

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

CASE No. EXP/503/ICANN/120

FEDERATION INTERNATIONALE DE BASKETBALL
(SWITZERLAND)

vs/

LITTLE HOLLOW, LLC
(USA)

(consolidated with case No. EXP/442/ICANN/59)

FEDERATION INTERNATIONALE DE BASKETBALL (SWITZERLAND) vs/ DOT
BASKETBALL LIMITED (GIBRALTAR))

This document is a copy 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.

FEDERATION INTERNATIONALE DE BASKETBALL (SWITZERLAND)

- V -

LITTLE HOLLOW, LLC (USA)

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

EXP/503/ICANN/120

CONSOLIDATED WITH CASE EXP/442/ICANN/59

FEDERATION INTERNATIONALE DE BASKETBALL (SWITZERLAND) v. DOT BASKETBALL LIMITED (GIBRALTAR)

EXPERT DETERMINATION

TABLE OF CONTENTS

1. Introduction	3
2. Proceedings	5
3. Potential Relief	6
4. Place of the Proceedings	7
5. Language of the Proceedings	7
6. Communications	7
7. Standards and Burden of Proof	7
8. Reasoning and Decision	7
9. Costs	21
10. Determination	22

This expert determination is made in expertise proceedings pursuant to Module 3 of the gTLD Applicant Guidebook (“Guidebook”) and its Attachment, the New gTLD Dispute Resolution Procedure (the “Procedure”). These proceedings take place under the International Chamber of Commerce (“ICC”) Rules for Expertise (in force as from 1 January 2003) (the “Rules”), as supplemented by the ICC Practice Note on the Administration of Cases under the Procedure (the “ICC Practice Note”).

1. INTRODUCTION

- 1.1 The Internet Corporation for Assigned Names and Numbers (“ICANN”) has implemented a program for the introduction of new generic Top-Level Domain Names (“gTLDs”). Further to this program, parties may apply for new gTLDs in accordance with the terms and conditions set by ICANN. Procedure, article 1(a).
- 1.2 The program includes a dispute resolution procedure for resolving disputes between a party who applies for a new gTLD and a party who objects to the application – namely, the Procedure. *Id.*, article 1(b). The Procedure provides that dispute resolution proceedings shall be administered by a Dispute Resolution Service Provider (a “DRSP”) in accordance with the Procedure and the applicable DRSP rules identified in article 4(b) of the Procedure. *Id.*, article 1(c).
- 1.3 By applying for a new gTLD, an applicant accepts the applicability of the Procedure and the applicable DRSP rules. An objector likewise accepts the applicability of the Procedure and the applicable DRSP rules by filing an objection to an application for a new gTLD. The parties cannot derogate from the Procedure without the express approval of ICANN and cannot derogate from the applicable DRSP rules without the express approval of the relevant DRSP. *Id.*, article 1(d).
- 1.4 There are four types of objections a party may raise against an application for a new gTLD. *Id.*, article 2(e). One of these is known as a “Community Objection”. A Community Objection is an objection that there is substantial opposition to the application from a significant portion of the community to which the string (i.e., the new gTLD) may be explicitly or implicitly targeted. *Id.*, article 2(e)(iv). The Fédération Internationale de

Basketball (the “Objector”) has raised this type of objection against the application of Little Hollow, LLC (the “Applicant”) for the new gTLD “.BASKETBALL” (the “Application”).

1.5 Pursuant to articles 3(d) and 4(b)(iv) of the Procedure, Community Objections shall be administered by the ICC International Centre for Expertise (the “Centre”) in accordance with the Rules, as supplemented by the ICC as needed. The ICC Practice Note is such a supplement to the Rules. In the event of any discrepancy between the Procedure and the Rules, the Procedure shall prevail. *Id.*, article 4(c). In all cases, the expert shall ensure that the parties are treated with equality, and that each party is given a reasonable opportunity to present its case. *Id.*, article 4(e).

1.6 The Objector’s contact details are as follows:

FÉDÉRATION INTERNATIONALE DE BASKETBALL
Attn: Mr. Patrick Koller, Communications Director
Avenue Louis Casai, 53
1216 Cointrin/Geneva, Switzerland
Email: koller@fiba.com

1.7 The Objector is represented by:

Ms. Kathryn A. Kleiman
Mr. Robert J. Butler
FLETCHER, HEALD & HILDRETH, PLC
1300 17th Street, North, 11th Floor
Arlington, VA 22209, USA
Email: kleiman@fhhlaw.com
Email: butler@fhhlaw.com

1.8 The Applicant’s contact details are as follows:

LITTLE HOLLOW, LLC
Attn: Mr. Daniel Schindler
10500 NE 8th Street, Suite 350
Bellevue, WA 20166, USA
Email: littlehollow@donuts.co
Email: secondary@donuts.co

