

**THE INTERNATIONAL CENTRE FOR EXPERTISE OF THE  
INTERNATIONAL CHAMBER OF COMMERCE**

CASE No. EXP/415/ICANN/32

PROF. ALAIN PELLET, INDEPENDENT OBJECTOR

(FRANCE)

vs/

CHARLESTON ROAD REGISTRY INC.

(USA)

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



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## 1. INTRODUCTION

1. The Internet Corporation for Assigned Names and Numbers (“ICANN”) has launched a program for the introduction of new generic Top-Level Domain Names (“gTLDs”). Applicants may apply for new gTLDs, in accordance with terms and conditions set by ICANN, notably in the gTLD Applicant Guidebook (the “Guidebook”).<sup>1</sup>
2. The Guidebook contains, as an Attachment to Module 3, a New gTLD Dispute Resolution Procedure (the “Procedure”). The Procedure governs the resolution of disputes between an entity that applies for a new gTLD (an applicant) and an entity objecting to the application (an objector).
3. Dispute resolution proceedings are administered by a Dispute Resolution Service Provider (a “DRSP”) in accordance with the Procedure and the applicable DRSP rules. Four kinds of objections can be brought under the Guidebook: String Confusion, Existing Legal Rights, Limited Public Interest, and Community. The DRSP responsible for Limited Public Interest objections is the International Centre for Expertise of the International Chamber of Commerce (“ICC”), and the applicable DRSP rules are the Rules for Expertise of the ICC (the “Rules”), as supplemented by the ICC. In March 2012, the ICC supplemented the Rules by issuing a Practice Note on the Administration of Cases under the New gTLD Dispute Resolution Procedure (the “ICC Practice Note”).
4. According to section 3.2.5 of the Guidebook, the Independent Objector may file a formal objection to a gTLD application. The Independent Objector’s role is to act not

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<sup>1</sup> gTLD Applicant Guidebook, v. 2012-06-04, Module 3, available at <http://newgtlds.icann.org/en/applicants/agb> [hereinafter Guidebook].

on behalf of any particular persons or entities, but in the best interests of the public who use the global Internet. Neither ICANN staff nor the ICANN Board of Directors has authority to direct or require the Independent Objector to file or not to file any particular objection. If the Independent Objector determines that an objection should be filed, he will initiate and file the objection in the public interest.

5. The Independent Objector may file objections against “highly objectionable” gTLD applications to which no objection has been filed. The Independent Objector is limited to filing two types of objections: (1) Limited Public Interest objections and (2) Community objections. The Independent Objector is granted standing to file objections on these enumerated grounds, notwithstanding the regular standing requirements imposed on others for such objections.
6. In light of the public interest goal noted above, the Independent Objector shall not object to an application unless at least one comment in opposition to the application is made in the public sphere.
7. These proceedings arise out of a Limited Public Interest objection (the “Objection”) to Charleston Road Registry Inc.’s application for the .MED gTLD (the “Application”).
8. The Objection to the Application was filed by the Independent Objector on 12 March 2013.

## **2. AGREEMENT CONCERNING THE PROCEDURE**

9. As stated in Article 1(d) of the Procedure, by applying for a new gTLD under the Guidebook, an applicant accepts the Procedure and the relevant DRSP rules governing possible objections. Similarly, by filing an objection, an objector accepts the Procedure and the applicable rules.

10. Pursuant to Article 8 of the ICC Practice Note, by accepting the process defined in the Procedure, the “parties are deemed to have agreed that the expert determination shall be binding upon the parties” as provided in Article 12(3) of the Rules.
11. As provided in Article 4(d) of the Procedure, “the place of the proceedings, if relevant, shall be the location of the DRSP that is administering the proceedings”. In this case this place is Paris, France.
12. As provided in Article 5(a) of the Procedure, the language of the submissions and proceedings is English.
13. The Expert Determination Procedure to which the parties have agreed to submit this dispute provides a specific procedural framework that is different from typical legal proceedings. It involves brief submissions (which are subject to strict word limits) and an expedited schedule. Hence, while the important and complex matters at issue have received serious consideration by both the parties and the Panel within that framework, the Panel has endeavored to apply a principle of economy to the preparation of this document.

### **3. THE PARTIES AND THEIR COUNSEL**

#### **3.1. The Independent Objector**

14. Professor Alain Pellet is the Independent Objector selected by ICANN pursuant to section 3.2.5 of the Guidebook.<sup>2</sup>
15. The contact information for the Objector is as follows:

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<sup>2</sup> See ICANN Press Release of 14 May 2012, available at <http://www.icann.org/en/news/announcements/announcement-14may12-en.htm>

Prof. Alain Pellet, Independent Objector  
16, Avenue Alphonse de Neuville  
92380 Garches, France  
Email: courriel@alainpellet.eu  
contact@independent-objector-newgtlds.org

16. The Independent Objector is represented in these proceedings by:

Ms. Héloïse Bajer-Pellet  
15, Rue de la Banque  
75002 Paris, France  
Email: avocat@bajer.fr

Mr. Daniel Müller  
20, Avenue du Général de Gaulle  
78290 Croissy sur Seine, France  
Email: mail@muelerdaniel.eu

Mr. Phon van den Biesen  
De Groene Bocht, Keizersgracht 253  
1016 EB Amsterdam, The Netherlands  
Email: phonvandenbiesen@vdbkadvocaten.eu

Mr. Sam Wordsworth  
24 Lincoln's Inn Fields  
London, WC2A 3EG, United Kingdom  
Email: SWordsworth@essexcourt.net

### **3.2. The Applicant**

17. Charleston Road Registry Inc. (“Charleston” or the “Applicant”) is an American company, wholly owned subsidiary of Google Inc. (“Google”), which was established to provide registry services to the Internet public. Google is an American multinational public corporation and global technology leader.
18. The contact information for the Applicant is as follows:

