THE INTERNATIONAL CENTRE FOR EXPERTISE OF THE

INTERNATIONAL CHAMBER OF COMMERCE

CASE No. EXP/407/ICANN/24

PROF. ALAIN PELLET, INDEPENDENT OBJECTOR

(FRANCE)

vs/

STEEL HILL, 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.

EXPERT DETERMINATION – COMMUNITY OBJECTION

Professor Alain Pellet (Independent Objector) v. Steel Hill, LLC.

Case No. EXP/407/ICANN/24

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TABLE OF ABBREVIATIONS

ACC	Association of Corporate Counsel
AHA	American Hospital Association
AAMC	Association of American Medical Colleges
ALAC	The ICANN At-Large Advisory Committee
Applicant	Steel Hill, LLC
Appointed Expert	Alan L. Limbury
Centre	The International Centre for Expertise of the International Chamber of Commerce
Donuts	Donuts Inc.
GAC	ICANN's Governmental Advisory Committee
GNSO	ICANN's Generic Names Supporting Organization
gTLD	Generic Top Level Domain
Guidebook	ICANN's gTLD Applicant Guidebook
ICANN	The Internet Corporation for Assigned Names and Numbers
ICC	The International Chamber of Commerce
ICC Practice Note	The ICC Practice Note on the Administration of Cases under the New gTLD Dispute Resolution Procedure
IMIA	The International Medical Informatics Association
IO	The Independent Objector
LPI Objection	Limited Public Interest Objection
Objector	Professor Alain Pellet, the Independent Objector
PIC	Public Interest Commitments
Procedure	The New gTLD Dispute Resolution Procedure set out in the Attachment to Module 3 of the Guidebook
Rules	Rules for Expertise of the ICC
WHO	The World Health Organization

I. The Parties

A. Objector

1. The Objector is Professor Alain Pellet of 16, Avenue Alphonse de Neuville, 92380 Garches, France, email: courriel@alainpellet.eu, represented by Ms. Héloise Bajer-Pellet

of 15, rue de la Banque, 75002 Paris, France, email: avocat@bajer.fr; Mr. Daniel Müller of 20, Avenue du Général de Gaulle, 78290 Croissy sur Seine, France, email: mail@muellerdaniel.eu; Mr. Phon van den Biesen of De Groene Bocht, Keizersgracht 253, 1016 EB Amsterdam, The Netherlands, email: phonvandenbiessen@vdbkadvocaten.eu and Mr. Sam Wordsworth of 24 Lincoln's Inn Fields, London, WC2A 3EG, United Kingdom, email: SWordsworth@essexcourt.net.

2. Professor Pellet is the Independent Objector ("IO") selected by The Internet Corporation for Assigned Names and Numbers ("ICANN") pursuant to Article 3.2.5 of the gTLD Applicant Guidebook ("Guidebook") to act solely in the best interests of the public who use the global Internet. His role is to file Limited Public Interest ("LPI") and Community Objections against "highly objectionable" generic Top-Level Domain ("gTLD") name Applications to which no objections have been filed.

B. Applicant

3. The Applicant is Steel Hill, LLC of 10500 NE 8th Street, Suite 350, Bellevue, Washington 98004, United States of America, emails: steelhill@donuts.co and secondary@donuts.co represented by The IP & Technology Legal Group, P.C. dba New gTLD Disputes, of 15260 Ventura Boulevard, Suite 1810, Sherman Oaks, California 91403, United States of America, email: john@newgtlddisputes.com and don@newgtlddisputes.com.

4. The Applicant is a subsidiary of Donuts Inc., ("Donuts"), whose stated goal is "to increase competition and consumer choice at the top level." Through the Applicant and other direct and indirect subsidiaries, Donuts has applied for 307 new gTLDs.

II. The Appointed Expert

5. The Appointed Expert is Alan Lawrence Limbury of Strategic Resolution, 2 Crown Street, Woolloomooloo, New South Wales 2011, Australia, email: expert@strategic-resolution.com.

III. The applied-for gTLD string

6. <.medical>.

IV. Procedural History

7. The Applicant submitted its Application to ICANN for the new gTLD string <.medical> on June 13, 2012 (Application ID: 1-1561-23663).

8. The IO filed a Community Objection with the International Centre for Expertise of the International Chamber of Commerce ("Centre") on March 12, 2013, pursuant to Article 7 of the New gTLD Dispute Resolution Procedure set out in the Attachment to Module 3 of the Guidebook ("Procedure"), the Rules for Expertise of the ICC ("Rules") supplemented by the ICC Practice Note on the Administration of Cases under the New gTLD Dispute Resolution Procedure ("ICC Practice Note").

9. The Centre conducted an administrative review of the Objection pursuant to Article 9 of the Procedure and informed the Objector on March 29, 2013 that the Objection was in compliance with Articles 5 – 8 of the Procedure and with the Rules.

10. On April 12, 2013, ICANN published its Dispute Announcement pursuant to Article 10(a) of the Procedure and on April 15, 2013 the Centre invited the Applicant to file a Response to the Objection within 30 days, pursuant to Article 11(b) of the Procedure.

11. The Applicant's Response dated May 15, 2013 was received by the Centre on May 16, 2013. In accordance with Article 6 of the Procedure, the Response was filed within the provided time limit. On July 12, 2013 the Applicant filed an Amended Response correcting the case reference number.