1.9 The Applicant is represented by:

Mr. John M. Genga
Mr. Don C. Moody
THE IP & TECHNOLOGY LEGAL GROUP, P.C.
15260 Ventura Boulevard, Suite 1810
Shearman Oaks, CA 91403, USA
Email: john@newgtlldisputes.com
Email: don@newgtlldisputes.com

1.10 The Expert in these proceedings is:

Ms. Jennifer Kirby
KIRBY
68 rue du Faubourg Saint-Honoré
75008 Paris, France
Email: jennifer.kirby@kirbyarbitration.com

1.11 The contact details for the Centre are:

Ms. Hannah Tümpel
ICC INTERNATIONAL CENTRE FOR EXPERTISE
33-43 avenue du Président Wilson
75016 Paris, France
Email: expertise@iccwbo.org

2. PROCEEDINGS

2.1 Below is a summary of the main procedural steps in these proceedings.

2.2 On 13 March 2013, the Objector filed its Community Objection with the Centre (the “Objection”) pursuant to article 7 of the Procedure.

2.3 By letter dated 5 April 2013, the Centre notified the parties that it had conducted an administrative review of the Objection pursuant to article 9(a) of the Procedure and had found the Objection in compliance with articles 5 through 8 of the Procedure. The Centre accordingly registered the Objection for processing in accordance with article 9(b) of the Procedure.

2.4 By letter dated 7 May 2013, the Centre informed the parties that it had decided to consolidate this case with case EXP/442/ICANN/59 pursuant to article 12 of the Procedure.

- 2.5 On 9 June 2013, the Applicant submitted its response to the Objection (the “Response”) pursuant to article 11 of the Procedure. By letter dated 12 July 2013, the Centre confirmed to the parties that the Response was in accordance with the Procedure and the Rules.
- 2.6 On 23 August 2013, the Vice-Chairman of the Standing Committee appointed Ms. Kirby as the Expert in the consolidated proceedings pursuant to article 13 of the Procedure, article 9(5) of the Rules and article 3(3) of Appendix I to the Rules.
- 2.7 On 26 August 2013, the Centre confirmed the full constitution of the Expert Panel and transferred the file to the Expert. The Centre clarified that, despite the consolidation of this case with case EXP/442/ICANN/59, the Expert was to render a separate determination for each case.
- 2.8 Article 21(a) of the Procedure, provides that the Centre and the expert shall make reasonable efforts to ensure that the expert renders her decision within 45 days of the “constitution of the Panel”.¹ The Centre considers that the Panel is fully 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 constituted on 26 August 2013. The Centre and the Expert were accordingly to make reasonable efforts to ensure that her determination was rendered no later than 10 October 2013. Procedure, articles 6(e), 6(f).
- 2.9 Further to paragraph 6 of the ICC Practice Note, the parties waived the requirements for the expert mission as set out in article 12(1) of the Rules.
- 2.10 Pursuant to article 21(b) of the Procedure, the Expert submitted her determination in draft form to the Centre for scrutiny as to form before it was signed.

3. POTENTIAL RELIEF

Article 21(d) of the Procedure provides that the remedies available to an applicant or an objector in these proceedings are limited to the success or dismissal of the objection and the refund by the Centre to the prevailing party of its advance payment of costs pursuant to article 14(e) of the Procedure and any relevant provisions of the Rules.

¹ All quotations in this determination are set forth “as is”. Any grammatical or typographical errors are in the original documents.

4. PLACE OF THE PROCEEDINGS

Pursuant to article 4(d) of the Procedure, the place of the proceedings is the location of the DRSP – i.e., the Centre – which is located in Paris, France.

5. LANGUAGE OF THE PROCEEDINGS

English is the language of the proceedings pursuant to article 5(a) of the Procedure. All submissions in these proceedings have been made in English.

6. COMMUNICATIONS

Pursuant to article 6(a) of the Procedure, all communications by the parties, the Expert and the Centre in these proceedings were submitted electronically.

7. STANDARDS AND BURDEN OF PROOF

7.1 In determining an objection, the expert shall apply the standards that have been defined by ICANN. Procedure, article 20(a). In this regard, section 3.5 of Module 3 of the Guidebook sets forth “Dispute Resolution Principles (Standards)” for each of the four types of objection that can be raised under the Procedure. The standards applicable to Community Objections are set forth in section 3.5.4 of Module 3 of the Guidebook. In addition, the expert may refer to and base her findings upon the statements and documents submitted and any rules or principles that she determines to be applicable. *Id.*, article 20(b).

7.2 The Objector bears the burden of proving that its Objection should be sustained in accordance with the applicable standards. *Id.*, article 20(c).

8. REASONING AND DECISION

8.1 This determination is made pursuant to article 21 of the Procedure. Further to paragraph 8 of the ICC Practice Note, the parties are deemed to have agreed that this determination shall be binding upon the parties, as permitted by article 12(3) of the Rules.