Charleston Road Registry Inc.  
Sarah Falvey  
1600 Amphitheatre Parkway  
Mountain View, California 94043, United States of America  
Email: tas-contact4@google.com

19. The Applicant is represented in these proceedings by:

Mr. Brian J. Winterfeldt  
Katten Muchin Rosenman LLP  
2900 K Street NW, North Tower - Suite 200  
Washington, DC 20007-5118, United States of America  
Email: brian.winterfeldt@kattenlaw.com

#### **4. THE EXPERT PANEL**

20. According to Article 13(b)(iii) of the Procedure, proceedings involving a Limited Public Interest objection are referred to a panel of three experts (“Expert Panel” or “Panel”), recognized as eminent jurists of international reputation, one of whom shall be designated as the Chair. The Chair shall be of a nationality different from the nationalities of the Applicant and of the Objector. Pursuant to Article 3(3) of Appendix I to the Rules, experts are appointed by the Chairman of the Standing Committee of the ICC International Centre for Expertise.
21. On 12, 13 and 14 June 2013, each of the experts completed and filed a Declaration of Acceptance and Availability and Statement of Impartiality and Independence which did not give rise to objections.
22. On 21 June 2013, the Chairman of the Standing Committee of the ICC International Centre for Expertise appointed the Panel pursuant to Article 3(3) of Appendix I to the Rules. Professor Fabien Gélinas, a Canadian national, was appointed as the Chair and

Mr. John Gaffney and Professor Guglielmo Verdirame were appointed as Co-Experts in accordance with Article 13(b)(iii) of the Procedure.

23. The experts' contact details are as follows:

Prof. Fabien G linas  
McGill University, Faculty of Law  
3644 Peel Street,  
Montreal (Quebec), H3A 1W9, Canada  
Email: fabien.gelinas@mcgill.ca

Mr. John Gaffney  
25 rue de Chazelles  
Paris 75017, France  
Email: jp\_gaffney@yahoo.com

Prof. Guglielmo Verdirame  
20 Essex Street  
London WC2R 3AL, United Kingdom  
Email: gverdirame@20essexst.com

24. After payment of the advance by both parties, the Panel received the file on 1 August 2013 and was deemed fully constituted on that date for the purpose of the Procedure.

## **5. HISTORY OF THE PROCEEDINGS**

25. This Objection relates to Charleston's application to register the string .MED. The Application was posted on ICANN's website on 13 June 2012 and given ID Number 1-1139-2965 in the ICANN system.<sup>3</sup> The Application passed the initial evaluation

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<sup>3</sup> <https://gtldresult.icann.org/application-result/applicationstatus/applicationdetails/1330>.

process provided by the Guidebook, which is independent from the dispute resolution process laid out in the Procedure.<sup>4</sup>

26. On 12 March 2013, the Independent Objector filed the Objection to the Application with the DRSP. A copy of the Objection was transmitted to Charleston on 13 March 2013. The requisite filing fee was paid to the DRSP, following Article 8(c) of the Procedure and Article 1 of Appendix III to the Rules.
27. Pursuant to Article 9 of the Procedure, the DRSP conducted an administrative review of the Objection for compliance with its Rules and with Articles 5 to 8 of the Procedure (Language, Communications and Time Limits, Filing of the Objection, and Content of the Objection). On 2 April 2013, the DRSP notified the parties that the Objection was compliant. On 12 April 2013, ICANN made a dispute announcement under Article 10 of the Procedure, listing the objections that had passed administrative review, including this Objection.
28. On 12 April 2013, the DRSP sought the comments of the parties on the possible consolidation of this case with two other cases in which the string .MED was at issue, as contemplated by Article 12 of the Procedure. On 22 April 2013 the DRSP notified the parties that the cases would not be consolidated.
29. On 22 May 2013, the Applicant filed a response to the Objection (the “Response”). A copy of the Response was transmitted to the Independent Objector on the same day. Pursuant to Article 11(f) of the Procedure, the Applicant also paid the requisite filing fee to the DRSP on the same day.

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<sup>4</sup> The Application was given a pass by report dated 30 August 2013. The Report is available at <http://newgtlds.icann.org/sites/default/files/ier/m6bk8at7iydw5jrsb9zat5ia/ie-1-1139-2965-en.pdf>.

30. On 21 June 2013, the Chairman of the Standing committee of the ICC International Centre for Expertise appointed the Expert Panel pursuant to Article 13 of the Procedure and Article 9(5)(d) of the Rules.
31. On 24 June 2013, the DRSP informed the parties of the appointment of the Expert Panel and of the estimate of total costs in this matter. The parties were informed that the Panel would not be deemed fully constituted and the matter would not proceed until each of the parties had made advance payment of the estimated costs.
32. On 1 August 2013, the DRSP informed the parties of the receipt of the necessary advance payment and transferred the file to the Panel. The Panel received the file and was deemed fully constituted on that date for the purpose of the Procedure.
33. On 2 August 2013, the Independent Objector requested leave from the Panel to file an additional written statement to address issues raised in the Applicant's Response.
34. On 5 August 2013, the Expert Panel wrote to the parties asking the Applicant to comment on the Independent Objector's request and seeking the parties' observations on the conduct of the proceedings generally and, in the event the Independent Objector's request were to be granted, the appropriate length and timing of any additional round of submissions.
35. The Applicant and the Independent Objector sent their observations on 5 and 9 August 2013 respectively.
36. On 12 August 2013, the Expert Panel informed the parties that it had conducted the "quick look" procedure contemplated in subsection 3.2.2.3 of Module 3 of the Guidebook and had not found the Objection to be manifestly unfounded or an abuse of the right to object such that it should be summarily dismissed.