12. On June 12, 2013, having provided to the Centre a Declaration of Acceptance and Statement of Independence, the Expert was appointed by the Chairman of the Standing Committee of the Centre as the sole member of the Panel in accordance with Article 13 of the Procedure and Article 9(5)(d) of the Rules.

13. ICANN (on behalf of the IO) and the Applicant subsequently paid an advance of the costs estimated by the Centre and on July 30, 2013 the Centre confirmed the constitution of the Expert Panel and transferred the file to the Expert, noting that the draft Expert Determination was due within the following 45 days.

14. On August 2, 2013 the Objector sought leave to file a Reply to parts of the Response which claimed bias in the Objector and which interpreted the requirements of the Guidebook in ways with which the Objector disagreed. Pursuant to Article 17(a) of the Procedure, the Expert granted the Objector leave to file a Reply, confined to those parts, by August 9, 2013. The Objector did so that day. Since the Objector's Reply made reference to ICANN's Governmental Advisory Committee ("GAC") Beijing communiqué of 11 April, 2013 and to the Applicant's comments thereon to the Board of ICANN, the Expert granted leave to the Applicant to respond by August 16, 2013. The Applicant filed a Rejoinder that day.

15. In accordance with Articles 5(a) and 6(a) of the Procedure, the language of the proceeding and of all submissions is English and all communications by the parties, the Expert and the Centre were submitted electronically.

16. On August 29, 2013, the Expert Determination was submitted in draft form to the Centre for scrutiny in accordance with Article 21(b) of the Procedure and Article 12(6) of the ICC Rules. The draft was submitted within the 45 day time limit in accordance with Article 21(a) of the Procedure.

V. Preliminary issues

17. The Applicant has questioned the IO's impartiality and independence and his standing to bring this Objection. These issues need to be determined before any consideration of the merits of the Objection. Article 3.2.5 of the Guidebook requires the IO to be and remain independent and, by necessary implication, impartial. Article 3.2.2 contemplates the Expert having authority to determine whether an objector has standing in any particular case. Accordingly, having given the Objector an opportunity to respond to the Applicant's submissions and the Applicant an opportunity to reply, the Expert considers that he has authority to determine these issues.

A. Impartiality and Independence of the Objector

(i) Objector's submissions

18. According to Article 3.2.5 of the Guidebook "the IO must be and remain independent and unaffiliated with any of the gTLD applicants". The IO and all his legal representatives have no link with any of the Applicants having applied for a gTLD during the current

Program. The IO considers himself to be impartial and independent as required by the Guidebook. He confirms that he is acting in no other interest but the best interests of the public who use the global Internet.

(ii) Applicant's submissions

19. According to the IO's website, he is "impartial and is unaffiliated with any particular Internet community." He also specifically reasserts his independence in the Objection itself.

20. The Objector has filed essentially identical objections, on both LPI and community grounds, against a number of medical-related gTLD Applications made by entities of Donuts, including:

<.healthcare>	LPI	Silver Glen, LLC	1-1492-32589	EXP/405/ICANN/22
<.healthcare>	Community	Silver Glen, LLC	1-1492-32589	EXP/411/ICANN/28
<.hospital>	LPI	Ruby Pike, LLC	1-1505-15195	EXP/406/ICANN/29
<.hospital>	Community	Ruby Pike, LLC	1-1505-15195	EXP/412/ICANN/23
<.medical>	LPI	Steel Hill, LLC	1-1561-23663	EXP/407/ICANN/30
<.medical>	Community	Steel Hill, LLC	1-1561-23663	EXP/413/ICANN/24
<.health>	LPI	Goose Fest, LLC	1-1489-82287	EXP/417/ICANN/34

21. Donuts' Applications represent a significant proportion of the relatively few objections filed by the IO. Almost exclusively he has attacked only Applications for health-related gTLDs but has not objected to all such Applications and has made no objection to many other strings that could be viewed as equally "sensitive" as health – *e.g.*, children, financial topics, intellectual property, gambling and education.

22. The IO has a background in health-related matters and with particular medical and policy interests. He has worked with the World Health Organization (WHO), and so acknowledges in his *curriculum vitae*. In addition, his legal assistant, Julien Boissise, has a connection to Rosa Delgado, a consultant to WHO. Ms. Delgado appears to have advocated on behalf of the International Medical Informatics Association (IMIA) in proceedings involving the ICANN At-Large Advisory Committee (ALAC), which since has brought a community objection on IMIA's behalf against Donuts' <.health> gTLD Application, ICC Case No. EXP/505/ICANN/122. Clearly, the IO has some bias that favors medical interests and opposes those who would provide a forum for such topics on the Internet. The Applicant does not suggest the he has engaged in any improper conduct. However, the Panel should consider the Objection in light of his healthcare bias.

(iii) Objector's Reply

23. In questioning the impartiality of the IO, the Applicant does not draw any procedural consequence from its allegations but suggests that the Panel should consider the Objection "in light of his healthcare bias". Although the Applicant does not suggest the IO has engaged in any improper conduct, these unfounded allegations make it necessary for the IO to reaffirm his impartiality and independence.

24. The IO has filed this objection (and all other objections) in accordance with Article 3.2.5 stating that "the IO must be and remain independent and unaffiliated with any of the gTLD applicants". So he is. He has no relationship of any kind with any of the gTLD applicants in the present round. He is acting in no interest other than the best interests of

the public who use the global Internet. This is equally true for his legal representatives as well as for his assistant, specifically and unduly targeted by the Applicant.