8.2 Although I have considered all of the allegations, evidence and arguments the parties have submitted to me, I refer in my determination only to those I consider relevant to my reasoning and decisions.

Two-Step Approach

8.3 To have its Objection considered, the Objector must have standing. As the first step in making my determination, I accordingly must review the Objection and decide whether the Objector has standing to object. Guidebook, Module 3 § 3.2.2.

8.4 To have standing to raise its Community Objection, the Objector must prove that (1) it is an “established institution” and (2) it has an “ongoing relationship with a clearly delineated community”. *Id.* § 3.2.2.4. And the community named by the Objector must be a community “strongly associated” with the new gTLD that is the subject of the Application. *Id.*

8.5 If I find that the Objector has standing, my second step is to determine the merits of the Objection in light of the standards set out in section 3.5.4 of Module 3 of the Guidebook applicable to Community Objections. Further to those standards, I am to apply a four-part test for determining whether there is substantial opposition to a gTLD application from a significant portion of the community to which the gTLD may be targeted. Specifically, for a Community Objection to be successful, an objector must prove that (1) the community invoked by the objector is a “clearly delineated community”; (2) community opposition to the application is “substantial”; (3) there is a “strong association between the community invoked and the applied-for gTLD”; and (4) the application creates a “likelihood of material detriment to the rights or legitimate interests of a significant portion of the community to which the string may be explicitly or implicitly targeted.”

Standing

8.6 The Objector contends that it has standing to object to the Application for the new gTLD “.BASKETBALL”. According to the Objector, it is the global governing body for basketball and is responsible for the rules of the game and the organization and governance of international championships. Objection at 6. It was established in 1932 as an amateur organization, “but became representative of professional basketball as well in 1989 when

NBA [National Basketball Association] players were admitted to the 1992 Olympics for the first time.” *Id.* The Objector considers that its motto, “We Are Basketball”, reflects the “global standing of the organization with respect to the Basketball Community.” *Id.*

8.7 Section 4.1 of the Objector’s statutes provides that the Objector’s mission is to “promote the sport of basketball throughout the world and to lead the basketball movement as recognized by the International Olympic Committee” (“IOC”). The Objector’s General Statutes, Objection, Attachment A. To that end, as the sole competent authority in basketball recognized by the IOC, the Objector does the following:

- Establishes the official rules and other regulations that apply to all international and Olympic basketball competitions, as well as the system of competition;
- Controls and governs the appointment of international referees;
- Regulates the transfer of players from one country to another; and
- Controls and governs all international basketball competitions.

Objection at 6 (citing to the “Quick facts” section of the Objector’s website).

8.8 The Objector contends that there is a “clearly delineated community”, which it calls the “Basketball Community”, that is composed of an “extensive network of basketball organizations, leagues and players under the leadership of [the Objector]” and is “bound together by a singular common interest in the sport of basketball.” *Id.* at 7. These include the Objector’s member federations from 213 countries in Africa, the Americas, Asia, Europe and Oceania. *Id.* These federations sponsor more than 100 000 clubs involving millions of players. *Id.*; the Objector’s National Federation and National Clubs and Players Data (2003) and National Federation Information (2003), Objection, Attachment D. That the Objector has an ongoing relationship with the Basketball Community is axiomatic. Objection 7-8; *see also* the “FIBA strategy” section of the Objector’s website, Objection, Attachment B. And the Objector considers it obvious that the Basketball Community is strongly associated with the gTLD “.BASKETBALL”. Objection at 10-11.

8.9 In light of the above, the Objector considers that it is (1) an “established institution” with (2) an “ongoing relationship with a clearly delineated community” – namely, the Basketball Community – that is “strongly associated” with the new gTLD “.BASKETBALL” that is the

subject of the Application, and that it therefore has standing to bring its Objection. For the reasons explained below, I agree.

- 8.10 Section 3.2.2.4 of Module 3 of the Guidebook sets forth a series of non-exclusive factors I may consider in determining whether the Objector is an “established institution”. These non-exclusive factors are (1) the level of global recognition of the institution; (2) the length of time the institution has been in existence; and (3) public historical evidence of the institution’s existence, such as the presence of a formal charter or national or international registration, or validation by a government, inter-governmental organization, or treaty. In all events, however, the institution must not have been established solely in conjunction with the gTLD application process.
- 8.11 That same section also sets forth a series of non-exclusive factors that I may consider in determining whether the Objector has an “ongoing relationship with a clearly delineated community”. These non-exclusive factors are (1) the presence of mechanisms for participation in activities, membership and leadership; (2) an institutional purpose related to the benefit of the associated community; (3) the performance of regular activities that benefit the associated community; and (4) the level of formal boundaries around the community.
- 8.12 In determining whether the Objector has standing, I am to “perform a balancing of the factors listed above, as well as other relevant information”. Guidebook, Module 3 § 3.2.2.4. It is not expected that the Objector must satisfy each and every factor considered in order to satisfy the standing requirements. *Id.*
- 8.13 With respect to the Objector’s being an “established institution”, I note that the Applicant does not contest that it is. The Objector was established in 1932, many decades before the gTLD application process,² and is the sole competent authority in basketball recognized by the IOC. I accordingly find that it is an “established institution” for purposes of standing.
- 8.14 I also find that the Objector has an “ongoing relationship with a clearly delineated community” – namely, the Basketball Community. Though it is an element an objector must prove to establish standing (Guidebook, Module 3 § 3.2.2.4) and to prevail on the

