contents of three of the Determinations. First, Merck noted that the Sole Panel Expert referenced intended geo-targeting by MSD, when in fact it was Merck which was intending to do so. Secondly, Merck stated that the Sole Panel Expert did not consider the three elements of the LRO Policy but rather those contained in the UDRP. In addition, Merck stated the following:

There is no appeals process for incorrect decisions under the LRO procedure, and accordingly there is no clear way in which my client (Merck KgaA) can rectify the damage done by an inattentive Panel. No court can review these decisions, and indeed even ICANN likely has limited powers to overturn a decision, even where it has been entered based on a wholly erroneous review of the submitted facts and evidence.

30. The Sole Panel Expert issued an Addendum dated September 24, 2013. As regards geo-targeting, he stated:

It is correct that the Expert Determinations under 6. (Discussion and Findings) under the heading Trademark Infringement, under non-exclusive factor viii, should not have included the following sentence:

> *"Applicant has made it clear that it will take all necessary measures, including geo-targeting, to avoid that Internet users in the territories in which Objector has trademark rights, will be able to visit websites that use the Disputed gTLD String."*

.....

Having noted this, the Panelist should make clear that, in reviewing LRO2013-0009, LRO2013-0010 and LRO2013-0011, he was in fact aware of the distinction in this regard, as reflected in the pleadings as cited and summarized in the Expert Determinations, between the latter three cases and cases LRO2013-0068 and LRO2013-0069 in relation to the competing applications at stake.

In any event, the Panelist considers it important to confirm that the above-mentioned sentence as such is immaterial to the conclusion which the Panelist reached in rejecting the Objections.

31. As regards his application of UDRP or LRO Policy, the Sole Panel Expert was of the view that, UDRP comparisons notwithstanding, he had applied the specific LRO criteria.

32. On February 27, 2014, ICANN informed Merck that it had updated the LRO Determinations together with the Sole Panel Expert's Addenda.

33. On March 13, 2014, Merck filed a Request for Reconsideration. It requested ICANN to reject the advice recorded in the Sole Panel Expert's Determinations, and "instruct a panel to make an expert determination that applies the standards defined by ICANN".

34. Merck's grounds for its Request for Reconsideration were summarized as follows:

In this case, the Expert Panel failed to take reasonable care in evaluating the parties' respective evidence and to make a correct application of the LRO standard developed by ICANN in the Applicant Guidebook, resulting in a denial of due process to the Requester in the context of its three LRO disputes.

35. On April 29, 2014, the Board Governance Committee of ICANN ("BGC") made its Determination dismissing the Request for Reconsideration. The initial part of that Determination summarized the reasons:

Merck Registry Holdings, Inc. applied for .MERCK and MSD Registry Holdings, Inc. applied for .MERCKMSD. The Requester, who also applied for .MERCK, objected to these applications and lost. The Requester claims that the Panel failed to comply with ICANN policies

and processes in reaching its determinations. Specifically, the Requester contends that the Panel:

(i) improperly interpreted the factors governing legal rights objections in light of "wholly inapplicable" Uniform Domain Name Dispute Resolution Policy ("UDRP") standards; and

(ii) failed to "accurately assess critical facts concerning the Parties' pleadings, leading to mis-attribution of party intent [concerning geo-targeting commitments] and a material misrepresentation of the parties' respective positions." (Request, §§ 6, 8, Pgs. 6, 18.)

With respect to the claims submitted by the Requester, there is no evidence that the Panel either applied the improper standard or failed to properly evaluate the parties' evidence. First, the Panel correctly referenced and analyzed the eight factors set out in the Applicant Guidebook relevant to legal rights objections and considered the UDRP only as a means to further provide context to one of the eight factors. The Requester does not identify any policy or process that was violated in this regard. Second, after the Requester brought the Panel's mis-attribution of geo-targeting commitments to the attention of WIPO, the Panel issued an Addendum to the Determinations, confirming that the misstatement was "inadvertent," that the Panel "was in fact aware of the distinction," and that the misstatement was not material to the Determinations in all events. Because the Requester has failed to demonstrate that the Panel acted in contravention of established policy or procedure, the BGC concludes that Request 14-9 be denied.