25. In serving as counsel and advocate before the International Court of Justice in an advisory proceeding concerning a request of the WHO, Professor Pellet acted for the French Republic, not for the WHO. This shows how artificial and absurd the Applicant's accusations are. In addition, the Applicant's allegations concerning a relationship between Mr. Boissise and Ms. Delgado on the sole basis of a non-existing LinkedIn connection equally lack any substance. The Applicant's evidence of bias is flimsy in the extreme and, in any event, it does not draw any conclusion from its (regrettable) allegations.

26. The IO is neither biased nor has favored any particular interests, including medical interests. He has filed objections concerning gTLD Applications for strings entirely unrelated to health and the healthcare sector and, in the aim of ensuring transparency, has explained on his website why he decided not to file an objection against some "controversial" Applications.

27. The Applicant's allegation that the IO has not objected to other equally "sensitive" strings also ignores the statutory limitations to which the IO is subject. According to Article 3.2.5: "In light of the public interest goal noted above, the IO shall not object to an Application unless at least one comment in opposition to the Application is made in the public sphere." Furthermore, he can only file Community objections or LPI objections that are properly regulated, excluding String Confusion Objection or Legal Rights Objection.

28. The Applicant seems to reproach the IO for having especially targeted Applications submitted by entities of Donuts. The IO has objected to Applications that he considers contrary to the public's interests and in each case has justified his reasons, which are entirely indifferent to the identity of the Applicant. These objections concern 5 out of Donuts' 307 applied-for strings and the IO has filed comparable objections to Applications for the same or identical strings submitted by entities unrelated to Donuts.

29. In conclusion, the Applicant argues that the allegations of bias lack any colourable basis, and are regrettable.

(iv) Determination

30. The Expert notes that, while making its emphatic assertions of healthcare bias, the Applicant expressly disclaims any suggestion that the IO has engaged in any improper conduct. His *curriculum vitae* makes clear that Professor Pellet did not act for WHO before the International Court of Justice but for the French Republic, as Counsel and Advocate in a 1994 case in which WHO requested an advisory opinion concerning *Legality of the use by a State of nuclear weapons in armed conflict*.

31. The asserted connection between the IO's legal assistant and a consultant to WHO is said in a declaration by Mr. Jonathon Nevett, a founder and Executive Vice President of Donuts, to be a Linked-In connection. However, no such connection appears from the links provided by Mr. Nevett, namely http://www.linkedin.com/pub/julien-boissise/5a/b43/197 and http://www.linkedin.com/pub/rosam-delgado/0/304/24. Each link depicts the person concerned and, in each case, the other person's name and image appear under the heading "People also viewed". This indicates no more than that people who viewed the Linked-In profile of one of them also viewed the Linked-In profile of the other, hardly a basis for the Applicant's assertion that there is "a connection" between

them, let alone one which could possibly give rise to any concern as to the impartiality and independence of the IO or of his legal assistant.

32. The number of Objections filed by the IO in relation to health-related gTLD Applications and Applications by Donuts is no more than a reflection of the number of Applications filed by Donuts and the number of those which are health-related.

33. There is no basis for any finding that the IO has any bias that favours medical interests. The Expert will disregard that allegation when considering this Community Objection.

B. Standing

(i) Objector's submissions

34. In accordance with Article 3.2.5 of the Guidebook, the IO is granted standing to file Community Objections "notwithstanding the regular standing requirements for such objections". He acts in the best interests of the public who use the global Internet and initiates and prosecutes the present objection in the public interest. The Guidebook further states that "[i]n light of the public interest goal noted above, the IO shall not object to an Application unless at least one comment in opposition to the Application is made in the public sphere." This condition is met.

(ii) Applicant's submissions

35. ICANN has authorized the IO to file community objections only "against 'highly objectionable' gTLD Applications to which no objection has been filed." While the Guidebook grants him standing to file community objections "notwithstanding the regular standing requirements for such objections," he nevertheless still must act on behalf of a "clearly delineated community." The community named by the objector must be "strongly associated with the applied-for gTLD string". In other words, the word "medical" must readily bring to mind some "community" recognized by that designation. Merely stating that proposition reveals its folly.

36. Clear delineation of a medical "community" hardly seems possible. The word "medical" describes a subject, not a community, which interests and affects numerous and diverse individuals and organizations not susceptible of neat classification. The entire world population has a fundamental interest in, and is impacted by, medical matters. The notion of a "community," which would allow the IO to prevent the use of a dictionary term to the exclusion of all others, defies reason. Such a scheme contravenes the open nature of the Internet and the intent of ICANN in adopting the new gTLD program. The Panel should dismiss the Objection on standing alone.

(iii) Objector's Reply

37. The IO does not represent a community even in a Community Objection. Article 3.2.5 of the Guidebook provides that "[t]he IO does not act on behalf of any particular persons or entities, but acts solely in the best interests of the public who use the global Internet". The existence of a clearly delineated community is part of the substantive standards enshrined in Article 3.5.4 and does not constitute an additional standing requirement for the IO.

38. To the contrary, Article 3.2.5 states: "The IO is granted standing to file objections on these enumerated grounds [i.e., LPI objections and Community objections], notwithstanding the regular standing requirements for such objections". The IO has

therefore *ipso facto* standing and his objection must be considered on its merits. The only limitation on the wide discretion of the IO is embodied in the last paragraph of Article 3.2.5: "In light of the public interest goal noted above, the IO shall not object to an Application unless at least one comment in opposition to the Application is made in the public sphere". This condition is fulfilled in the present case.