37. On the same day, in accordance with Article 17 of the Procedure, the Expert Panel granted the Independent Objector leave to submit an additional written statement within ten days and gave the Applicant the opportunity to reply within ten days of the Independent Objector's submission.
38. The Independent Objector submitted an additional written statement on 22 August 2013 and the Applicant a reply on 30 August 2013.
39. As required by Article 5(a) of the Procedure, submissions and communications were made in English. In accordance with Article 6(a) of the Procedure, all communications in the proceedings were submitted electronically.
40. On 3 September 2013, the Panel notified the parties that it was moving into a deliberative phase. The Panel then considered the entire record and proceeded with the preparation of a draft Expert Determination.
41. On 4 September and 3 October 2013, the DRSP granted the Panel extensions for the submission of its draft Expert Determination to 5 and 12 October respectively.
42. On 12 October 2013, the Expert Determination was submitted in draft form to the DRSP for scrutiny in accordance with Article 12(6) of the Rules and Article 21(b) of the Procedure.

## **6. SUMMARY OF THE PARTIES' RESPECTIVE POSITIONS**

43. The Objection considered in these proceedings is a Limited Public Interest objection. The Guidebook provides the applicable standards, or principles of adjudication, for a Limited Public Interest objection. In terms of standing, since the Independent Objector acts solely in the best interest of the public who use the global Internet, he shall not

object to an application unless at least one comment in opposition to the application has been made in the public sphere. On the merits, the Independent Objector must demonstrate that the applied-for gTLD string is contrary to generally accepted legal norms of morality and public order that are recognized under principles of international law. The parties' respective positions concerning the application of these principles are summarized below.

### **6.1. The Independent Objector's Objection**

44. The Independent Objector argues that he has standing to bring this Objection because, as required by the Guidebook, at least one comment in opposition to the Application was made in the public sphere. In fact, various non-governmental organizations have submitted Public Comments with respect to all four of the applications that have been submitted to ICANN for the .MED gTLD. Many of these comments express great concern about the reliability and trustworthiness of a .MED gTLD that is run by a private enterprise. Although several of these comments were submitted under the heading "Community Objection", the rationale of the comments often refers to "public interest" and "public health", which fall within the parameters set for a Limited Public Interest objection, given the status of health as a fundamental human right and of the medical sector as a constitutive element thereof.
45. The Independent Objector's position is that the applied-for gTLD string would be contrary to specific principles of international law as reflected in relevant international instruments of law.
46. The Independent Objector alleges that "med" as an abbreviation for "medical" and "medicine", as well as similar terms in multiple languages, is inextricably connected to health, since it refers to the goods, services and facilities that are necessary for the effective fulfillment of the right to health. This is confirmed by the approach the Applicant takes in its Application. Therefore, the Independent Objector states that his

appreciation of a .MED gTLD is directly linked to his appreciation of the very concept of health.

47. The Independent Objector submits that health was recognized as a fundamental human right in international law for the first time in 1948, in the Universal Declaration of Human Rights. Since then, several instruments of international law have confirmed the human rights status of health. The Independent Objector argues that the promotion and protection of international health is inherent in the due respect of generally accepted legal norms of public order that are recognized under fundamental principles of international law.
48. The right to health was defined by the United Nations Committee on Economic, Social and Cultural Rights (the “Committee”) as “a right to the enjoyment of a variety of facilities, goods, services and conditions necessary for the realization of the highest attainable standard of health.” The Independent Objector notes that the Committee lists health care as the very first element covered by the right to health while interpreting the right to health as not only extending to health care but also to the underlying determinants, including access to health-related education and information. In addition, the Committee observes that states should also ensure that third parties do not limit people’s access to health-related information and services.
49. The Independent Objector also refers to the case law of regional human rights courts confirming that access to information is an essential element of specific human rights.
50. The Independent Objector is of the view that any entity applying for a .MED gTLD should demonstrate awareness of its duty to see to it that this gTLD is organized, set up and managed in such a way that the right to health, with all of the implications discussed above, including the necessity of reliability and trustworthiness of medical information, is fully respected and, consequently, should demonstrate that this duty will be effectively and continuously implemented. In addition, the Applicant should demonstrate how, given the public interest at stake, the policies and decision-making

of the Applicant will be properly connected to the public authorities, national as well as international, that are under a legal obligation to respect, protect and fulfill the right to health. In the view of the Independent Objector, these are requirements that are fully justified given the specific principles of international law as reflected in the relevant international instruments of law discussed above.

51. The Independent notes that while Google does propose measures and policies to prevent abuse, a random review of other applications submitted by Google shows that the same exact abuse prevention and mitigation measures are proposed for entirely different gTLDs.
52. The Independent Objector submits that it is clear from the Application that the goal of the applied-for – community-based – gTLD is to become a source of content related to medicine and doctors, that the precise meaning of the term “med” yet has to be defined and will be defined by the Applicant, that the eligibility is to become a worldwide trusted source for medical-related information and that the eligibility for domain operating will be restricted in accordance with quality-related standards. It is also clear that it is the Applicant that will make all relevant policy decisions and that all stated positions, rules and policies may be changed in the Applicant’s sole discretion. Comparing this Application with the 100 other applications that Google submitted to ICANN leads to the conclusion that Google views .MED, indeed, as another commodity: a random review of several other Google-Applications does not only show that the texts of those applications are very similar, if not identical to the text of the present .MED Application, but also that the same exact abuse prevention and mitigation measures are proposed for all of them. In the view of the Independent Objector, the Application does not provide for any views on the international nature of this undertaking, while for a gTLD the world at large seems to be the natural environment, as is confirmed by the Applicant.
53. The Independent Objector submits that more importantly the Applicant does not demonstrate awareness of the fact that “med”, referring to medical services and to

medical-related information as essential elements, is not only a “term” but that it also represents a fundamental right, indissociable from the right to health, which involves extensive obligations for national and international public authorities across the globe as well as for citizens and private enterprises. Providing medical related information on a worldwide basis might interfere with efforts of public authorities to fulfill their obligations, while for developing countries “there is a growing concern that an unrestricted health gTLD will bypass regulatory controls”. The Application is silent on these aspects of fundamental importance.