36. On April 29, 2014, the BGC held a meeting and the minutes note the following:

Reconsideration Request 14-9– Ram Mohan abstained from participation of this matter noting conflicts. Staff briefed the BGC regarding Merck KGaA's Request seeking reconsideration of the Expert Determinations, and ICANN's acceptance of those Determinations, dismissing Merck KGaA's legal rights objections to Merck Registry Holdings, Inc.'s application for .MERCK and MSD Registry Holdings, Inc.'s application for .MERCKMSD. After discussion and consideration of the Request, the BGC concluded that the Requester has not stated proper grounds for reconsideration because the Request failed to demonstrate that the expert panel acted in contravention of established policy or procedure. The Bylaws authorize the BGC to make a final determination on Reconsideration Requests brought regarding staff action or inaction; the BGC still has the discretion, but is not required, to recommend the matter to the Board for consideration. Accordingly, the BGC concluded that its determination on Request 14-9 is final; no consideration by the NGPC is warranted.

37. In light of the foregoing, this Panel now analyses the first contested action for the purposes of the comparison exercise. Although in paragraph 48 of its Request Merck characterizes the challenged action as the "acceptance" of by the Board of the BGC determination, it is clear from the Request as a whole that the focus of the complaint is the decision of the BGC. While this Panel's focus is on the first contested action precisely as advanced by Merck (namely, "acceptance"), concomitant with that exercise will be an analysis (within the confines of this Panel's jurisdiction) of the BGC's Determination (noting ICANN's Articles of Incorporation and Bylaws, Article I, Section 2.3(f)).

38. The question now arises as to whether the first contested action was consistent with Article I, Section 2.8, namely, was there a neutral and objective application, with integrity and fairness, by the Board of documented policies.

39. Assistance for this Panel is derived from the three elements defining the focus of the review in Article IV, Section 3.4, namely:

> *a did the Board act without conflict of interest in taking its decision?;*
> *b did the Board exercise due diligence and care in having a reasonable amount of facts in front of them?; and*
> *c did the Board members exercise independent judgment in taking the decision, believed to be in the best interests of the company?*

40. The Panel takes each of the three factors, a-c, in turn.

41. Factor (a): Did the Board act without conflict of interest in taking its decision? The Panel finds that there is no evidence whatsoever to suggest that there was any conflict of interest. Merck suggests that ICANN had a conflict of interest due to the potential for a financial windfall in the event of there being an Auction of Last Resort. This is a submission made without evidence, is speculative, and is unfounded. Moreover, this Panel

does not consider that this Independent Review was initiated (or capable of being initiated) to challenge, in substance, the policy decision of ICANN in 2012 to include the Auction of Last Resort.

42. The Panel finds that the answer to question "a" is yes.

43. Factor (b): Did the Board exercise due diligence and care in having a reasonable amount of facts in front of them? In the Panel's assessment of the materials and arguments put before it, this appears to be at the heart of Merck's complaints.

44. Merck criticizes severely the manner by which the Sole Panel Expert dealt with the issue of geo-targeting. Merck also takes particular issue with the application (or otherwise, as it suggests) by the Sole Panel Expert of LRO standards. It claims that these failings caused a denial of due process. Put another way, Merck is contending that the Sole Panel Expert got it so badly wrong, the process should be run again.

45. Merck's criticisms of the Sole Panel Expert flow through into its complaints directed at the BGC.

46. Merck wanted the BGC to "reject the advice set forth in the Decisions, and instruct a panel to make an expert determination that applies the standards defined by ICANN". Merck effectively wanted the BGC to overturn the Sole Panel Expert's decisions and have the process re-run (which is what it, in substance, wants from this Panel). Its reasons for making that request of the BGC were that the Sole Panel Expert failed to decide the case on the basis of the correct and applicable LRO Standard, and moreover failed to decide the case on the basis of the true and accurate factual record which was presented to him in the course of the dispute. Merck then concludes from those points that it had "been denied fundamental due process, as its pleadings were not meaningfully taken into account in the course of the panel's deliberations, and the panel elected to decide the case on inapplicable grounds".

47. However, this basis for requesting relief does not sit easily with Merck's own stated position on September 23, 2013, noted above, and repeated here for emphasis:

> *There is no appeals process for incorrect decisions under the LRO procedure, and accordingly there is no clear way in which my client (Merck KgaA) can rectify the damage done by an inattentive Panel....*

Merck plainly recognized that the sole recourse was by means of the Request for Reconsideration process (which Merck itself invoked). That process is of limited scope, with Article IV, Section 2.2, delineating that jurisdiction:

> *Any person or entity may submit a request for reconsideration or review of an ICANN action or inaction ("Reconsideration Request") to the extent that he, she, or it have 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.*

None of these three bases for the Request for Reconsideration process requires or even permits this Panel to provide for a substitute process for exploring a different conclusion on the merits.

