

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

CASE No. EXP/424/ICANN/41

UNION OF ORTHODOX JEWISH CONGREGATIONS OF AMERICA

(USA)

vs/

KOSHER MARKETING ASSETS LLC

(USA)

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

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

EXP/424/ICANN/41

in re “.kosher” gTLD

EXPERT DETERMINATION

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

vs.

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

Expert

Professor Luca G. Radicati di Brozolo

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

I. INTRODUCTION

1. The community objection to the application for the “.kosher” gTLD dated March 13, 2013 (the “**Objection**”), which is at the origin of these proceedings, was filed by the Union of Orthodox Jewish Congregations of America (OU Kosher), 11 Broadway, New York, NY 10004, USA, (the “**Objector**”). The Objector is represented in these proceedings by Mr. David E. Weslow, Wiley Rein LLP, 1776 K Street NW, Washington, DC 20006, dweslow@wileyrein.com.
2. The Objection is supported by¹: (i) Star-K Kosher Certification, Inc, 122 Slade Ave, Suite 300, Baltimore, MD 21208, USA; (ii) Chicago Rabbinical Council, Inc., 2701 W. Howard St, Chicago IL 60645, USA; (iii) Kosher Supervision Service, Inc. (Kof-K), 201 The Plaza, Teaneck, NJ 07666, USA; (iv) The Kashruth Council of Canada (COR), 3200 Dufferin Street, Suite 308, Toronto, Ontario, M6B 2C1, Canada; (v) Kehilla Kosher Los Angeles, 345 North La Brea Avenue, Ste 204, Los Angeles, CA 90036, USA; (vi) Orthodox Rabbinical Board of Broward and Palm Beach Counties, PO Box 640326, Miami FL 33164-0326, USA; (vii) Kosher Miami, Vaad HaKashrus of Miami Dade, PO Box 403225, Miami, FL 33140-1225, USA; (viii) Rabbinical Council of California, 3780 Wilshire Blvd# 420, Los Angeles, CA 90010, USA; (ix) Orthodox Vaad Ha Kashrus of the Ashkenazi Kehila in Mexico, #70, 6th Floor, Col Roma Norte, Mexico City 06700, Mexico; (x) The Rabbinical Court of Moscow Kashruth Department, Big Spasoglinitshesky per. 10, Moscow 101000, Russia; (xi) London Beth Din Kashruth Division, 305 Ballards Lane, London N12 8GB, United Kingdom (collectively the “**Supporters of the Objection**”).
3. The application for the “.kosher” gTLD (the “**Application**”) was filed by Kosher Marketing Assets LLC, 391 Troy Avenue, Brooklyn, NY 11213, NY, USA (the “**Applicant**”). 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, brian.winterfeldt@kattenlaw.com, newgtld@kattenlaw.com. The Applicant filed its Response to the Objection (the “**Response**”) on May 13, 2013.
4. On June 4, 2013 the Chair of the Standing Committee of the International Centre for Expertise of the International Chamber of Commerce (the “**Centre**”) appointed as sole member of the Panel of Experts Professor Luca G. Radicati di Brozolo, Arblit - Radicati di Brozolo Sabatini, 15 Via Alberto da Giussano, 20145 Milan, Italy, Luca.Radicati@arblit.com (the “**Expert**”), who submitted his declaration of acceptance and availability and statement of impartiality and independence on the following day.

¹ See Objection, p. 8.

