

To,

Mr. Cherine Chalaby, Chair, NGPC, ICANN

Mr. Fadi Chehadé, President and CEO, ICANN

Mr. Akram Atallah, President, Generic Domains Division, ICANN

Ms. Christine Willett, VP of New gTLD Operations, ICANN

CC: Ms. Špela Košak, Deputy Manager, ICC

1<sup>st</sup> November 2013

Dear Mr.Chalaby, Mr.Chehadé, Mr. Atallah, Ms. Willett,

We, the undersigned, are writing to express our ever-growing concerns relating to the Community Objection process. Some of our concerns in this regard have already been communicated to you in two letters, dated 22<sup>nd</sup> July 2013 and 24<sup>th</sup> September 2013.

Unfortunately, the issues surrounding Community Objection determinations are growing, and we are more concerned than ever that this process, and therefore the entirety of the New gTLD Program, is being corrupted by significant departures from the Applicant Guidebook (AGB). The undersigned strictly followed and relied upon the AGB throughout the application process. This included consideration about whether or not to apply for strings that may have been subject to Community Objections or contested by Community Priority Applicants. We were part of the ICANN community's discussion that set a high bar for prevailing Community Objections and resulted in the high standard that is in the AGB. The analysis we present herein related to the ICC's Expert Panels shows a disregard of the model and the standards set forth in the AGB. This is intolerable and deserves immediate mitigation.

While the decision regarding .SPORT provided by the expert can be questioned in all four criteria, the analysis is most clearly erroneous and is in clear contradiction of the AGB with regard to two specific criteria: community definition, and the likelihood of material detriment. Specifically, the record clearly demonstrates that panelists are not considering the very stringent definition of "community" set forth in the AGB. The decisions to date indicate that panelists are employing their own personal assumptions of "community" or have accepted the objectors' definition of "clearly delineated communities" without question. Additionally, panelists are ignoring the AGB requirements for a showing of material detriment. Among those requirements is the objector's burden to prove that its community is likely to be adversely affected by the delegation of the string in question.

Please note that the undersigned represent a variety of companies, including both single-string applicants and portfolio applicants, not all of which are facing community objections. We must stress that this is an issue that affects the entire New gTLD Program and ICANN community, and the support of applicants not directly affected by Community Objection proceedings speaks to our shared interest in strictly adhering to *all* AGB procedures.

To recap our prior correspondence, the first letter brought to ICANN's attention the fact that Expert Panels appointed by the DRSPs for the purpose of providing an Expert Determination on each community objection are three degrees removed from ICANN. They have neither prior experience with the new gTLD program nor a deep understanding of the AGB. It was then explicitly suggested that these Expert Panels should be provided with training or education materials that reinforce certain standards—primarily that the Panels must strictly follow the AGB to arrive at Expert Determinations. We are concerned that this process was never put into place.

The second letter pointed out specific examples of serious lapses on ICC Experts' parts in the Expert Determinations for .ARCHITECT and .FLY. The letter was a sincere attempt to inform ICANN of the fact that, although ICANN may have spent significant amounts of time working with the personnel at the DRSPs to familiarize them with the AGB, it is clear that the requisite knowledge and understanding of the AGB has not been successfully conferred to the actual Expert Panels appointed by the ICC. It was also recommended that ICANN should make appropriate appeal mechanisms available to parties who have been materially affected by decisions that departed from AGB standards. Finally, we urged ICANN to consider temporarily suspending all objection adjudications until a certain basic level of training was conducted to ensure that all concerned Experts are well versed with the AGB.

The response that was received from ICANN to this letter was disappointing, to say the least, given that ICANN's only follow-through was a simple acknowledgement of the correspondence, with no forthcoming engagement on these very serious issues.

Although the form response we received from Customer Service claimed that our comments would be "considered carefully," we believe this assurance was not genuine. We say this because the ICC recently published an Expert Determination on a community objection against an application for the .SPORT<sup>1</sup> generic TLD which, again, is fatally flawed. In particular, we draw ICANN's attention to at least five examples of glaring errors in this determination, which prove that at least one of ICC's Experts is not familiar with the AGB or its intent.

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<sup>1</sup> .SPORT Expert Determination: [http://www.iccwbo.org/Data/Documents/Buisness-Services/Dispute-Resolution-Services/Expertise/ICANN-New-gTLD-Dispute-Resolution/EXP\\_471\\_ICANN\\_88\\_Expert\\_Determination/](http://www.iccwbo.org/Data/Documents/Buisness-Services/Dispute-Resolution-Services/Expertise/ICANN-New-gTLD-Dispute-Resolution/EXP_471_ICANN_88_Expert_Determination/)

1. The Expert reported that, *“the concept of ‘community’ is not defined by the ICANN Guidebook.”*<sup>2</sup>

Clearly, the Expert did not know that the concept of “community” is actually explained by the ICANN Guidebook:

“‘Community’ - Usage of the expression ‘community’ has evolved considerably from its Latin origin – ‘communitas’ meaning ‘fellowship’ –while still implying more of cohesion than a mere commonality of interest. Notably, as “community” is used throughout the application, there should be: (a) an awareness and recognition of a community among its members; (b) some understanding of the community’s existence prior to September 2007 (when the new gTLD policy recommendations were completed); and (c) extended tenure or longevity—non-transience—into the future.”<sup>3</sup>

We reiterate that the above definition of the term “community” was relied upon by *all* applicants whilst making their decisions to stake hundreds of thousands of dollars applying as standard applicants for generic strings in the new gTLD Program. It is absolutely unfair and unacceptable for an application to be rejected under the premise that the concept of “community” is not defined in the AGB. This is blatantly untrue and to disregard this is to compromise the integrity of the AGB, the New gTLD Program, and ICANN.