54. The Independent Objector submits that the Application does not meet the standards that have to be applied to a highly sensitive gTLD and finds that the launch of the applied-for .MED gTLD would, indeed, be contrary to specific principles of international law as reflected in relevant international instruments of law.
55. In the alternative, the Independent Objector objects to this Application as long as the Applicant has not – after consultation and coordination with all stakeholders of the health community, including states and competent international organizations – provided solutions for the serious objections raised above.
56. For these reasons the Independent Objector asks the Expert Panel to hold that the present Objection is valid and to uphold the Objection. In the alternative, the Independent Objector requests the Expert Panel to hold that the Objection is valid as long as the Applicant has not provided solutions for the serious objections raised above.
57. In addition, the Independent Objector requests that his advance payment of costs be refunded in accordance with Article 14(e) of the Procedure.

## 6.2. The Applicant's Response

58. The Applicant's position is that the Objection should not be granted.
59. In line with Google's general mission, the Applicant's mission is to help make information universally accessible and useful by extending the utility of the DNS while enhancing the performance, security, and stability of the Internet for users worldwide. The Applicant aspires to create unique web spaces where users can learn about products, services, and information in a targeted manner and in ways never before seen on the Internet. Its business objective is to manage Google's gTLD portfolio and Google's registry operator business. The Applicant intends to outsource all critical registry functions to Google Registry Services.
60. The purpose of the proposed gTLD is to provide a forum for doctors and medical practices to offer content related to their profession. The mission of the proposed gTLD is to provide a dedicated domain space in which doctors can enact unique second-level domains. The Applicant believes the proposed gTLD will have significant value, as there are over five million doctors worldwide. This mission will enhance customer choice by providing new availability in the second-level domain space, creating new layers of organization on the Internet, and signaling the kind of content available in the domain. The proposed gTLD will also provide the Applicant with the means to meet its business objectives.
61. The Applicant agrees that medical professionals and institutions are an essential part of any health system. The Applicant also agrees that the term "med" will be perceived as a shortened form of the English words "medicine" or "medical" by English speakers and that it is related to term "health". However, the two terms are not "inextricably connected" as alleged by the Independent Objector. The term "health" can mean a general soundness or well-being; as well as freedom from injury; as well as a general condition or state, while "medicine" and "medical" refer expressly to the science of diagnosing, treating, and preventing disease and drugs used for these purposes. A

wide variety of issues that may be applicable to the general field of health will not apply to the term “medicine” or “med”.

62. The Applicant also agrees that health “is not just another commodity”. It is for this precise reason that the Applicant desires to create a safe space for users of the .MED gTLD that improves upon the current environment for accessing medical information online.
63. While agreeing that governments have a role to play in fulfilling the right to health, the Applicant notes that many governments, due to their own corrupt policies, instability, or violence, are not doing a good job of protecting and ensuring the basic right to health care, nutrition, clean air, clean water, etc. The Independent Objector seems to argue that, regardless of any lack of capability or prerogative to protect their citizens, corrupt governments are under health-related obligations, and so this is no excuse for the Applicant not to offer its gTLD services in connection with these governments.
64. Also, the Independent Objector’s definition of health/medicine/medical is very narrow. The healthcare/medical field is very broad and encompasses many different things and spans many different industries, so while some aspects of maybe should be spearheaded by states, there are many areas/aspects of “health” or “medicine” that should not be dominated/controlled by states.
65. The Applicant recognizes the importance of access to reliable and trustworthy health-related information. The Applicant has given due consideration to the fundamental rights and related obligations at stake and will include mechanisms to strengthen the same.
66. In designing the new gTLD program, ICANN has always emphasized the need for applicants to work together, and this is a tenet of the program that the Applicant is taking very seriously. However, the Applicant believes that itself and Google are one of only a handful of organizations so well suited to provide a secure, globally-relevant

and politically-neutral domain space to better enhance the profile of global health issues among Internet users. The Applicant states that it takes Internet security and user experience extremely seriously, has outlined several policy and technological standards it intends to implement on the .MED gTLD, and has also shown its experiences within this space – from prior experience with building health-related products to their unique and data-driven approach to combating fraud, abuse, and counterfeiting.

67. The Applicant requests that, for all of the above reasons, the Objection be dismissed.
68. Finally, with regard to the Independent Objector’s alternative basis for objection, the Applicant submits that consultation and coordination with all stakeholders of the health community is unwarranted and impossible. While the Applicant recognizes that it is the prerogative of the Independent Objector to advance an objection on behalf of a community, particularly when there is no central organization or entity to do so, the Applicant argues that this measure has been misapplied, as the intent of this power is to protect groups with little structure, resources or governance.

### **6.3. The Independent Objector’s Additional Statement**

69. In its Response, the Applicant questions the Independent Objector’s position that “med”, i.e. “medicine”, “medical”, is inextricably connected to health, since it refers to the goods, services and facilities that are necessary for the effective fulfillment of the right to health. However, this same approach of the Independent Objector is also applied in the Safeguard Advice issued by ICANN’s Governmental Advisory Committee (GAC), which Advice the Applicant has annexed to its Response. In this document the GAC advises that extensive additional safeguards should be put in place for a whole range of gTLDs, including the .MED. Also, the GAC advises that registration restrictions for particular strings, including .MED, may be imposed so long as they are appropriate for the types of risks associated with the gTLD. The GAC’s

Safeguard Advice confirms the sensitivity of all health-related strings, among them .MED.