² The gTLD application process opened for user registration and application submission in January 2012. Guidebook, Module 1 at 1-2.

merits of its objection (*id.* § 3.5.4), the Guidebook does not define what constitutes a “clearly delineated community”. When evaluating the merits of an objection, the Guidebook suggests that I could balance a number of factors to determine whether the community at issue can be considered “clearly delineated”. These factors include, but are not limited to, (1) the level of public recognition of the group as a community at a local or global level; (2) the level of formal boundaries around the community and what persons or entities are considered to form the community; (3) the length of time the community has been in existence; (4) the global distribution of the community; and (5) the number of people or entities that make up the community. *Id.* § 3.5.4.

- 8.15 The Guidebook does not suggest any factors I could consider when considering what constitutes a “clearly delineated community” for purposes of standing. But there is nothing in the Guidebook that suggests that the words “clearly delineated community” should be given any different meaning when evaluating standing than they are given when evaluating the merits of an objection. In light of this, I consider that the five factors listed above may be helpful to my analysis of whether the Basketball Community is a “clearly delineated community” for purposes of assessing whether the Objector has standing.
- 8.16 With this approach in mind, I note that the Basketball Community, as defined by the Objector, has existed for decades and brings together under the Objector’s leadership member basketball federations from over 200 countries around the globe. Together, these federations sponsor more than 100 000 basketball clubs involving millions of players in Africa, the Americas, Asia, Europe and Oceania. The Objector’s purpose is to promote basketball throughout the world. As the sole competent authority in basketball recognized by the IOC, the Objector does this through regular activities that benefit the Basketball Community. These include establishing the rules and regulations for international and Olympic basketball competitions, governing the appointment of international referees, regulating the transfer of players from one country to another and governing all international basketball competitions. In light of this, I find that the Basketball Community is a “clearly delineated community” with which the Objector has an “ongoing relationship”.
- 8.17 I also find that the Basketball Community is “strongly associated” with the gTLD “.BASKETBALL”. Again, although it is an element an objector must prove to establish standing (Guidebook, Module 3 § 3.2.2.4) and to prevail on the merits of its objection (*id.* § 3.5.4), the Guidebook does not define what it means for a community to be “strongly

associated” with the applied-for gTLD. When evaluating the merits of an objection, the Guidebook suggests several factors I could balance to determine whether there is such a “strong association”. These include, but are not limited to, (1) statements contained in the Application; (2) other public statements by the Applicant; and (3) associations by the public. *Id.* § 3.5.4. The Guidebook does not suggest any factors I could consider when considering the term “strongly associated” in the context of standing. But there is nothing in the Guidebook that suggests that the terms “strongly associated” in section 3.2.2.4 and “strong association” in section 3.5.4 should be read to mean materially different things. In light of this, I consider that the three factors listed above may be helpful to my analysis of whether the Basketball Community is “strongly associated” with the gTLD “.BASKETBALL”.

8.18 In this regard, the factor that strikes me as important in the context of this case is factor (3) – associations by the public. This is because the applied-for gTLD effectively names the community defined by the Objector as the Basketball Community. The Basketball Community does not encompass every person who plays basketball or every basketball-related organization, but it does encompass an extensive network of basketball organizations and leagues under the leadership of the Objector that spans the globe and involves millions of players. In light of this, there is a likely association in the minds of many people between the word “basketball” and the Basketball Community. I consider this association sufficient to support a finding that the Basketball Community is “strongly associated” with the gTLD “.BASKETBALL”.