(iv) Determination

39. The requirements for standing of Article 3.2.2.4 of the Guidebook do not apply to the IO. To show standing, the IO does not have to act on behalf of a "clearly delineated community". Nor does he have to show, for the purpose of standing, that the word "medical" must readily bring to mind some "community" recognized by that designation. More than one comment in opposition to the Application having been made in the public sphere, two of which are identified in paragraph 63 and set out in paragraphs 139 and 140, the IO has *ipso facto* standing to bring this Community Objection, pursuant to Article 3.2.5 of the Guidebook.

VI. The Merits of the Application

40. The merits of the Objection will now be considered.

VII. The Applicant's vision for <.medical>

41. The Applicant says (omitting citations):

> "ICANN adopted its new gTLD program to increase choice and competition in domain names. Sharing and seeking to accomplish these same goals, Donuts has applied for the instant and other TLDs, to offer domains on subjects that otherwise may not have their own forums. The Applicant would make the <.medical> registry open to all consumers, creating paths of communication more expansive than the narrow use to which Objector believes the TLD should be put. Such generic TLDs bring competition to registries, which have not experienced it in a world that has known little more than <.com>, as well as the opportunity for more consumers to enjoy the benefits of such competition. A <.medical> gTLD in Applicant's hands represents one of a number of niche offerings in an expanding Internet "shopping mall." It gives users the choice of a specialty experience as an alternative to the sprawling "department store" environment of incumbent registries such as <.com>. The Objection threatens these important benefits. It would close an entire segment of the Internet to the many potential uses of a common word's multiple meanings".

VIII. The Four Tests for a Community Objection

42. According to the Guidebook, a Community Objection is warranted where there is "substantial opposition to the gTLD application from a significant portion of the community to which the gTLD string may be explicitly or implicitly targeted". In order to evaluate the merits of a Community Objection the Expert Panel shall "use appropriate general principles (standards)" as set out in Article 3.5, as well as "other relevant rules of international law in connection with the standards."

43. Article 3.5.4 of the Guidebook sets out the following four tests, all of which need to be proved by the objector for a Community Objection to be successful:

(a) the community invoked by the objector is a clearly delineated community (Community test);

(b) Community opposition to the application is substantial (Substantial opposition test);

(c) there is a strong association between the community invoked and the applied-for gTLD string (Targeting test);

(d) 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 (Detriment test).

44. The IO says all four tests are met in the present case. The Applicant says the IO fails to prove any of them. The parties' contentions on each test are summarised below.

IX. Community test

(i) Objector's submissions

45. The term "community" refers to a group of people living in the same place or having a particular characteristic in common. The distinctive element of a community is therefore the commonality of certain characteristics. The individuals or entities composing a community can share a common territory, region or place of residence, a common language, a common religion, a common activity or sector of activity, or other characteristics, values, interests or goals which distinguish them from others.

46. The Guidebook does not determine which kind of common characteristics, values or goals are relevant to the issue whether a given group constitutes a community, nor does it establish any limits in that regard. The 2007 ICANN Final Report confirms that "community should be interpreted broadly and will include, for example, an economic sector, a cultural community, or a linguistic community."

47. One of the relevant criteria is whether the group of individuals or entities can be clearly delineated from others and whether members of the "community [are] delineated from Internet users in general" with reference to their common characteristics and particularities. The recognition of the community among its members, on the one hand, and by the general public at a global or a local level, on the other hand, depending on its actual distribution, is, in that regard, a useful factor to be taken into account.

48. The community targeted by this Application is the medical community. The professionals and institutions which constitute this community are essential in any health system. Their general work and mission, as part of the health policy in a given system, is the diagnosis and treatment, preventive or curative, of diseases. Their activities are of critical importance to the achievement of the public policy goal of public health, especially through medical treatment of ill persons and the restoration of health. They have developed their own characteristic system of moral principles that apply values and judgments to the practice of medicine, including the principles to act in the best interest of the patient, fairness and equality in the distribution of healthcare and resources, non-malfeasance, the respect for patients who have the right to be treated with dignity, and truthfulness and honesty.

49. The medical community comprises a great variety of different health professionals. Despite their variety, the medical community can be clearly delineated with regard to others by several factors. First, membership of the medical community is directly linked to the qualification to exercise a specific healthcare, medical profession. Access to such

professions is regulated and controlled by public institutions. In order to access a medical profession and the medical community, one needs to have successfully completed a specific scientific or professional education program or to get a specifically granted licence or authorization to exercise a medical profession and to deliver medical services. Membership of the community is therefore restricted and not open to the public or all Internet users.

50. Second, members of the community usually work and exercise in specific sectors of activity. This includes healthcare and medical services, pharmaceutics, but also the development of medical and alike technologies. Third, the medical community, despite the variety of actors it includes, has developed a highly specific and complex system of technical terms and phrases. This creates a clear delineation between members of the community and the general public who, usually, can hardly understand the specific language and terms used by medical community members.

51. It is therefore submitted that the medical community constitutes a clearly delineated community in the sense of the Guidebook.

(ii) Applicant's submissions

52. The Objector must show that the string itself describes a clearly delineated community. It does not. The word "medical" itself has numerous connotations. Among them: "of or pertaining to the science or practice of medicine;" "curative; medicinal; therapeutic;" and "pertaining to or giving evidence of the state of one's health." These represent matters of interest to the global public – not merely medical professionals, as the IO would limit the term. The word's broad meanings make it impossible for the Objector to show that it describes a true "community."