5. The file of the case was transmitted by the Centre to the Expert on July 5, 2013.
6. These proceedings are administered by the Centre pursuant to Article 3(d) of the New gTLD Dispute Resolution Procedure (the “**Procedure**”),² which is applicable by virtue of its Article 1(d).
7. These proceedings are governed, as to matters of procedure, by the Procedure and by the Rules for Expertise of the International Chamber of Commerce, as supplemented by the ICC Practice Note on the Administration of Cases under the Attachment to Module 3 of the gTLD Applicant Guidebook, New gTLD Dispute Resolution Procedure of the gTLD Applicant Guidebook (Article 4(a) and 4(b)(iv) of the Procedure).
8. As dictated by Article 20 of the Procedure, the merits of the dispute before the Expert are to be decided by reference to the relevant standards defined by ICANN, in particular in Section 3.5.4 of the objection procedures in Module 3 of the AGB (the “**Objection Procedures**”), as well as to any rules and principles that the Expert determines to be applicable, having due regard to the statements and documents submitted by the Parties. The burden of proof that the Objection should be sustained rests with the Objector in accordance with the applicable standards.
9. Following an exchange of correspondence with the Objector and the Applicant (collectively the “**Parties**”), the Expert issued the Expert Mission on August 1, 2013.
10. Pursuant to Article 5(a) of the Procedure, the language of all submissions and proceedings was English. Moreover, in accordance with Article 6(a) of the Procedure, all communications by the Parties, the Expert and the Centre were submitted electronically.
11. In conformity with the procedural timetable fixed in the Expert Mission, the Objector filed its supplemental pleading on August 13, 2013 (“**Supplemental Pleading**”) and the Applicant filed its response on August 27, 2013 (“**Response to the Supplemental Pleading**”).
12. On September 2, 2013 the Expert requested the Applicant to provide two clarifications and granted the Objector the opportunity to reply. The Applicant’s clarifications were submitted on September 4, 2013 and the Objector’s reply on September 9, 2013, according to the timetable agreed with the Parties.
13. In accordance with Article 19(a) of the Procedure, and in the absence of any request by the Parties, no oral hearing was held.
14. Article 21(a) of the Procedure provides that the Centre and the Expert shall make reasonable efforts to ensure that the Expert renders his decision within 45 days of the “constitution of the Panel”. The Centre considers that the Panel is constituted when the Expert is appointed, the Parties have paid their respective advances on costs in full and the file is transmitted to the Expert. In this case, the Panel was

² Attachment to Module 3 of the AGB.

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

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

II. THE OBJECTOR'S STANDING

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

- (i) is an established institution; and
- (ii) has an ongoing relationship with a clearly delineated community.

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

(a) *The Position of the Objector*

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

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

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

(b) *The position of the Applicant*

21. The Applicant does not dispute the Objector's claim to be the oldest and largest kosher certification organization ("**KCO**") in the world.
22. It states that the Objector fails to discuss an ongoing relationship with a clearly delineated community, merely submitting that it has such a relationship with "*an established community*", and thereby apparently equating "*established*" with "*delineated*", notwithstanding that the terms are not equal and do not have the same meaning in the AGB. It then contests that the ongoing relationship between the Objector and the community of KCO is "*for the benefit*" of the community itself, since the other members of the community are not the Objector's beneficiaries but its commercial competitors. The Objector's activities benefit itself and its clients rather than other KCOs and the wider kosher industry. It then posits that the community of KCOs and the wider kosher community lack formal boundaries, since anyone can claim to be a KCO and, even under Jewish law, different certifiers follow different rules.
23. In its Response to the Supplemental Pleading, the Applicant adds that the Objector has no mechanisms for participation in or establishing and sustaining a relationship with other KCOs.

(c) *Determination of the Expert*

24. There is no dispute between the Parties that the Objector is "*an established institution*" and thereby satisfies the first requirement for standing.
25. As to the requirement of an "*ongoing relationship with a clearly delineated community*", the Applicant's arguments turn essentially on whether the community to which the Objector claims to be associated, i.e. the community of KCOs, is clearly delineated and on whether the relationship between the Objector and that community is for the benefit of the latter.
26. On the issue of the clear delineation of the community, the Applicant's arguments do not differ fundamentally from those developed to contest the satisfaction of the first substantive standard for community objections, which turns on the existence of a clearly delineated community (Section 3.5.4 of the Objection Procedures). For the reasons set out in detail in Section III.A(c) below, the Expert is satisfied that the community of KCO's on whose behalf the Objection is filed satisfies the criteria to be considered clearly delineated.
27. As to whether the relationship between the Objector and the invoked community of KCOs is for the benefit of the latter, there is merit in the Objector's argument that, due to the communal nature of kosher certification, KCOs rely on each other, and that therefore other KCOs draw some benefit from the Objector's activities. The fact that other KCO's are competitors of the Objector does not necessarily detract from that.
28. In any event, the two factors that relate to the "*benefit of the associated community*"