8.19 I accordingly find that the Objector has standing to bring the Objection at issue here.

8.20 Broadly speaking, the Applicant resists this conclusion on two grounds. First, the Applicant argues that the Basketball Community is not “strongly associated” with the gTLD “.BASKETBALL”. Specifically, the Applicant contends that, for the Basketball Community to be “strongly associated” with the gTLD “.BASKETBALL”, the “term ‘basketball’ must readily and essentially solely bring [the Objector] itself, and not the sport of basketball, to mind.” Response at 6. I disagree and consider the Applicant’s position in tension with the text of the Guidebook. To have standing, an objector must prove that the applied-for gTLD is “strongly associated” with the community at issue, not with the objector itself. And there is nothing in the Guidebook that requires that the applied-for gTLD bring to mind “solely” that community, much less solely the objector. The Applicant also notes that it has made no statements in the Application or otherwise that indicate an association

between the Basketball Community and the gTLD “.BASKETBALL”. *Id.* at 9-10. Taking this as true, for the reasons stated above (§ 8.18), I nevertheless consider the likely association in the minds of many people between the Basketball Community and the word “basketball” sufficient to support a finding that the Basketball Community is “strongly associated” with the gTLD “.BASKETBALL”.

8.21 Second, the Applicant contends that the Basketball Community is not a “clearly delineated community”. Specifically, the Applicant contends the Objector has failed to define the formal boundaries of the Basketball Community. *Id.* at 6-7. Again, I disagree. As noted above (§ 8.8), the Objector defines the Basketball Community as being an extensive network of basketball organizations, leagues and players under the leadership of the Objector that is bound together by a common interest in basketball. The Applicant contends that, to the extent the Basketball Community is defined as such, it does not encompass everyone who is involved with basketball. *Id.* at 7. While this is true, there is no requirement in the Guidebook that the community the Objector represents include everyone who is involved in basketball. Relatedly, the Applicant contends that the “basketball world consists of many parties – fans, players, officials, consumers, retailers, suppliers, venue operators, promoters, critics, journalists, commentators, historians and others” with divergent interests – and therefore cannot be said to constitute a “clearly delineated community”. *Id.* at 8. This may be so, but the Objector has not argued that it does. As defined by the Objector, the Basketball Community, while large, does not purport to encompass everyone involved with basketball. Again, however, there is no requirement that it do so.

Merits

8.22 Having found that the Objector has standing, I must now turn to the merits of its Objection. As noted above (§ 8.5), with respect to Community Objections, the Guidebook sets forth a four-part test for determining whether there is substantial opposition to a gTLD application from a significant portion of the community to which the gTLD may be targeted. Specifically, to succeed, the Objector must prove that (1) the community it invokes – the Basketball Community – is a “clearly delineated community”; (2) community opposition to the application is “substantial”; (3) there is a “strong association” between the Basketball Community and the gTLD “.BASKETBALL”; and (4) the Application creates a “likelihood of material detriment to the rights or legitimate interests of a significant portion” of the Basketball Community.

- 8.23 In the context of deciding standing, I have already found that the Basketball Community is a “clearly delineated community” and that there is a “strong association” between the Basketball Community and the gTLD “.BASKETBALL”. *See supra* ¶¶ 8.16-8.18. It therefore remains for me to determine whether the Basketball Community’s opposition to the Application is “substantial” and whether the Application creates a “likelihood of material detriment to the rights or legitimate interests of a significant portion” of the Basketball Community.
- 8.24 The Objector contends, among other things, that the Basketball Community’s opposition to the Application is “substantial” because the opposition of the Objector alone constitutes “substantial” opposition given the “breadth of its membership and stature in that Community”. Objection at 9. A number of the Objector’s members – including Federación Española de Baloncesto, Fédération Ivoirienne de Basket-ball, Basketball Australia, Swiss Basketball, Canada Basketball, Hellenic Basketball Federation, and USA Basketball – have also filed comments opposing the Application in their own names. *See* letters from the Objector’s members, Objection, Attachment C. Various other basketball-related organizations – such as Euroleague Basketball and the NBA – have likewise filed comments opposing the Application. Letter dated 1 March 2013 from Euroleague Basketball and letter dated 11 March 2013 from the NBA, Objection, Attachment C.
- 8.25 In light of the above, the Objector contends that the Basketball Community’s opposition to the Application is “substantial”. For the reasons set forth below, I agree.
- 8.26 Section 3.5.4 of Module 3 of the Guidebook suggests that I “could balance a number of factors to determine whether there is substantial opposition” by the Basketball Community to the Application. These factors include, but are not limited to, (1) the number of expressions of opposition relative to the composition of the community; (2) the representative nature of the entities expressing opposition; (3) the level of recognized stature or weight among sources of opposition; (4) the historical defence of the community in other contexts; and (5) the costs incurred by the Objector in expressing opposition, including other channels the Objector may have used to convey opposition.
- 8.27 The Basketball Community, as defined by the Objector, is an extensive network of basketball organizations, leagues and players under the Objector’s leadership that is bound

together by a common interest in basketball. As the leader of the Basketball Community, the Objector represents its interests and speaks on its behalf. Its stature both within and without the Community cannot be gainsaid. *See supra* ¶¶ 8.6-8.8. Under these circumstances, I consider that the Objection in and of itself constitutes “substantial opposition” to the Application by the Basketball Community.