70. The Independent Objector notes that the Applicant has apparently responded in a positive manner to the GAC's requiring additional safeguards for health-related gTLDs and from that perspective it draws the conclusion that this should be more than adequate to ensure that the Applicant operates .MED in accordance with principles of international law. He submits that the Applicant seems to misunderstand his position that "health" is a fundamental right, "med" being inextricably connected to it, which implies that public authorities across the world, national as well as international, are under a legal obligation to respect, protect and fulfill the right to health. The Independent Objector has stated that the Applicant's activities should be properly connected to national as well as international public authorities that are under a legal obligation to protect the right to health of their citizens. In this approach the Independent Objector is aiming, in the interests of the internet using public at large, to prevent that the effective protection, by public national and international authorities, of the citizens' fundamental rights would be undermined.
71. Noting the Applicant's submission that many governments, due to their own corrupt policies, instability, or violence, are not doing a good job of protecting and ensuring the basic right to health care, the Independent Objector submits that the obligations to respect, protect and fulfill also apply to possibly corrupt governments, while the lack of capabilities signaled above is not the prerogative of corrupt governments.
72. The Applicant also states that while some aspects maybe should be spearheaded by states, there are many areas of health or medicine that should not be dominated or controlled by states. Contrary to what the Applicant seems to suggest, there is nothing in the position of the Independent Objector as set out in his Objection that may be construed as the Independent Objector promoting that all aspects related to "health" or "medicine" are to be dominated or controlled by states.

73. Recently, the Sixty-sixth World Health Assembly adopted a Resolution on “eHealth standardization and interoperability” through which, the Independent Objector submits, it in effect shows to understand, confirm and support his concerns raised in relation to the applied-for and other health-related gTLDs. In this Resolution, the World Health Assembly emphasizes that health-related global top-level domain names should be operated in a way that protects public health. In the view of the Independent Objector, this Resolution demonstrates the value of the alternative remedy sought by the Independent Objector.

#### **6.4. The Applicant’s Reply to the Independent Objector’s Additional Statement**

74. The Applicant submits that the Independent Objector has not established that the Application will interfere with any obligations imposed on public authorities, or that there is any obligation for a generic gTLD operator to provide its domain name services in connection with local governments. On the contrary, the Applicant proposes to provide a new dedicated and trusted Internet space for the medical and medicinal industries to provide information about goods, services, and issues within those industries to citizens worldwide, regardless of the capabilities of their government’s ability to provide adequate healthcare, medical services, or medicinal supplies. In some cases, this will be in connection with government actors in this space, and in other cases, it will be filling a void left open by governments that are not furthering the interests of their citizens. The Applicant submits that opening up this new space for these industries will, contrary to the Independent Objector’s assertions, extend access to medical and related information in areas where a government may aim to suppress or be unwilling to communicate such information. Regardless, the Independent Objector has not demonstrated how running such a registry could possibly be contrary to international law or international legal norms of morality and public order.

75. In his Additional Written Statement, the Independent Objector relies on a Resolution adopted by the Sixty-sixth World Health Assembly on 27 May 2013 to argue that health-related domain names should not be treated as belonging to a different category than the .HEALTH gTLD. The Independent Objector also cites to the Safeguard Advice issued by ICANN's Governmental Advisory Committee (GAC) on 11 April 2013, which advises that additional safeguards be put in place for a range of sensitive strings including .MED. The Applicant argues that the Resolution of the Sixty-Sixth World Health Assembly and the GAC Advice do not contain general principles of international law for morality and public order.
76. Under the Guidebook, the Independent Objector bears the burden of proving facts needed to sustain his Limited Public Interest objection, but it has offered only mere speculation or irrelevant evidence. The Independent Objector allegations that the Governmental Advisory Committee's (GAC) *Communiqué* and the eHealth standardization and interoperability document contain general principles of international law for morality and public order are incorrect.
77. The Applicant maintains that the Independent Objector has not demonstrated that the Application is contrary to any international law, norm of morality, or public order and that the Objection should be dismissed.

## 7. ANALYSIS

78. In this section the standards of adjudication and relevant legal principles for a Limited Public Interest objection are discussed in detail and applied to the facts of the case. In applying the standards the Panel is mindful that the Independent Objector bears the burden of proof in respect of both standing and merits.<sup>5</sup> If he has standing, the

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<sup>5</sup> Guidebook, s. 3.5; Procedure, art. 20(c).

Independent Objector must show that the applied-for gTLD string is contrary to generally accepted legal norms of morality and public order that are recognized under principles of international law.

79. It should be noted that the Expert Panel comes to this Determination applying a principle of judicial economy arising out of the nature of these proceedings, which involve brief submissions (which are subject to strict word limits) and an expedited schedule for their disposal. Hence, while the issues raised are complex and have received serious consideration by both the parties and the Panel, the Panel's Determination will be correspondingly brief.

#### **7.1. The "Quick Look" Procedure**

80. Subsection 3.2.2.3 of the Guidebook provides that anyone may file a Limited Public Interest objection. Due to this inclusive standing base, however, objectors are subject to a "quick look" procedure designed to identify and eliminate frivolous or abusive objections. An objection found to be manifestly unfounded or an abuse of the right to object may be dismissed at any time.
81. The quick look was the Panel's first task after its appointment by the DRSP and involved an initial review on the merits of the Objection in the light of the requirements of subsection 3.2.2.3 of the Guidebook. A Limited Public Interest objection would be manifestly unfounded if it did not fall within one of the categories defined as the grounds for such an objection at section 3.5.3 of the Guidebook. A Limited Public Interest objection may also be an abuse of the right to object. An objection may be framed to fall within one of the accepted categories for Limited Public Interest objections, but other facts may clearly show that the objection is abusive.