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

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

III. THE MERITS OF THE OBJECTION

31. In accordance with Section 3.5.4. of the Objection Procedures, the Objection can be sustained if the Expert ascertains the existence of substantial opposition from a significant portion of the community to which the string may be targeted. For a showing of such opposition the Objector must prove that:
 - (i) the community invoked by the Objector is clearly delineated;
 - (ii) there is substantial community opposition to the Application;
 - (iii) there is a strong association between the community invoked by the Objector and the “.kosher” gTLD string;
 - (iv) the Application creates a likelihood of material detriment to the rights or legitimate interests of a significant portion of the community to which the “.kosher” string may be explicitly or implicitly targeted.
32. The Parties have amply debated each of these criteria in their written submissions.

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

(a) The position of the Objector

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

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

34. The Objector considers that its position on the existence of a community of KCOs is confirmed by the Application, which describes the mission and purpose of the “.kosher” gTLD string as, *inter alia*, “to promote food certification in general”, stating that “the .kosher TLD and all the domains under it will be used to provide reliable information about Kosher certification, as an industry and as concerns Kosher certified products” and “.kosher TLD aspires to become the premiere reliable source of information on the internet about everything to do about Kosher certification”. The Objector draws further support from an *amicus curiae* brief filed, *inter alia*, by the Applicant in an action before US courts, wherein it was asserted that the courts were ill-equipped to determine whether a product is 100% kosher and that such determinations can be made only by Jewish religious authorities.³ According to the Objector, further admissions regarding the existence of a clearly delineated KCO community comes from the statement in the Applicant’s website that, when an organization or an individual puts a kosher certification on a product, they attest that the contents and manufacturing meet their kashrut standards. Finally the Objector notes that the kosher certification community is the focus of several publications and newsletters, one of which has a distribution of more than 80,000 copies and some of which serve as industry monitors.
35. In its Supplemental Pleading the Objector underlines the observation of ICANN’s Independent Objector that “the notion of ‘community’ is wide and broad, and is not perfectly defined”⁴ and stresses again that the existence of a clearly delineated KCO community has been recognized by the Applicant. It adds that the Applicant’s definition of community is excessively limited, since the level of “formal boundaries” is only one of the relevant factors. It refers to the Independent Objector’s position that a community can include a “community of interests, as well as a particular ethnical, religious, linguistic or similar community” and that “a community can be defined as a group of individuals who have something in common [...] or share common values, interests or goals”. The kosher community is unique in that it is defined by the community itself. Finally the Objector contests the relevance of the Independent Objector’s lack of objection to the application for the “.Catholic” string in particular because, unlike the Catholic Church, “kosher is decentralized and

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

⁴ See Prof. Alain Pellet, Independent Objector, The Issue of “Closed Generic” gTLDs, <http://www.independent-objector-newgtlds.org/english-version/the-issue-of-closed-generic-gtlds/> (Objector’s Annex B to the Supplemental Pleading).

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

(b) *The position of the Applicant*

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

(c) *Determination of the Expert*

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

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

⁶ See *supra*, footnote 5.