- 8.28 The Applicant opposes this conclusion on the grounds that the letters and comments the Objector has submitted are insufficient to establish that there is “substantial opposition” to the Application by the Basketball Community. Response at 8-9. My finding that there is “substantial opposition” is not based on these letters and comments, however, but rather on the Objection itself. Similarly, the Applicant also contends that the Objector has failed to put on sufficient evidence of any historical defence of the Basketball Community or the distribution or diversity of any opposition. Again, however, these matters are immaterial to my decision. Finally, the Applicant also contends that the Objector has failed to provide sufficient evidence of the stature of those voicing opposition. *Id.* at 9. For the reasons set forth above (¶ 8.27), I disagree.
- 8.29 This brings me to the last element the Objector must prove to succeed on its Objection – namely, that the Application creates a “likelihood of material detriment to the rights or legitimate interests of a significant portion” of the Basketball Community. The Objector contends that it does. Specifically, the Objector contends that “control and management of the .BASKETBALL TLD must be lodged with an entity that will act for the benefit of the Basketball Community, one that is under control of the Basketball Community and embodies its regulations and ethics.” Objection at 11; *see also* the Objector’s Code of Ethics, Objection, Attachment F. According to the Objector, applicants “with no connection to or oversight by [the Objector]” – such as the Applicant – “threaten the Basketball Community’s integrity and independence.” Objection at 11. Further, the Objector warns that “[t]hose with incentive, opportunity and motive to engage in activities that will ultimately harm the Basketball Community threaten the world’s respect for the sport.” *Id.* The Objector is concerned that the Applicant does not intend to act in the interests of the Basketball Community. *Id.*
- 8.30 According to the Objector, the Basketball Community will suffer material, economic and other concrete harm if “.BASKETBALL” is delegated to the Applicant. *Id.* This is allegedly because the Applicant will generally allow people to register domain names in

“.BASKETBALL” on a “first-come, first-served basis”. *Id.* (quoting not from the Application at issue here, but rather an application for “.BASKETBALL” filed by Dot Basketball Limited). According to the Objector, such a policy will “provide inadequate protection of the brands, professional players, officials, sponsors and teams under the [Objector’s] umbrella, both amateur and professional, and lead to severely adverse economic consequences,” including:

- Ambush marketing and the bad faith association of products or services in direct competition with those of official sponsors;
- Scalping of tickets and the fraudulent sale of fake tickets via the Internet;
- Selling unofficial tournament and team merchandise, especially around tournaments; and
- Cybersquatting and domaining.

Id. at 11-12. The Objector contends that “[e]conomic damage to the World Cup and other commercial program losses could range into millions of dollars.” *Id.* at 12. The economic loss attributable to abuse of the gTLD “.BASKETBALL” would undermine the Objector’s mission to promote basketball. *Id.*

8.31 The Objector alleges that it is not only the Basketball Community’s commercial programs that will be harmed if “.BASKETBALL” were delegated to the Applicant, but its non-commercial programs as well. *Id.* Many of the Objector’s activities at local and provincial levels are not protected by trademarks, and the Objector contends that the Applicant will provide no protection for “non-trademark identifiers as domain names”. *Id.* at 13. The Objector predicts that many of these will be registered on a “first-come, first-served” basis by people, including domainers, with no affiliation with the Basketball Community, thereby depriving the Basketball Community of its “most logical and useful identifiers”. *Id.* As a consequence, the Objector foresees that it will lose the “most logical and direct channels in .BASKETBALL to communicate safety information, educate on anti-doping campaigns, and reach out to the youth who represent the future of basketball.” *Id.*

8.32 The Objector also believes that the reputation of the Basketball Community and of basketball itself will suffer if “.BASKETBALL” is delegated to the Applicant. *Id.* In this regard, the Objector states that it is its “understanding” that the co-founder and CEO of the Applicant’s parent company – Mr. Paul Stahura – was formerly the president of a company

called Demand Media. *Id.* The Objector contends that, during his tenure as president, Demand Media and its subsidiaries faced numerous allegations of cybersquatting and lost 26 disputes brought under ICANN’s Rules for Uniform Domain Name Dispute Resolution Policy (“UDRP”). *Id.*; *see also* National Arbitration Forum Decision, Paxar Americas, Inc. v. eNom, Inc., Claim No. FA0705000980114 (22 June 2007), Objection, Attachment G; World Intellectual Property Organisation (“WIPO”) Administrative Panel Decision, Chivas Brothers Ltd. v. Demand Domains, Inc., Case No. D2007-1789 (5 February 2008), Objection, Attachment G; WIPO Administrative Panel Decision, Sharelook Beteiligungs GmbH v. Enom Partner, Case No. D2005-1001 (26 January 2006), Objection, Attachment G. The Objector states that, if the Applicant’s parent company were to “promote or permit similar practices or principles in connection with the .BASKETBALL string, our core values would inevitably be compromised.” Objection at 13. According to the Objector, “.BASKETBALL” must be “administered by companies and individuals deeply committed to strict adherence to the rules and values of the Sport and of the Internet.” *Id.* at 14.