82. On 13 August 2013, the Expert Panel informed the parties that it had conducted the “quick look” procedure contemplated in subsection 3.2.2.3 of the Guidebook and had not found the Objection to be manifestly unfounded or an abuse of the right to object such that it should be summarily dismissed.

## **7.2. The Independent Objector’s Standing**

83. Section 3.2.5 of the Guidebook provides that a formal objection to a gTLD application may be filed by the Independent Objector on the grounds of Limited Public Interest or Community. The Independent Objector may file a Limited Public Interest objection to an application even if a Community objection has been filed, and vice versa. The Independent Objector may file an objection notwithstanding the fact that a String Confusion objection or a Legal Rights objection has also been filed in respect of that application. Absent extraordinary circumstances, the Independent Objector is not permitted to file an objection to an application where an objection has already been filed on the same ground. There is no issue here in any of these respects because this Objection was brought on the ground of Limited Public Interest and no other objection has been filed on the same ground.
84. Section 3.2.5 of the Guidebook also imposes a public comment requirement. The Guidebook states that “in light of the public interest goal” associated with his role, “the Independent Objector shall not object to an application unless at least one comment in opposition to the application is made in the public sphere.” As the Independent Objector indicates, several public comments were filed on the ICANN website in respect of the Application. The Panel is satisfied that the public comment requirement imposed by the Guidebook has been met in this case.
85. One last point bears mention before turning to the merits of the Objection. According to section 3.2.5 of the Guidebook, “the Independent Objector may file objections against ‘highly objectionable’ gTLD applications.” Conceivably, this could be viewed

as raising a question of standing. The parties have not addressed it as such, however. In fact the parties' submissions do not address the question whether the Application is "highly objectionable" other than by discussing the application of the principles of adjudication governing the merits.

### **7.3. The Standards of Adjudication and Legal Principles**

86. Section 3.5 of the Guidebook stipulates that each panel will use appropriate general principles (standards) to evaluate the merits of each objection, while Article 20(a) of the Procedure obliges each panel to apply the standards that have been defined by ICANN. In addition, pursuant to Article 20(b) of the Procedure, the Panel "may refer to and base its findings upon the statements and documents submitted and any rules or principles that it determines to be applicable."
87. In the case of a Limited Public Interest objection, section 3.5.3 of the Guidebook specifies that an expert panel will consider "whether the applied-for gTLD string is contrary to general principles of international law for morality and public order".
88. The Guidebook provides that "the Panel will conduct its analysis on the basis of the applied-for gTLD string itself" but, as emphasized by the Independent Objector, "may, if needed, use as additional context the intended purpose of the gTLD as stated in the Application." The Panel will thus proceed on that basis.
89. Section 3.5.3 of the Guidebook provides useful guidance concerning "the general principles of international law for morality and public order" which it contemplates:

Examples of instruments containing such general principles include, but are not limited to:

- The Universal Declaration of Human Rights (UDHR);

- The International Covenant on Civil and Political Rights (ICCPR);
- The Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW);
- The International Convention on the Elimination of All Forms of Racial Discrimination;
- Declaration on the Elimination of Violence against Women;
- The International Covenant on Economic, Social, and Cultural Rights;
- The Convention against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment;
- The International Convention on the Protection of the Rights of all Migrant Workers and Members of their Families;
- The Slavery Convention;
- The Convention on the Prevention and Punishment of the Crime of Genocide; and
- The Convention on the Rights of the Child.

90. The Guidebook notes that these instruments “are included to serve as examples, rather than an exhaustive list,” and that they “vary in their ratification status.” The Guidebook also observes that “states may limit the scope of certain provisions through reservations and declarations indicating how they will interpret and apply certain provisions.”

91. One principle which finds express mention in section 3.5.3 of the Guidebook is freedom of expression. The Guidebook however adds that “the exercise of this right carries with it special duties and responsibilities” and that “certain limited restrictions may apply.”

92. The following part of section 3.5.3. elaborates on the grounds upon which an applied-for gTLD string may be considered contrary to generally accepted legal norms relating to morality and public order that are recognized under principles of international law are. Four such grounds are identified:

- Incitement to or promotion of violent lawless action;
- Incitement to or promotion of discrimination based upon race, color, gender, ethnicity, religion or national origin, or other similar types of discrimination that violate generally accepted legal norms recognized under principles of international law;
- Incitement to or promotion of child pornography or other sexual abuse of children; or
- A determination that an applied-for gTLD string would be contrary to specific principles of international law as reflected in relevant international instruments of law.

93. The present Objection is based upon the fourth ground, namely that the string, in the context of the Application, would be contrary to specific principles of international law as reflected in relevant international instruments of law.

94. The four grounds are similar insofar as they all correspond to a notion of contrariety to generally accepted norms of morality and public order. If a situation of contrariety to international law does not relate to morality and public order, then an objection cannot stand. At the same time, the Panel notes that the fourth ground is different from the first three in an important way. The first three grounds each provide a specific basis for a finding that the string is “contrary to generally accepted legal norms relating to morality and public order that are recognized under principles of international law.” They refer to specific actions deemed contrary to the relevant norms, i.e., “incitement to or promotion of [...] violent, lawless action”, “discrimination” and “sexual abuse of children”. The fourth ground, by contrast, leaves open the scope of further possible substantive violations, but imposes an important requirement: the string must be contrary to *specific* principles of international law that rise to the level of generally accepted legal norms relating to morality and public order.