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

39. In the case at hand the community invoked by the Objector, i.e. the one that the Objector "*has identified itself as representing*" (in the words of Objection Procedures), is the community of KCOs.
40. The Expert does not accept the Objector's argument that the Application itself and the *amicus curiae* brief filed by "*several major kashrut supervision agencies*", including the Applicant, in proceedings before the US courts⁷ constitute an acknowledgement of the existence of a KCO community. Those documents merely confirm the importance of certification and the pre-eminence of KCOs over courts in determining when a product can be defined as kosher.
41. Other elements cited by the Objector are, instead, relevant. Particularly important is the undisputed fact that KCOs have existed since at least almost a century and that they play a very significant role in what the Applicant refers to as the "*greater kosher community*", because they perform the fundamental function of certifying what products comply with the strict requirements of Jewish law. Their role and authority are recognized by all those who seek to follow the dictates of kosher. It is equally not disputed that today there are over one thousand KCOs that operate in a wide range of countries.
42. It is true that there is no official roster of KCOs or "*officially recognized limitation on membership*" of the community at stake, since anybody can engage in kosher certification, and the exact number and identity of all the KCOs in existence and operating at any one moment is impossible to certify.
43. These factors are not of themselves sufficient to deny the existence of a community or its clear delineation. The community of KCOs is made up only of KCOs, and these entities can be identified as such. This is sufficient to conclude that there are sufficient formal boundaries around the community. The fact that anybody can engage in kosher certification is not a bar to the identification of the members of the community, in particular considering that it is not necessary that the identity of every single member of a given community be known. There is no requirement that the existence of the community or the identity of the individual members be certified through any type of formality.
44. Also the fact that different KCOs follow different certification standards is not conclusive. It does not entail that, considered overall, KCOs do not share common values, interests and goals, which are those of providing certification according to the standards of kosher in the interests of the broader community of those who seek to abide by kosher rules.

⁷ See *supra*, footnote 3.

45. The Expert is also not persuaded of the relevance of the consideration that there may be other communities with an interest in the term “kosher” and that the kosher community includes other categories of individuals and entities besides KCOs. The existence of a community, and its clear delineation, is not precluded by the existence of other communities to which a given string may be targeted. From the Objection Procedures (in particular at 3-22 and 3-23) it is clear that there need not be a coincidence between the community to which the string is targeted by the applicant and the one on behalf of which an objector can purport to express opposition. In any event, even if the KCO community were characterized as a sub-community of a broader community of all those with stake in kosher, it would unquestionably remain an important part of the overall community.
46. The refusal of the Independent Objector to object to the “.Catholic” string is not pertinent.⁸ In that case, the Independent Objector found that the public comments on the ICANN website did not tend to prove the existence of a delineated community and did not necessarily pretend to express an opinion in the name of such a community. In the present case the Expert considers that the arguments advanced by the Objector do indicate the existence of a clearly delineated community and there is no doubt that the Objector claims to express the opinion of the community.
47. All these elements support the conclusion that the community of KCOs invoked by the Objector enjoys a certain level of public recognition and encompasses a significant number of entities and can be distinguished from other communities by its characteristics and specificities.
48. More specifically, based on the evidence, the Expert considers that the community of KCOs enjoys a significant level of public recognition, is characterized by formal boundaries in the sense that it is possible to identify the entities that form part of it, has been in existence since a considerable amount of time, is distributed in many parts of the world and is composed of over one thousand entities.
49. The Expert is therefore satisfied that the community of KCOs, in the name of which the Objection was filed, is clearly delineated.

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

(a) The position of the Objector

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

⁸ See *supra*, footnote 5.

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

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

(b) The position of the Applicant

52. According to the Applicant, the Objection is supported by less than 1% of the purported community, of which the entities expressing opposition are unrepresentative. In particular, the Objector and the Supporters of the Objection represent only certification of kosher ingredients and food products, leaving out many other essential sectors, including restaurants, caterers, bakeries etc. Moreover, the parties to this dispute are of equal weight and stature. The opposition comes from large commercial entities and "*an unrepresentative sample of regional certification organizations*", whilst the Applicant's support comes from 21 countries. Also, the Applicant has passed over a significant opportunity to defend KCOs. Finally, unlike the Applicant that has borne significant costs for the Application, the Objector rejected the Applicant's offer of joint control of the ".kosher" string "*citing fiscal reservations*". The Objector's true reason for the opposition is that "*ideally .kosher would not exist*", which is of itself a reason for dismissal of the Objection since it is based on obstruction, in contrast to the principle laid down in Section 4.2.3 of the AGB (at 4-19).
53. The Response to the Supplemental Pleading notes that the Objector relies on the "*sheer number*" of ingredients purportedly certified by the opponents of the Application and that the numbers are based on "*dubious statistics*". In any event, the number of certified products is a measure of work product, which is not an AGB factor. For the Applicant there is no evidence of world-wide opposition, the opposition is limited to "*a handful of 'heavyweight' class entities*" and "*[a] divided community is not substantial opposition*". It also alleges intimidation by the Objector.