- 8.33 The Objector contends that it has a high level of certainty that the damaging events it foresees will come to pass if “.BASKETBALL” is delegated to the Applicant. *Id.* The Objector states that it “already must spend millions of dollars” to protect its commercial programs and millions more in support of its core activities and growth of the sport. *Id.* The delegation of “.BASKETBALL” to the Applicant would make the Objector’s work “inestimably more difficult”, as it would have “no control, oversight and enforcement” and would therefore “be forced to spend far greater amounts of time and resources protecting its commercial programs and core activities, thus undermining its mission and threatening the integrity of [the Objector] together with the Basketball Community it represents.” *Id.*
- 8.34 Finally, the Objector contends that delegating “.BASKETBALL” to the Applicant could lead to an association between that string and gambling. *Id.* Although the Objector is not opposed to gambling per se, its Code of Ethics regulates and limits the relationships of basketball-related entities and gambling interests. *Id.*; the Objector’s Code of Ethics §§ 28(d), 30(j), Objection, Attachment F. The Objector also has a contractual arrangement with bwin, a gaming company, that “limits bwin’s rights to associate its betting promotion and offerings with [the Objector’s] marks and competitions and obligates bwin both to adhere to all [the Objector’s] regulations and codes and to inform [the Objector] of any irregular betting patterns they detect.” Objection at 15. The Objector says it is trying to make similar arrangements with other major betting operators. *Id.*

- 8.35 The Objector fears that the Applicant's parent company will not share the Objector's concerns related to gambling or enforce similar principles in its relationship with gambling interests. The Objector considers its fear well grounded because the Applicant's parent company "has announced its intent to be directly an extensively involved with gambling interests" by applying for gambling related gTLDs such as ".BET", ".CASINO" and ".POKER". *Id.* According to the Objector, the Applicant's parent company "has the incentive and opportunity to co-mingle activity in all of the TLDs of its registry portfolio as cross-promotion and cross-registration of domain names in co-owned TLDs is a tried and true marketing feature of Registry sales." *Id.* If such a situation were to arise, the Objector "would have absolutely no meaningful oversight" and the "relationship between online gaming activities and sports would immeasurably damage the reputation of the basketball community." *Id.* The Objector states that its concerns in this regard are particularly high because the "worldwide operations of the Basketball Community are heavily dependent upon the DNS for its core activities". *Id.*
- 8.36 In light of the above, the Objector considers that it has proven that the Application creates a "likelihood of material detriment to the rights or legitimate interests of a significant portion" of the Basketball Community. For the reasons set out below, I disagree.
- 8.37 Section 3.5.4 of Module 3 of the Guidebook suggests that I could use several non-exclusive factors in determining whether the Application creates a likelihood of material detriment to the rights or legitimate interests of a significant portion of the Basketball Community. These non-exclusive factors are (1) the nature and extent of damage to the reputation of the Basketball Community that would result from the Applicant's operation of ".BASKETBALL"; (2) evidence that the Applicant is not acting or does not intend to act in accordance with the interests of the Basketball Community or users more widely, including evidence that the Applicant has not proposed or does not intend to institute effective security protection for user interests; (3) interference with the core activities of the Basketball Community that would result from the Applicant's operation of ".BASKETBALL"; (4) dependence of the Basketball Community on the DNS for its core activities; (5) the nature and extent of concrete or economic damage to the Basketball Community that would result from the Applicant's operation of ".BASKETBALL"; and (6) the level of certainty that the alleged detrimental outcomes would occur. In all events, an allegation of detriment

that consists only of an applicant being delegated the gTLD instead of an objector will not be sufficient for a finding of material detriment.