48. The BGC recognized in its Determination that the Sole Panel Expert, in his Addenda, specifically noted the correct position as regards geo-targeting, and also that he further considered that his conclusions remained the same. In light of the Addenda, there is nothing to suggest that the Sole Panel Expert made his decision on the basis of incorrect facts. More importantly

for the purposes of this Review, the BGC analyzed whether he had done so.

49. Moreover, Merck's complaints about the Sole Panel Expert's application, or in its view, non-application of the LRO Standards lack merit. The BGC determined that the Sole Panel Expert did not apply the wrong standards. That is a determination which this Panel does not, because of the precise and limited jurisdiction we have, have the power to second guess. Rather, the critical question for this Panel is whether the BGC exercised due diligence and care in having a reasonable amount of facts in front of them. Merck complains that the BGC did not have "sufficient and accurate facts", and that Merck was thus deprived of an "accurate review of its complaints". These formulations miss the point, and indeed misstate the applicable test in proceedings such as these. The BGC had to have a reasonable amount of facts in front of it, and to exercise due diligence and care in ensuring that it did so. There is no evidence that the BGC did not have a reasonable amount of facts in front of it or consider them fully. It plainly had everything which was before the Sole Panel Expert. Nothing seems to have been withheld from the BGC.

50. Merck's complaints are, in short, not focused upon the applicable test by which this Panel is to review Board action, but rather are focused on the correctness of the conclusion of the Sole Panel Expert. Because this is not a basis for action by this Panel, the Panel answers question "b" with "yes".

51. Factor (c): Did the Board members exercise independent judgment in taking the decision, believed to be in the best interests of the company? The Panel does not see that Merck has mounted any attack through this route other than inferentially by vague references to the auction process. As regards that particular decision, there is no evidence (or indeed any concrete allegation) that the BGC or Board members did not exercise independent judgment.

52. In summary, therefore, the Claimant's first contested action complaint is dismissed.

53. The **second contested action** as characterized and raised by the Claimant in paragraph 46 of the Request is:

> *The ICANN Board improperly disposed of the Claimant's RFR as the BGC violated its competency and independence in its evaluation of the application of the LRO standard. Further, its assessment was incorrect and failed to take into account the global use of the gTLD by Merck & Co. Additionally, the ICANN Board has provided the possibility for third-party review of some prima facie erroneous expert determinations while denying the same to other, similarly situated parties, including the Claimant. This results in discrimination and unfairness to, and failure of due process for, the Claimant.*

54. The Claimant says that this is a violation of ICANN's Articles of Incorporation and Bylaws, Article I, Section 2.8, which provide as follows:

> *In performing its mission, the following core values should guide the decisions and actions of ICANN..... 8. Making decisions by applying documented policies neutrally and objectively, with integrity and fairness.*

55. The action of the Board, as precisely contested by Merck, is set out in paragraph 53 above. This particular action of the Board is developed by Merck as follows at paragraph 79 of the Request:

> *The BGC did not address the Claimant's concerns (i) competently, (ii) independently, and (iii) substantively on the basis of the Claimant's legal argument.*

56. Incompetence: Merck asserts, at paragraph 82 of the Request that the BGC was incompetent because it had no alternative but to engage "in impermissible substantive analysis and interpretation". Merck then states that the BGC should have taken steps to address its concerns by, citing prior ICANN examples, appointing an independent legal advisor, or "recommending that the ICANN Board take appropriate measures that the

BGC is incompetent to make". Drawing on these, Merck criticizes the fact that in some instances where there has been a prima facie erroneous determination ICANN provides for a review, whereas in others it does not. It says that this is a violation of the requirements of neutrality and fairness.

57. The Panel's attention is drawn by Merck to a document recording the Resolutions of the Meeting of the New gTLD Program Committee ("NGPC") on March 22, 2014, which notes that:

> *....the Board may wish to seek a clear understanding of the legally complex and politically sensitive background on its advice regarding .WINE and .VIN in order to consider the appropriate next steps of delegating the two strings.*

58. A professor of law in Paris was commissioned to provide advice, and this was incorporated into the decision of the NGPC.