(c) Determination of the Expert

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

opposition.

55. The Objection is submitted by an entity that is generally recognized as the “*oldest and largest*” KCO in the world and is supported by a significant number of other well established KCOs, including four of the “Big Five” KCOs that are alleged to certify approximately 63% of kosher ingredients worldwide, and leading entities in several major countries. The fact that the number of KCOs objecting to the Application (twelve) is fairly small in absolute terms would not of itself be a bar to considering their opposition substantial. Although the AGB refers to the “*number of expressions of opposition*”, in the Expert’s opinion this does not prevent him from also weighing the expressions of opposition to the Application.
56. Given their recognized stature and weight within the KCO community, the Objector and the Supporters of the Objection can also be held to be sufficiently representative of a significant portion of that community. The fact that the Applicant has equivalent stature within the community does not detract from the fact that the Objectors’ opposition can be substantial. In the opinion of the Expert, “*substantial*” does not necessarily mean “*overwhelming*” or require that the opposition be the expression of the majority of the community. The objecting entities’ leading roles and weight within the community in a variety of countries could be sufficient for a finding that also the fourth factor listed in the AGB (the one relating the distribution or diversity amongst the sources of opposition) is satisfied.
57. As pointed out by the Applicant, the Objector has provided no evidence as to the satisfaction of the two remaining factors, i.e. the historical defense of the community in other contexts and the costs incurred by the objector in expressing opposition. This does not necessarily entail a finding that opposition is not substantial, since the factors listed in Section 3.5.4. of the Objection Procedures are only examples of those that can be considered by the Expert, who has discretion in deciding whether the individual criteria are satisfied.
58. Nonetheless, in this case not only has the Objector not provided any evidence on the last two factors listed in the Objection Procedures as indicating substantial opposition. Also for some of the other factors discussed above it could be doubted that the required standard of proof has been satisfied in full. One could therefore hesitate to conclude that, considering the relevant standards individually or collectively, there is strong and unequivocal evidence of substantial opposition to the Application within the community. The Objector has not put forth other elements that the Expert would be permitted to consider in this context and that could buttress the Objector’s case.
59. In light of the Expert’s conclusion in relation to the fourth factor required for a community objection to be successful (Section III.D(c) below), it is in any event not necessary to reach a final conclusion on the substantial opposition criterion.

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

(a) *The position of the Objector*

60. For the Objector the association between “.kosher” and the KCO community is evidenced by the string’s declared mission to “*promote Kosher food certification in general and OK Kosher certification and its clients in particular*”. This demonstrates the existence of a kosher certification community and the intertwining of the concepts of kosher and certified products. Further unequivocal acknowledgement of the strong association between the string and the KCO community comes from the statement in the Application that “*.kosher TLD aspires to become the premiere reliable source of information on the internet about everything to do with Kosher certification*”. On the other hand, the Application, shows no particular association between the Applicant and the string that would justify its exclusive dominion over the string. The strong association between kosher and the KCO community extends beyond orthodox Jews. The need for certification for foods to be considered kosher appears clearly from internet searches.
61. The Supplemental Pleading criticizes the Applicant’s reliance on the possible association of other communities with the term kosher on the ground that the AGB does not require that the objecting community’s association with the applied-for string be exclusive.

(b) *The position of the Applicant*

62. The Applicant argues that KCOs are a subset of the individuals and entities targeted by the Application and understood to be associated with kosher, which are intended to include manufacturers, distributors, service providers, sellers and consumers of kosher food. The Applicant contends that the association between kosher and KCOs is no stronger than that between art appraisers and the word art. Kosher is defined, even by the Objector, as meeting Jewish standards, regardless of certification. KCOs are only part of a broader industry of entities and individuals that use the word kosher. Any association between kosher and the alleged community is ancillary to the much stronger one with the greater community. The fact that the Application’s purpose is to provide information on everything to do with kosher certification is not evidence of a strong association, whilst the lack of a special connection between the Applicant and kosher is irrelevant, since no such connection is required by the AGB. Consumers do not associate kosher with anything other than food products and certainly not exclusively with KCOs.
63. In the Response to the Supplemental Pleading, the Applicant labels as “*misleading*” the suggestion that there can be no practice of kosher law without certifying organizations and reiterates the weakness of the association between KCOs and kosher, “*whereas a strong association actually exists between the string and the producers and consumers of kosher food*”.