95. Under the overall requirement of contrariety “to generally accepted legal norms relating to morality and public order that are recognized under principles of international law”, the fourth ground leaves it to the discretion of the Expert Panel to determine if the applied-for gTLD is contrary to a specific principle or principles of international law relating to morality and public order. The three preceding grounds provide context which may assist the Expert Panel in determining the kinds of principles of international law that are sufficiently specific, and the kinds of grounds considered sufficiently serious, to restrict the right to freedom of expression of the Applicant.
96. The Panel notes that the first three grounds mentioned in section 3.5.3 could potentially afford a basis for necessary and proportionate restrictions on free expression under international law, in terms, for example, of Article 19(3)(b) and Article 20(2) of the ICCPR. There are other grounds on which free expression may be limited, i.e.: respect for the rights or reputations of others, national security, public order, public health or morals. In the Panel’s view, the reference to “morality” and “public order” in the first paragraph of section 3.5.3 of the Guidebook does not exclude limitations of free expression on such other grounds as are mentioned in the ICCPR. While also accepting that – as underscored in section 3.5.3 of the Guidebook – state practice on the interpretation of these provisions (including the right to free expression) varies, in the Panel’s view there is a specific principle of international law, reflected in relevant international legal instruments, which permits limitation of free expression on public health grounds.

#### **7.4. The Merits of the Objection**

97. The Independent Objector alleges that the applied-for gTLD string, viewed in context with the intended purpose of the gTLD as stated in the Application, would be contrary to a specific principle of international law as reflected in relevant international instruments of law, namely the right to health. He argues that his appreciation of the

.MED gTLD is directly linked to his appreciation of the concept of health, since the abbreviation “med” for medical and medicine is inextricably connected to health. On the other hand, while agreeing that the term “med” is related to the term “health”, the Applicant argues that they are not inextricably connected, since a wide variety of issues that may be applicable to the general field of health will not apply to the term “medicine” or “med”. In his Additional Written Statement, the Independent Objector relies on a Resolution adopted by the Sixty-sixth World Health Assembly on 27 May 2013 to argue that health-related domain names should not be treated as belonging to a different category from the .HEALTH gTLD. The Independent Objector also cites to the Safeguard Advice issued by ICANN’s Governmental Advisory Committee (GAC) on 11 April 2013, which advises that additional safeguards be put in place for a range of sensitive strings including .MED. The Applicant argues that the Resolution of the Sixty-Sixth World Health Assembly and the GAC Advice do not contain general principles of international law for morality and public order.

98. The Independent Objector lists several instruments of international law that confirm the existence of a right to health and concludes that the promotion and protection of health is inherent in the due respect of generally accepted legal norms of public order that are recognized under fundamental principles of international law. He argues that the right to health extends to access to reliable and trustworthy health-related education and information.
99. According to the Independent Objector, the Applicant should demonstrate how its policies and decision-making will be properly connected to the public authorities, national as well as international, that are under a public international law obligation to respect, protect and fulfill the right to health. While the Applicant agrees that governments have a role to play in fulfilling the right to health, it submits that not all aspects related to health or medicine are to be dominated or controlled by states. The Applicant supports the inclusion of health as a fundamental, international human right and recognizes the importance of access to reliable and trustworthy health-related information.

100. The Independent Objector has framed his Objection in terms of the right to health rather than in terms of public health as a valid ground for limiting freedom of expression. There are analytical differences between the right to health as an individual human right (enshrined, for example, in Article 12 of the International Covenant Economic, Social, and Cultural Rights (“ICESCR”)) and public health as a ground for limiting freedom of expression (in terms, for example, of Article 19 of the ICCPR). It is worth exploring these differences to cast light on the state of international law in this area.
101. The right to health is defined by the United Nations Committee on Economic, Social and Cultural Rights as the right to the highest attainable standard of physical and mental health.<sup>6</sup> In the interpretation of the Committee, the right to health also includes the right to receive and have access to information about health.<sup>7</sup> As the terms of Article 12 of the ICESCR indicate, the principal obligor is the state. The Independent Objector has however stressed that “not only public authorities, but also the private sector have responsibilities vis-à-vis the protection of human rights.” The Panel does not consider it necessary to come to a definitive view on the question of the extent to which, if any, non-state actors may be bound by international human rights obligations, because, as explained below, the right to health question can be resolved by reference to the content of the right.
102. Where public health appears as a ground for restricting freedom of expression, as for example in the case of Article 19 of the ICCPR, it has permissive rather than obligatory effects. States are permitted to limit the exercise of free expression on public health grounds. But they are not obliged to do so – at least not in terms of Article 19 of the ICCPR.

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<sup>6</sup> United Nations Committee on Economic, Social and Cultural Rights, General Comment No. 14, *The right to the highest attainable standard of health (art.12 of the Covenant on Economic, Social and Cultural Rights)*, 11 August 2000, E/C. 12/2000/4, para. 9.

<sup>7</sup> *Id.*, para. 11.