We understand that the above description of “community” is referenced with regard to community applications; however, the context is relevant to “community” objections as well. This is because, like a community application, a community objection that is upheld directly eliminates the bona fide standard application against which it is filed. Consequently, it is the Expert’s duty to thoroughly test the existence of a “clearly delineated community” as per AGB descriptions before eliminating the standard application from the program altogether.

2. While the Expert is clearly aware that the objector needs to prove that “the application creates a likelihood of material detriment...”, none of the factors that were considered included anything about the application. The Expert did not identify a single objectionable or lacking aspect in the application that creates a likelihood of material detriment.
3. The Expert states:

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<sup>2</sup> Page 18 of the .SPORTExpert Determination

<sup>3</sup> §4-11 of AGB

*“In other words, the standard of a “likelihood of material detriment” is, in the Appointed Expert’s opinion, equivalent to future “possible” damage.”<sup>4</sup>*

In this case, the Expert opines that “likelihood” is equivalent to “future possible.” It almost appears as if the criteria have been deliberately weakened in order to allow the objector to prevail. In fact, the Expert even made this statement:

*“...Expert agrees with Applicant that many detriments alleged by Objector are purely hypothetical...”*

In spite of this, the Expert ruled in favor of the Objector. If the Expert’s current logic is followed, every application, including the Objector’s own application, creates “possible” damage. In this case, an allegation of material detriment against any application would be upheld because there is future “possible” damage. How can any applicant guarantee that it is “not possible,” in all conceived hypotheticals, for any future damage to occur?

The .SPORT ruling leaves no doubt the panelist replaced the word “likelihood” with the word “possibility” thus materially altering AGB fourth test to read as follows:

*“The application creates a ~~likelihood~~ possibility 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.”<sup>5</sup>*

Procedurally, the guidebook explicitly does not provide the panelist with discretion to change the burden of proof the objector bears. If this is not true, then ICANN did not notify applicants and other interested parties of such discretion provided to the panelist. Either way a procedural error has occurred. In the spirit of fairness and due process, we call upon ICANN to incorporate an appeals process for exactly such procedural errors in the community objection proceedings.

4. The Expert has erroneously considered the “economic damage” that the *objector* “may suffer.”<sup>6</sup> Instead, he was supposed to consider the “nature and extent of damage to the reputation of the *community* represented by the objector...”. It appears that the Expert misread the AGB or inappropriately assumed that the Objector IS the “sports community.”
5. The decision provides no evidence that the Expert even considered the “level of certainty that alleged detrimental outcomes would occur.” As noted above, in point 3,

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<sup>4</sup> Page 27 of the .SPORT Expert Determination

<sup>5</sup> §3-24 of AGB

<sup>6</sup> Page 28 of the .SPORT Expert Determination

unlikely and hypothetical situations have been given credence over any level of certainty.

To evidence that unbiased industry insiders share our viewpoint on this subject, please take note of two recently published relevant articles, both by reputed journalists who are not participants in the new gTLD program:

- 1) <http://www.thedomains.com/2013/10/29/wow-icc-upholds-objection-of-sportaccord-to-famous-fours-app-for-new-gtld-sport-giving-sportaccord-the-extension/>. In this case, the title itself expresses shock over this Expert Determination.
- 2) <http://domainnamewire.com/2013/10/29/breatheaccord-wins-community-objection-against-breathe-top-level-domain-name/>. This article is a satirical response to the above news that the .sport objection was upheld. It shows the extent to which the journalist found the .sport decision to be unmerited.

We also bring to ICANN's attention the fact that objectors on other unrelated cases are citing these decisions in their Supplemental Submissions in order to influence Experts to weaken the objection criteria and rule in their favor. If these are considered to be precedents for other Experts, we can assure you that most community objectors will unfairly prevail over applicants who applied as standard applicants in good faith.

Not only does this situation cause immense commercial damage to the affected applicants, but also sets a precedent for future application rounds where applicants cannot rely on the application documents and ICANN can expect absolutely any applicant to use (or rather, abuse) the community objection process as its first attempt at contention resolution. These current decisions by ICC Experts will probably be used as grounds for rejecting future applications on the most generic words.

ICANN should *immediately* rectify this obvious deficiency. We sincerely request ICANN to take a more active role in the Dispute Resolution Process altogether. This includes impressing upon the ICC that its Experts need appropriate training before additional decisions are published to avoid any further inadequate decision making, by ensuring that the AGB is followed for future cases, and by putting in place an appeals mechanism so that procedural errors such as those in the .sport decision can be rectified. As applicants in the program, we are confident that ICANN will do the right thing, and ensure that its contracted parties uphold the AGB at any cost.

We thank you for taking the time to read this letter, and look forward to a positive and constructive response from you.

Sincerely,

Shweta Sahjwani, Radix FZC

United TLD Holdco Ltd.

DotClub Domains, LLC

Top Level Design, LLC

Donuts Inc.

Top Level Domain Holdings Ltd

Priver Nivel S.A.

Fegistry, LLC

Employ Media, LLC

Famous Four Media Limited

Merchant Law Group, LLP

DOTSTRATEGY CO.