53. In the context of the elements enumerated in the objection standard, the Objector does not show that the public recognizes "medical" as a "community." The term does not raise "formal boundaries" that indicate who makes up the "community." And because "medical" does not describe a "community," the Objector cannot establish indicia by which to measure it, such as the number of its "members."

54. In prior correspondence with the Applicant, the IO has recognized the essential inability to "delineate" a "community" connoted by such a generic, broad and widely-encompassing dictionary word in the English language. When preliminarily considering the ability to equate the term "health" with a "community," he noted that the term "encompasses numerous stakeholders, who do not always share similar primary interests." These "include [ ] multilateral organizations" as well as "governmental agencies" and "non-governmental organizations" concerned with the delivery of medical services to the public. Medical services likewise involve for-profit entities such as pharmaceutical companies as well as medical practitioners and both ill and well patients. From such wide-ranging and divergent interests, the IO found it "quite doubtful that they represent a clearly delineated community" in the context of a <.health> TLD. The foregoing describes health *care* in equally broad terms, making its ability to define a "community" just as dubious.

55. At bottom, "medical" does not denote a "community," it represents a *subject*. The Applicant applied for the TLD name for precisely that purpose. Neither the Applicant nor the public should be constrained from discourse on a subject of such universal relevance. Upholding the Objection would stifle expression and discussion concerning this important topic. Such a result would undermine the very purpose of the new gTLD program, and contravenes the Applicant's open-Internet philosophy to benefit the public,

increase consumer choice, promote free expression and allow the Internet marketplace to function, grow and innovate. For such reasons, and because the Objector fails to carry his burden to prove a "clearly delineated community," the Objection cannot succeed.

(iii) Objector's Reply

56. The Community test is aimed at proving that the "community expressing opposition can be regarded as a clearly delineated community". None of the illustrative elements listed in the Guidebook with respect to the Community test implies that the applied for string has to "describe" a community (whatever this actually means). The Objector has to demonstrate that the community which expresses opposition to an Application is a "clearly delineated community" rather than a simple group of people or entities. It is therefore irrelevant, so far as this first test is concerned, if the string actually "describes" the community or not. Even if the Applicant's assertion – that "medical" is nothing other than a subject of interest to everybody and has a broad meaning – were true this does not imply that there cannot be a "medical community" satisfying the test of a delineated community in the sense of the Guidebook. Only the characteristics of the community have to be taken into account for this assessment, not the meaning of the string "medical", and even less the meaning of the string "health" as suggested in Applicant's Response.

57. The IO has demonstrated that the "medical community" does satisfy the Community test as described in the Guidebook. His conclusion has been reaffirmed in the Advice contained in the GAC's Beijing Communiqué, dated 11 April 2013, which has not been disputed by the Applicant in its Response to the Panel. It is indeed striking that the GAC has not only included <.medical> in its list of sensitive strings necessitating particular safeguard measures, but has also pointed to the fact that strings in the health segment, including <.medical>, are part of those strings "associated with market sectors which have clear and/or regulated entry requirements (such as: financial, gambling, professional services, environmental, health and fitness, corporate identifiers, and charity) in multiple jurisdictions." The GAC has therefore confirmed that the medical community can be clearly delineated through the regulated entry requirements and credentials which should be verified by registrars at registration and throughout the operation of a registered domain.

(iv) Applicant's Rejoinder

58. The wide-ranging "medical" term does not denote a "community" so much as a subject matter, and certainly not "uniquely or nearly uniquely" so. Thus, the Objector must but has failed to show that the string exclusively or nearly so identifies a "closely connected group of people or organizations," as opposed to the great variety of those who may have an interest in, or wish at certain times to find out or talk about, a wide range of "medical" topics. On the one hand, the Objector urges the Panel to cordon off access to a domain making use of an everyday dictionary word, while dismissing the need to demonstrate who comprises the alleged community that should have such access. The Objector cannot have it both ways.

59. The Objector's reference to GAC activities does not overcome his absence of proof. Nothing that the Objector has presented suggests that even the GAC views "medical" as denoting a "community," as opposed to simply one of many "sensitive strings." The GAC mentioned over 100 strings in its Beijing advice and its purpose was to add safeguards for those gTLDs – not to create a community such that non-community applicants would be rejected. Just as the GAC did not intend to create a community by mentioning <.diet> or <.care>, the GAC does not create a community for <.medical>.

60. The GAC's statements do not and cannot create a "community" where none exists or has been shown by the Objector. Falling well short of its burden to prove a "clearly delineated" community "targeted" by a <.medical> gTLD, the Objection cannot prevail.

X. Substantial opposition test

(i) Objector's submissions

61. In order to determine if "substantial opposition" with regard to an Application exists, the Panel is not limited to the factors listed in the Guidebook, which focus on the number of oppositions expressed or the representative nature of those having expressed opposition. A mere numerical criterion was certainly not the intent of the authors of the Guidebook. The word "substantial" cannot be defined as limited in that way. It is not only the number of oppositions which should be taken into account, but also the material content of comments and oppositions expressed by those concerned, and in particular, the importance of the rights and interests at stake. Particular importance should be paid in that regard to comments made by governments through the GAC Early Warning Procedure.