- 8.38 As a preliminary matter, I note that the Objector has also applied for the gTLD “.BASKETBALL” (see the Objector’s application, Response, Annex B, Exhibit 3) and that many of the Objector’s allegations with respect to material detriment speak to the ways in which the Objector considers “.BASKETBALL” would be best operated to serve the interests of the Basketball Community. Indeed, much of the Objection could be read as a submission on why the Objector’s application should be preferred to the Application at issue here. A Community Objection, however, is not the avenue for determining the relative merits of competing gTLD applications, and nothing in the four-part test set out in section 3.5.4 of Module 3 of the Guidebook suggests that it is. The alleged relative merits of the Objector’s application for “.BASKETBALL” are accordingly not material to my determination of the Objection.
- 8.39 What is material to my determination is the Objector’s failure to put on evidence proving that the Application creates a likelihood of material detriment to a significant portion of the Basketball Community. Rather, the Objection sets forth a series of speculative allegations with no evidence to support a finding that any material detriment to the Basketball Community would likely come to pass if “.BASKETBALL” were delegated to the Applicant. This is insufficient to meet the Objector’s burden of proof on this issue.
- 8.40 Specifically, the Objector contends that the Applicant would operate “.BASKETBALL” in a way that would (1) permit ambush marketing, scalping, the selling of fake tickets and unofficial team merchandise, cybersquatting and domaining, and (2) cause the Basketball Community to lose the most logical channels in “.BASKETBALL” to communicate safety information, educate about anti-doping campaigns and reach out to young people. In support of these allegations, the Objector does not cite to any evidence on record in this case. It rather cites to the text of the application for “.BASKETBALL” filed by dot Basketball Limited – an application that is not at issue here – which would allow people to register domain names in “.BASKETBALL” on a first-come, first-served basis. See *supra* ¶¶ 8.30-8.31. This is insufficient.
- 8.41 Moreover, even assuming *arguendo* that the Applicant would permit people to register domain names in “.BASKETBALL” in a similarly open and liberal manner, the Objector

has failed to submit any evidence to support its contention that this would likely lead to the wrongful conduct it foresees and cause the Basketball Community “millions of dollars” in economic damage. *See supra* ¶ 8.30. And the Application – which promises to “control abuse by carefully and uniformly implementing [the Applicant’s] extensive range of user and rights protections” – suggests it would not. Application § 18(b), Response, Annex B, Exhibit 1. In that regard, the Application states that the Applicant’s parent company will “adhere to ICANN-required registration policies and will comply with all requirements of the Registry Agreement and associated specifications regarding registration policies” and “will not tolerate abuse or illegal activity in this TLD, and will have strict registration policies that provide for remediation and takedown as necessary.” *Id.*; *see also* Declaration of Jonathon Nevett dated 9 June 2013 ¶ 11 (setting out the eight additional protective measures the Applicant’s parent commits to take above and beyond the fourteen protective measures ICANN already requires of all new gTLD applicants), Response, Annex B.

8.42 These same sections of the Application likewise contradict the Objector’s allegation that the Applicant would damage the reputation of the Basketball Community by allowing “.BASKETBALL” to be used for cybersquatting (*see supra* ¶¶ 8.32-8.33) – an allegation that is similarly unsubstantiated. In this regard, the Objector makes reference to 26 alleged UDRP cases that relate not to the Applicant or to its parent company, but to Demand Media, a company where Mr. Stahura was briefly president a number of years ago. *See* Response, Annex B ¶ 3 (providing a link to Mr. Stahura’s profile). In my view, this is already too attenuated for me to draw the chain of inferences the Objector would have me draw.

8.43 Moreover, the Objector has put on no evidence concerning 23 of these 26 alleged UDRP cases. With respect to the remaining three, the Objector has submitted the decisions and these decisions go against Demand Media and its subsidiaries, which were always the respondents. But these decisions do not establish that the respondents – much less Mr. Stahura himself – promoted or permitted cybersquatting. It rather appears that the respondents prohibited cybersquatting, but did not always succeed in preventing it. For example, in one case (Paxar Americas), the respondent did not register the disputed domain name, but rather assumed ownership of it due to the original registrant’s failure to pay the registration fee. When the rights holder complained, the respondent – in accordance with its policy against holding domain names in derogation of legitimate rights holders – offered to transfer the name at no cost to the complainant, but the complainant refused. The facts of another case (Chivas Brothers), though less clear, appear to be similar. In the third case

(Sharelook Beteiligungs), the respondent did not participate, so the record is underdeveloped.

- 8.44 The Objector has similarly failed to prove that the Applicant’s operation of “BASKETBALL” would lead to a relationship between online gaming and sports that would damage the reputation of the Basketball Community. *See supra* ¶ 8.35. Rather, the Objector speculates that this would happen based on the fact that the Applicant’s parent company has applied for new gTLDs linked to gaming. This is conjecture, not evidence.
- 8.45 For these reasons, I find the Objector has failed to prove that the Application creates a likelihood of material detriment to the rights or legitimate interests of a significant portion of the Basketball Community.

9. COSTS

- 9.1 Pursuant to article 14(e) of the Procedure, upon the termination of the proceedings, after I have rendered my determination, the Centre shall refund to the prevailing party its advance payment of costs. *See also* Procedure, article 21(d).
- 9.2 As I have decided to dismiss the Objection, the Applicant is the prevailing party in these proceedings. The Centre shall accordingly refund to the Applicant its advance payment of costs.

10. DETERMINATION

- 10.1 For the reasons set out above, the Expert makes the following determination:
- 10.2 The Objection is dismissed and the Applicant accordingly prevails;
- 10.3 The Centre shall refund to the Applicant its advance payment of costs.

Date: 8 January 2014



Jennifer Kirby
Expert