103. It is conceivable that an obligation to restrict freedom of expression may arise as part of a state's obligation vis-à-vis the right to health. But such a restriction would still have to satisfy the conditions in the limitation clause in Article 19 (or other equivalent provisions protecting free expression). A restriction of free expression cannot be justified solely on the basis of its purported positive consequences on the right to health. To do so would result in endless expansions in the permissible limitations of freedom of expression by reference to consequentialist arguments about the impact that a particular restriction could have on the enjoyment of other rights. Moreover, such restrictions must be both necessary and proportionate.
104. Furthermore, as the Independent Objector has himself noted, the information-related element of the right to health is the right to *have access* to information that is reliable and trustworthy. It does not follow from this right that a state has a duty to censor all information on health that is not deemed reliable and trustworthy.
105. The above analysis of the relationship between the right to health, freedom of expression and public health as a ground for limiting free expression informs the approach of the Panel. The Panel accepts that the right to health is a specific principle of international law, but that right has to be considered in light of the right to freedom of expression and of the limited grounds upon which it is permissible to restrict this right.
106. Starting from those premises, the Independent Objector bears the burden of proving that the applied-for gTLD string, in light of the Application, would be “contrary” to the right to health, that a restriction on freedom of expression would be permissible under section 3.5.3 of the Guidebook, and hence that the Objection should be sustained (Article 20 of the Procedure). The Panel finds that the Independent Objector has failed to discharge his burden of proof in this case.
107. The Independent Objector has not established how the right to health requires that the operation of the string must “be properly connected to ... public authorities who are

under a legal obligation to protect the right to health.” He affirms, but fails to establish, that the right to health prohibits the dissemination of health-related information, on a commercial basis or otherwise.

108. The Independent Objector claims that the private sector has responsibilities vis-à-vis the protection of human rights, but links these responsibilities to the idea of a possible interference with the obligations imposed on public authorities by international law: “[p]roviding medical related information on a worldwide basis”, he writes, “*might* interfere with efforts of public authorities to fulfill their obligations” under international law. (emphasis added)
109. The Independent Objector has not demonstrated to the Panel’s satisfaction that the capacity or efforts of public authorities to fulfill their international obligations by protecting and promoting the right to health would be affected by the applied-for gTLD string and, furthermore, how such alleged interference by the applied-for gTLD string (in the context of the intended purpose thereof) would be contrary to a specific principle of international law relating to public morality, public health or public order..
110. Even if the Panel were to assume, *arguendo*, that the capacity and efforts of public authorities to protect and to promote the right to health might be adversely affected, it would still be necessary to show that morality and public order – or any of the other grounds on which limitations of free expression are justifiable under international law – are engaged in a way that justifies a limitation on freedom of expression. Free expression cannot be limited merely on the grounds of policy convenience. As noted earlier, the threshold for a permissible restriction is higher. In the case of public health, the restriction must also be shown to be necessary to the protection of public health. The Independent Objector does not meet this necessity test.
111. Even if one were to consider the Independent Objector’s case exclusively on right to health grounds, and not take into account the principles governing the limitation of freedom of expression, the Objection would have to fail. In fact, in the view of the

Committee on Economic, Social and Cultural Rights, information accessibility in relation to the right to health “includes the right to seek, receive and impart information and ideas concerning health issues.” It does not include the right to be protected from the mere risk of misleading or unreliable information. Had there been proof of a significant risk of dissemination of misleading or unreliable information, or a deliberate intention to this effect, the Panel’s assessment may well have differed. But the Independent Objector has offered no such evidence. For its part, the Applicant has provided various assurances, most notably in relation to the administration of the gTLD.

112. The Panel thus finds that the Independent Objector has failed to bridge the large gap between, on the one hand, his bare allegation that the capacity or efforts of states to fulfill their obligations under the right to health *might* be affected by the applied-for gTLD, and, on the other hand, a demonstration of how such a scenario would amount to contrariety to general principles of international law for morality and public order. The Objection must therefore fail.

### **7.5. The Alternative Remedy**

113. In the event the Objection is not successful, the Independent Objector seeks an alternative remedy. He asks this Panel “to hold the present Objection is valid as long as the Applicant has not provided solutions for the serious objections raised”. The Independent Objector does not provide details of this alternative remedy or of its basis in the Guidebook or the Procedure. The Procedure indicates quite clearly that the available remedies are “limited to the success or dismissal of an Objection and to the refund by the DRSP to the prevailing party, as determined by the Panel in its Expert Determination, of its advance payment(s) of costs pursuant to Article 14(e) of this Procedure and any relevant provisions of the applicable DRSP Rules.” This Panel finds that there is no basis in the Procedure for the alternative remedy sought by the Independent Objector.

114. This does not take away from the serious concerns raised by the Independent Objector. However, the very difficult policy questions surrounding the delegation and operation of health-related strings are not matters for this Panel to decide. It was not in particular this Panel's task to decide on matters of public interest broadly defined, although the expression "Limited Public Interest" might suggest otherwise. This Panel was asked only to determine whether the Objection could be sustained on the basis that the applied-for gTLD string (in the context of its intended purpose) was contrary to general principles of international law for morality or public order. It was not, in other words, the task of this Panel to determine whether granting the Application advances the public interest in a more general sense. This Panel's task was to impartially apply the tests as they are found in the Guidebook and as they may be understood from a consideration of the broader context in which they came to be formulated.

## **8. DETERMINATION**

115. For the reasons provided above, and in accordance with Article 21(d) of the Procedure, the Panel

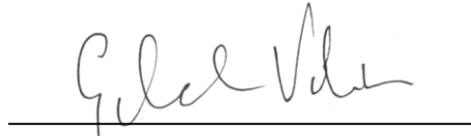
- **DISMISSES** the Limited Public Interest Objection to Charleston Road Registry Inc.'s Application for the string .MED brought by the Independent Objector;
- **DECLARES** that the prevailing party for the purpose of cost advance refund under Article 14(e) of the Procedure is Charleston Road Registry Inc.; and
- **DISMISSES** all other requests in these proceedings.



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Mr. John Gaffney

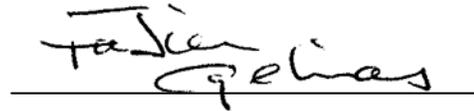
Co-Expert of the Expert Panel



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Professor Guglielmo Verdirame

Co-Expert of the Expert Panel



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Professor Fabien Gélinas

Chair of the Expert Panel

Date: 19 December 2013