62. The very fact that the IO was granted the possibility to file "Community Objections" confirms the necessary broad meaning of the terms "substantial opposition". Indeed, the IO would not file a formal "Community objection" if a single established institution is better placed to represent the community concerned. The role of the IO is to defend the public interest and to act on behalf of the public for the defence of rights and interests of communities that lack an institution which obviously could represent the community in the present context. Article 3.2.5 of the Guidebook also indicates: "In light of the public interest goal noted above, the IO shall not object to an Application unless at least one comment in opposition to the Application is made in the public sphere." This shows that even a single comment can trigger a "Community objection" if it raises issues in relation to rights and interests of a community that can be associated with the applied-for gTLD.

63. The <.medical> Application has triggered a relatively small number of direct comments on ICANN's public comments website. The most relevant for the present purpose are the comments posted on behalf of the American Hospital Association (AHA) and the Association of American Medical Colleges (AAMC), established institutions associated with the medical community. Both represent a significant number of stakeholders of the community in the North America region.

64. Both comments voice similar concerns. They point out that the protection of the public and the users of a <.medical> TLD is an absolute imperative and that this domain name needs to be operated in the interest of public health and safety. AHA and AAMC are both concerned about the lack of safety measures and, in particular, about the lack of registrant eligibility requirements or validation procedures aiming at the prevention of abuse of the <.medical> TLD, of harm to the reputation of the medical community and of damage to healthcare systems and public health in general.

65. Thus, an important part of the invoked community has expressed concerns over the launch of a new gTLD related to the medical community. The grounds for this opposition are clearly substantial. They concern the medical community in general and, most importantly, public interest issues of considerable importance for the international community, i.e., public health and the protection of healthcare users. It is highly significant that similar concerns and oppositions have been voiced by numerous

governments and institutions, from a large variety of geographical regions, with regard to Applications for closely connected strings, and in particular <.health>.

66. For these reasons, it is submitted that the opposition against the <.medical> Application is substantial.

(ii) Applicant's submissions

67. The Objection offers virtually no evidence to show any, let alone substantial, opposition. Among no doubt countless groups around the world with medical subject-matter connections, the IO notes that two geographically limited associations – the AHA and the AAMC – posted public comments on ICANN's website voicing "similar concerns." The IO characterizes these associations as being "established institutions" that "represent a significant number of stakeholders of the community in the North America region." Yet, he proffers no evidence in support of this conclusory statement, and the statement itself admits that these organizations do not represent a significant amount of the global medical population.

68. A third public comment, from the Association of Corporate Counsel ("ACC"), "point[s] also to the additional burden on the often very limited resources of medical providers." The ACC is comprised of attorneys who are neither medical providers nor members of the community the IO purports to represent – *i.e.*, "the medical sector and its professionals." Its comments, therefore, do not bolster opposition within the purported community.

69. From only these three public comments, the IO proceeds directly to the conclusion that "a significant portion of the involved community has expressed concerns to the launch of a new gTLD related to the medical sector." How one can characterize three public comments as opposition from a significant portion of a medical "community" is puzzling at best.

70. The Objection perhaps would warrant more discussion had the IO provided the type of evidence one might expect to back his position. These would include exhibits in support of opposition, information as to how many alleged members of the purported community join the Objection, a showing of any historical "defence" mounted for the "community" invoked, mention of the distribution or diversity of opposition or evidence of costs incurred. He did not do so, notwithstanding that such information represents just what the Guidebook's elements of "substantial opposition" expressly call for.

71. The IO offers not one letter from a single member of the "community" expressing opposition to the <.medical> gTLD and he attaches not a single exhibit to make this requisite showing. "Evidence is appropriately required in all types of objection proceedings. Absent evidence, no objection should stand." *See* http://www.icann.org/en/topics/newgtlds/summary-analysis-proposed-final-Guidebook-feb11-en.pdf. The Objector falls well short of showing "substantial opposition" within the community, and the Objection should be rejected.

XI. Targeting test

(i) Objector's submissions

72. A "community objection" is warranted in the event of a strong association between the applied-for gTLD string and a specific community. In other words, the string used is or

could be clearly linked to a community the rights and interests of which are at stake. This link can be explicit or implicit. Steel Hill's Application has not been framed as a community-based TLD for the benefit of the medical community. Nevertheless, it targets explicitly this community. The Application at 18 (a) points out that the <.medical> TLD is:

> *"attractive to registrants with affinity or professional interest in promotion or treatment of human health, and the methods of delivery and payment for health care services. This includes, but is not limited to, those engaged in the treatment and prevention of disease and illness, the provision of primary and secondary care, the dissemination of health care information, and the advancement of public health."*

73. Further, as stated in Article 1.2.3.2 of the Guidebook: "All applicants should understand that a formal objection may be filed against any Application on community grounds, even if the applicant has not designated itself as community-based or declared the gTLD to be aimed at a particular community."

74. The Guidebook also confirms that a relevant factor to be taken into account in order to evaluate the Targeting test is "[a]ssociations by the public". The 2007 ICANN Final Report on the Introduction of New Generic Top-Level Domains also indicates that "implicitly targeting means that the objector makes an assumption of targeting or that the objector believes there may be confusion by users over its intended use". The test is therefore not limited to the assumptions and the intended use proposed in the Application, but is primarily concerned with the expectations of the average Internet users and their perception of and associations with the string. In the present case, the term "medical" qualifies the targeted community. As an adjective it describes things or professionals "of or relating to the science of medicine, or to the treatment of illness and injuries". The term is generally associated with activities related to the diagnosis and treatment, preventive or curative, of diseases, the medical professions and professionals which deliver these services to users of the healthcare system, as well as to institutions specific to the medical community, including medical treatment centres or medical schools.