59. The Panel's attention is also drawn to the Recommendation in relation to the Reconsideration Request 13-9 of October 10, 2013, made by the BGC. At the end of the Recommendation, the following is stated:

> *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.*

A proposed review mechanism is outlined thereafter.

60. Merck's arguments are unavailing. If this Panel were to find that the BGC and Board are incompetent to assess the propriety of a Panel determination under the LRO this would effectively require a referral or appeal process for LRO decisions. Such a mechanism was not included in the delegation,

challenge and dispute resolution process adopted by ICANN and it is not open to this Panel to create it.

61. As to the claim of discrimination, this Panel finds that it was within the discretion of the BGC and Board, once the Sole Expert had revised his original determination to reflect his complete basis for the decision, to conclude that the Sole Expert had applied the correct legal standard to the correctly found set of facts. Of course, in different cases, the BGC and Board are entitled to pursue different options depending upon the nature of the cases at issue. It is insufficient to ground an argument of discrimination simply to note that on different occasions the Board has pursued different options among those available to it.

62. In conclusion, Merck was not discriminated against. These two examples, properly and fairly assessed, do not provide it with support for an allegation of discrimination.

63. Independence: Merck's complaint as to the lack of independence relies on the "Auction of Last Resort" argument which imputes to ICANN a financial interest, insinuating something improper. This is the same point, in substance, which was rejected by this Panel in paragraph 42 above. It is an argument which is speculative, and made without evidence to support it. In light of its dismissal above, it is also dismissed at this point.

64. Mischaracterization: Merck complains that the BGC mischaracterized its arguments. Merck describes its core concern as presented to the BGC as follows (paragraph 89 of the Request):

> *...did the LRO Panel fail to decide the case on the basis of the correct and applicable LRO Standard, which requires it to consider the potential use of the applied-for gTLD ....*

65. This complaint is identical in substance to the matters already addressed by the Panel in paragraphs 43-50 above. In effect, Merck is running the same argument here as before, and it is therefore dismissed.

66. In summary, therefore, the Claimant's challenge to the second contested action complaint is dismissed.

67. The **third contested action** raised by Merck in paragraph 46 of the Request:

> *As the result of the prior two violations, the ICANN Board has accepted without due diligence and care, a dysfunctional expert determination procedure within the New gTLD Program which has not provided for the possibility to review or overturn determinations on the basis of substantial errors or manifest disregard of the LRO Standards, despite the foreseeable and forewarned possibility of such, resulting in fundamental unfairness and a failure of due process for the Claimant.*

68. In light of the resolution of the first two contested actions against Merck, the Panel finds that this third contested action must also be dismissed. It is predicated for success upon the first two by use of the language "*[A]s the result of the prior two violations*".

Section IV – Costs

69. As ICANN is the prevailing party, Merck is held responsible for costs. Therefore the administrative fees and expenses of the International Centre for Dispute Resolution (ICDR) totaling US$3,350.00 shall be borne by entirely by Merck KGaA, and the compensation and expenses of the Panelists totaling US$97,177.08 shall be borne by entirely by Merck KGaA. Therefore, Merck KGaA shall reimburse ICANN the sum of US$48,588.54, representing that portion of said fees and expenses in excess of the apportioned costs previously incurred by ICANN.

Section V – Declaration

1. Merck has not succeeded in this Independent Review Process. ICANN is the prevailing party. As per paragraph 69, Merck must pay ICANN costs in the amount of USD $48,588.54.

This Final Declaration of the Independent Review Process Panel may be executed in any number of counterparts, each of which shall be deemed an original, and all of which shall constitute together one and the same instrument.

December 10, 2015 — Date

Klaus Reichert, Panelist/ Chair

Date — A. Howard Matz, Panelist

Date — Graeme Dinwoodie, Panelist

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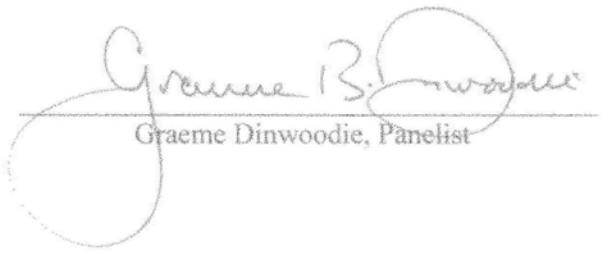
Date	Klaus Reichert, Panelist/ Chair
Date	A. Howard Matz, Panelist
December 10, 2015 Date	 Graeme Dinwoodie, Panelist