(c) *Determination of the Expert*

64. Under Section 3.5.4 of the Objection Procedures, the factors that can be taken into consideration to determine whether there is a strong association between “.koshers” and the KCO community represented by the Objector include (i) the statements contained in the Application, (ii) other public statements by the Applicant and (iii) associations by the public.
65. As noted by the Objector, the association between the “.koshers” string and kosher certification is unequivocally pointed to by the Applicant itself. The Application (para. 18(a)) describes “[t]he mission” of the string as “to promote kosher food certification”. In para. 18(b)(i) it adds that the domains will be used to provide information about “Kosher certification”, in para. 18(b)(ii) that the string “will specialize in Kosher Certification”, in para. 18(b)(iii) that it “aspires to become the premiere reliable source of information on the Internet about everything to do with Kosher certification” and in para. 18(b)(iv) that that the domain will be made available only to companies that intend to use it “to promote Kosher certification”. This in itself is a powerful indication of the link between the string and the KCO community.
66. The link between the string and kosher certification is in any case almost inherent. It is true that kosher food does not require a specialized organization, as remarked by the Applicant. It is equally true, however, that KCOs play a predominant role in determining what is kosher, and that this role is recognized and relied upon by the great majority of those who use kosher products.
67. The fact, to which the Applicant points, that the term kosher can be associated to a broader group than KCOs, or even that the Applicant intends to “target” such a broader group, does not demonstrate a lack of a relationship with the community in question. The Expert agrees with the Objector that nothing in the Objection Procedures requires that the community represented by the Objector be the only one having a “strong association” with the applied for string.
68. The Expert is therefore of the opinion that the criterion of strong association is satisfied, in that there is a strong association between the “.koshers” string and the community of KCOs.

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

(a) *The position of the Objector*

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

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

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

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

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

(b) *The position of the Applicant*

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

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

73. The Response to the Supplemental Pleading contests the claim that consumers will rely exclusively on the ".kosher" string for kosher status, thereby incurring in confusion. It reiterates that the Applicant's original intention was to sublicense domain names to certified second level registrants and to develop close affiliations with other KCOs and that it never intended exclusive control of the TLD. To alleviate any concern, the Applicant also declared its readiness to execute a public interest commitment at no cost, thereby further binding it in a manner enforceable by ICANN and third parties. Additionally, the Applicant offered the Objector an equal partnership in operating the TLD, subject to a sharing of costs. It notes that its RA is contractually binding, such that any unfairly exclusive operation by the Applicant would entail a breach thereof. Any claims by allegedly harmed parties would be subject to the Public Interest Commitment Dispute Resolution Policy ("**PICDRP**") provided for at Article 2 of Specification 11. The Applicant's failure to file a community-based application under Section 1.2.3. of the AGB is not evidence that it will operate the ".kosher" domain to the detriment of the community. The Application is in no way closed and does not allow for exclusive control of the domain, particularly because the Applicant will be subject to Specification 11 requiring registry operators to abide by fair and transparent registration and non-discriminatory policies. The Applicant concludes that it would have no choice as to whether to accept Specification 11.
74. In reply to the Expert's request for clarifications the Applicant confirmed that the verification of the eligibility requirements for registration of the domains will not be limited to the Applicant, and that "*[a] prospective registrant's own kosher certification organization will be responsible for personally visiting companies seeking to register a domain name*". It also clarified the statement in the Application about the intended limits to the registration of domains. It explained that the reference to "*affiliates*" was not intended in the strict legal sense of "*entities under common control*" and that in any event its initial intentions were superseded by the recent guidance from the ICANN Board requiring compliance with Specification 11, "*which entirely obviates Objector's concerns*". It added that "*there is no question that [the Applicant] would be subject to the obligations [...] under Specification 11*".