75. According to the Applicant's own statements and the general use of the term by the public, there is a strong association between the medical community and the applied-for gTLD string.

(ii) Applicant's submissions

76. The Objector bears the burden of proving a "strong association" between the applied-for string and the so-called community it invokes. He may do so by showing (a) statements made in the Application, (b) other public statements by the Applicant, and (c) public associations between the string and the objecting "community." The Objector offers no real evidence on any of these items. Statements in the Application do not "target" *any* "community," let alone that identified by the Objector. For example, in response to item 18(a) of the Application, seeking "the mission/ purpose of your proposed gTLD," the Applicant states generally: "This TLD is attractive and useful to end-users as it better facilitates search, self-expression, information sharing and the provision of legitimate goods and services. This TLD is a generic term and its second level names will be attractive to a variety of Internet users. No entity, or group of entities, has exclusive rights to own or register second level names in this TLD."

77. The purpose of the TLD is open and the string itself is not tied to a specific community. That is the whole point of Donuts' selection of generically worded TLDs.

78. The concept of "targeting," which lies at the heart of this facet of the Objection, runs directly contrary to the Applicant's stated purpose for this TLD and the philosophy behind the operation of registries generally by the Applicant and its family of companies: making this TLD available to a broad audience of registrants is consistent with the competition goals of the New TLD expansion program and with ICANN's objective of maximizing Internet participation. Donuts believes in an open Internet and, accordingly, the Applicant indicates it will encourage inclusiveness in the registration policies for this TLD. In order to avoid harm to legitimate registrants, Donuts will not artificially deny access, on the basis of identity alone (without legal cause), to a TLD that represents a generic form of activity and expression.

79. Thus, the Applicant expressly does not "target" the string toward *any* particular community, let alone that which the Objector claims to represent. Nor does the Objector present any evidence that the *public* "strongly associates" the word "medical" with any community.

80. Rather than targeting a community, this gTLD identifies users who may have an interest in medical subject-matter, which, as described, includes essentially the entire world population – hardly a "community." The Application goes beyond that universe of end users to include those more generally interested in "self-expression, information sharing and the provision of legitimate goods and services," and notes that, as a generic term, the TLD and "its second level names will be attractive to a variety of Internet users."

81. Dictionary definitions not selected by the IO show the broad reach of the term beyond what he ascribes to it; for example, "the field concerned with the maintenance or restoration of the health of the body or mind." *See* http://dictionary.reference.com/browse/medical. This definition subsumes activities and individuals interested in physical fitness and exercise, not just medical professionals as the Objector would so limit the term. The Objector's unsubstantiated conclusions regarding the string do nothing to prove a "strong" association between it and the narrow interests for which the Objector claims he seeks protection. The Applicant argues that this should come as no surprise, given the broad meaning of the term. It simply does not support the Objector's reading or his burden to prove "strong association." As such, the Objection must fail.

(iii) Objector's Reply

82. The Applicant's interpretation of the Targeting test is flawed. The Applicant largely focuses on the very inclusive group it wants to be able to register domain names within the <.medical> gTLD, which in the understanding of the Applicant means everybody. It is not the Application that has to target a community, but the string itself. The intended use of the string by the Applicant constitutes only one element in order to assess the "strong association" between the string and a community. But it is not the only one, and certainly not the most reliable one. What matters much more is whether the general public is likely to make a strong association between the string and the defined community, and here what counts is not whether the string expressly describes a community but whether the string is sufficiently linked with the community. The Applicant's arguments concerning the lack of targeting are therefore inconclusive. This is particularly true in respect of the dictionary definitions it uses to show a broader understanding of the string "medical", simply because the definition provided by the Applicant relates to the broader concept of "healthcare" and does not appear in the explanations of the term "medical" on the same online dictionary.

(iv) Applicant's Rejoinder

83. The "strong association" or "targeting" test does not look simply at the generic association between the string and the "community" in the eyes of the public. It also expressly considers what the *Applicant* "targets," as the Guidebook factors under this element include "[s]tatements contained in the application" and "[o]ther public statements by the applicant." Thus, the Guidebook itself distinguishes "strong association" from the stringent "clearly delineated" standard.

XII. Detriment test

(i) Objector's submissions

84. The present Application for the <.medical> gTLD creates a likelihood of material detriment to the rights or legitimate interests of a significant portion of the medical community and, most importantly, to users and the public in general.

85. Material detriment can result from harm to the reputation of the community, interference with the community's core activities, or economic or other concrete damage to the community or significant portions of the community. In order to assess the likelihood of such harm or damage, the Expert Panel can take into account a variety of factors, including the dependence of the community on the domain name system for its core activities, the intended use of the gTLD as evidenced in the Application, and the importance of the rights and interests likely to be harmed for the community targeted and for the public more generally.

86. The Guidebook gives particular attention to the issue whether the Applicant is not acting or does not intend to act in accordance with the interests of the community or of users more widely, including evidence that the applicant has not proposed or does not intend to institute effective security protection for user and community interests. In such a case, it is more than likely that the rights and interests of the community will be detrimentally affected by operation of the gTLD as projected by the Applicant.