(c) *Determination of the Expert*

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

76. The AGB specifies in Section 3.5.4 that “[a]n allegation of detriment that consists only of the applicant being delegated the string instead of the objector will not be sufficient for a filing of material detriment.”
77. The Objector has not explained how the operation of the “.kosher” domain by the Applicant would damage the community-oriented nature of kosher certification. There is no evidence that only the Applicant would be able to declare a food manufacturer kosher, thereby excluding other KCOs from this activity. Likewise, there is no persuasive evidence that the operation of the TLD by the Applicant would lead to significant confusion in consumers or others with a stake in kosher. Equally unsupported is the argument that the word kosher will become “*exclusively associated*” with the Applicant, as is the one that there would be a “*single entity*” with “*unilateral authority*” to determine what is kosher. There is also no indication that “.kosher” will be used to provide certification services.
78. While the statement in the Application that the Applicant “*intends to promote OK Kosher certification and its clients in particular*” might give the impression that the Applicant intends to operate the domain in a self-serving manner and as a closed gTLD, the likelihood of that happening is not established. An intention to use the TLD in an improper manner is not even proven by the statements in the Application that “.kosher” will only be available to companies that have been “*personally visited, inspected and are known to be using the domain to promote kosher certification*” and that the TLD “*aspires to become the premiere reliable source on the internet about everything to do with Kosher certification*”.
79. Specifically, the Application does not indicate that only the Applicant will verify the eligibility to use the “.kosher” domain. The Expert disagrees that the Applicant has failed to respond to his request for clarification as to who will personally visit prospective registrants to certify their compliance with the appropriate standards. Indeed, in response to the Expert’s request, the Applicant explicitly stated that responsibility for the verification will lie with the “*prospective registrant’s own kosher certification organization*”. This seems evidence enough of the lack of ground of the Objector’s claim that only the Applicant will verify eligibility and will be able to determine arbitrarily what registrants will have access to “.kosher” domains. On the other hand, the fact that registration will be subject to some form of third party verification of the conformity to objective standards provides precisely reassurance that the “.kosher” gTLD will only be available to registrants who use the domain for legitimate uses, in line with concerns voiced by the Objector.
80. The Objector’s reference to a purported opposition of the GAC to the registration of the “.halal” gTLD is incorrect, as the opposition was by some members of the GAC only.
81. On the other hand, the Applicant’s intention to take the broader interests of the community into consideration is borne out by its offers to cooperate with the Objector in the operation of the domain and to give them an equal partnership.
82. What is more significant, and ultimately dispositive, however, is that the ICANN mechanism for operating gTLDs provides significant safeguards against any type of

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

83. The Applicant would furthermore be subject to the obligation set out in Article 3(c) of Specification 11 to operate “.kosher” in *“a transparent manner consistent with general principles of openness and non-discrimination by establishing, publishing and adhering to clear registration policies”*. The Expert cannot accept the argument that the openness and non-discrimination obligations laid down in that provision would not prevent the Applicant from resorting to restrictive criteria, if it applied them openly and even-handedly. That argument presupposes an interpretation of Article 3(c) that would render it completely meaningless and is therefore untenable. Article 3(c) is a fundamental provision in the overall system, and it must be assumed that it will be interpreted constructively and not in a formalistic manner.
84. The enforceability of the commitments in question in the event of alleged violation by the Applicant would be assured by the PICDRP provided for by Article 2 of Specification 11. This will be binding on the Applicant because, contrary to the Objector’s contention, the Applicant will not have the option of not subscribing to Specification 11. There is no evidence that the Objector, or any third party for that matter, would be unable to rely with confidence on the PICDRP, should it turn out that the Applicant will operate “.kosher” improperly. Accordingly, there is no basis for the Objector’s argument that the Applicant would be in a position to apply *“subjective standards to exclude the Objector and its clients or to contradict the Objector’s certification standards, so long as it did so openly and equally”*. The whole purpose of the RA and of the public interest commitments and of the PICDRP is precisely to avoid similar outcomes.
85. The Expert is unable to follow the Objector’s argument that the Applicant *“cannot escape”* the language of its Application and that allowing the arguments put forward in these proceedings to supplant the language of the Application would render the ICANN objection process moot. In the opinion of the Expert, whether an application for a gTLD may give rise to some form of detriment must be assessed by reference, not to the moment of submission of the application, but by reference to the time when the gTLD will be active, and taking into consideration any intervening circumstances. It is only at that time that any detrimental effect of the application will become concrete and relevant.
86. In the present instance, subsequent to the filing of the Application ICANN introduced a mechanism to ensure the respect and enforcement of public interest commitments (Specification 11). In the eyes of the Expert this mechanism is capable of providing adequate safeguards against any improper behaviors by the Applicant in the use of the “.kosher” gTLD to the detriment of other members of the KCO community.
87. Moreover, in the course of these proceedings the Applicant gave assurances as to the accessibility of the registry to other members of the KCO community. The Expert

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

88. Also considering its latest assurances, there is therefore no evidence that the Applicant intends to operate ".kosher" as a "closed" registry and that there would not be sufficient safeguards were it eventually to attempt to do so.
89. Like the Expert in Case No. EXP/493/ICANN/110 (§ 58), also in this case the Expert cannot find with certainty that the Applicant will in future unfailingly operate ".kosher" in all respects in conformity with its commitments. Yet, like in that case, *"neither has the Objector offered convincing reasons to believe that the Applicant will not do so, though that is its burden"*.
90. Accordingly, having regard to the assurances given by the Applicant and to the current safeguards, in the opinion of the Expert there is today no serious ground for the accusation that the Application is designed to confer *"monopoly status"* on the Applicant over ".kosher" domain names and to permit the Applicant to engage in *"exclusionary practices"*, or in any event that it could lead to such a result. Nor does it seem likely that upholding the Application would lead to a *"usurpation"* of kosher by the Applicant or, more simply, that the Objector will not be permitted to register a domain under ".kosher". Finally, no relevance can be attributed in this context to the simple interest of the Objector *"that there should not be a .kosher gTLD at all"* (Applicant's Annex AE).
91. Furthermore, the Objector has provided no indication as to any other factor capable of evidencing a likely material detriment according to the AGB. It has not shown that the KCO community is dependent on the use of the ".kosher" gTLD for its core activities.
92. To conclude, the Expert finds that the Objector has not convincingly proven its claim that the Application will impact negatively on itself, the community of KCOs or the broader community of persons or entities with a stake in kosher. Specifically, it has not demonstrated that the Application could damage the economic or other interests of the KCO community or its reputation or could interfere with that

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

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

IV. CONCLUSION

93. Section 3.5.4 of the Objection Procedures provides that for a community objection to prevail all four tests laid out in that Section must be met.
94. In the present case the Expert has found that the first (clear delineation of the community: Section III.A above) and third (strong association between the string and the community: Section III.C above) tests are met. In relation to the second test (substantial opposition within the community: Section III.B above) the Expert has not deemed it necessary to come to a definitive finding in light of its conclusion on the fourth test. In relation to the fourth test (material detriment: Section III.D above) the Expert has found that the Objector has failed to provide convincing evidence and to satisfy its burden of proof.
95. Since at least one of the four tests contemplated by Section 3.5.4 of the Objection Procedures (detriment) is not met, the Expert must conclude that the Objection cannot be sustained.

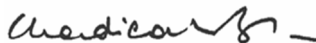
V. DECISION

96. For the reasons set out above, in accordance with Art. 21(d) of the Procedure, the Expert's final and binding decision is as follows:
- (i) The Objection is rejected and the Applicant accordingly prevails;
 - (ii) The Applicant shall be refunded by the Centre the costs advanced to the International Chamber of Commerce.

Place of the Expertise: Paris

January 14, 2014

The Expert



Professor Luca G. Radicati di Brozolo