87. Membership of the medical community and the activities of the community are highly regulated. Because of the public interests at stake, access to and the activities of the medical community are subject to important safeguards, including specific licensing and monitoring requirements imposed by public authorities on qualification, as well as appropriate enforcement mechanisms. It is indeed a primary concern of governmental action and policy – indeed, the responsibility of governments – to provide the most efficient and qualified health service system to its population, including through education and selection of medical professionals.

88. Specifically imposed limits and safeguards serve the protection of the interests and rights of users of the health care system as well as the achievement of the goal of global public health, a concern shared by the entire international community. "The enjoyment of the highest attainable standard of health is one of the fundamental rights of every human being without distinction of race, religion, political belief, economic or social condition." Under Article 12 of the 1966 International Covenant on Economic, Social and Cultural Rights adopted by the General Assembly of the United Nations, States have recognized "the right of everyone to the enjoyment of the highest attainable standard of physical and mental health" and the necessity to create "conditions which would assure to all medical service and medical attention in the event of sickness." The "attainment by all peoples of the highest possible level of health" is a key objective of the WHO and its 194 Member States. In 2010, the Heads of States and Governments of the United Nations have

reiterated their commitment to this objective and committed themselves again to "accelerating progress in promoting global public health".

89. The reputation among users and the trust users put into the medical community are of utmost importance. They serve the community as such which operates in a field of considerable sensitivity and importance for its users. Bad reputation and mistrust create important barriers between users and the medical professionals and the capacities of the latter to accomplish their dedicated public interest mission.

90. In its public comment on the <.medical> Application, the AAMC has pointed to these issues. It has underlined that "[i]t is imperative that the public view <.medical> gTLD, and its hosted websites and e-mail addresses, as trustworthy and legitimate sources of health related information, products and services." The AAMC fears that "the applicant, Donuts LLC, will operate this gTLD solely to advance private commercial interests and not in the interest of public health and safety. This will inevitably erode the public's confidence in the health care system." The AHA and others have expressed similar concerns.

91. The Applicant has shown only limited readiness to address these specific needs of the medical community and the health industry in general in its management of the gTLD <.medical>.

92. Although the Applicant has recognized "the level of end-user trust potentially associated with this string" and has proposed some additional protection mechanisms – as it has done for other Applications submitted by Donuts subsidiaries – the Application has not been framed as a community-based gTLD. It is therefore clear that the Applicant will operate the gTLD in a purely commercial perspective without paying attention to the community targeted and their specific needs and interests.

93. There are two factors demonstrating that the operation of the TLD by the Applicant, as foreseen in the Application, creates a likelihood of detriment to the community.

94. First, the declared policy of Donuts with regard to registry eligibility is questionable. In the Application the Applicant explains: "We recognize some applicants seek to address harms by constraining access to the registration of second level names. However, we believe attempts to limit abuse by limiting registrant eligibility is unnecessarily restrictive and harms users by denying access to many legitimate registrants."

95. On several occasions, Donuts pointed out that "it is far better to maintain the competitive and open nature of a gTLD and use protection measures against problem behaviour if it occurs, instead of making assumptions regarding the effectiveness or practicality of pre-registration restrictions. This is the reasonably balanced environment Donuts seeks to maintain."

96. The Applicant's parent company has taken a similar position in the comments it has itself posted on the public comment website concerning the <.medical> Application, in its response to the IO's Initial Notice concerning, *inter alia*, the <.health> Application filed by Donuts' subsidiary Goose Fest, LLC, and in the Public Interest Commitments (PIC) it has submitted on 6 March 2013.

97. Safety and security measures which are only directed at remedying problems and abuses *if* and *once* they occur do not meet the specific needs and requirements of the medical community, their users and the public interest of global health. The absence of

preventive security measures assuring the integrity and the trustworthy nature of the entities represented and of the information provided under the gTLD, e.g., through stringent eligibility criteria established in collaboration with the community and its stakeholders – a possibility the Applicant's parent company clearly excludes by invoking the open nature of the Internet in general – is likely to have detrimental effects on the trust in the community and the TLD, the reputation of the community, and, most importantly, on public health. To react once abuse and damage have occurred does not correspond to the ethical principles of the medical community. Prevention of detriment and to act in the best interest of the patient are core moral values for the community.

98. Second, the security mechanisms proposed by the Applicant's parent company and aimed at reacting to abuse are unlikely to meet the specific requirements and needs of the community.

99. The Applicant has made no commitment concerning the specific content of the "Anti-Abuse Policy" described in its Application, nor has it given any information concerning the elaboration of this policy. Given the importance of the subject and the public interests at stake, consultation with all stakeholders should be conducted throughout the management and the operation of the gTLD in order to determine adequate measures for the protection of Internet users and the promotion of public health. At no point has it been suggested that the medical community or any of its stakeholders will be associated in the elaboration of this policy or its implementation. To the contrary, the Applicant has expressly reserved the right to react to abuse and to take the appropriate steps "at its sole discretion and at any time and without limitation".

100. In addition, the proposed "Anti-Abuse Policy" is in no way specifically elaborated in order to meet the specific needs of the medical community and taking into account the importance of users' protection and confidence. Section 28 of the present Application and the same section in the Application submitted by Binky Frostbite, LLC, a subsidiary of Donuts, for the gTLD <.creditcard> are entirely identical. This is also the case with Section 28 of the Application submitted by Fox Shadow, LLC, also a subsidiary of Donuts, for the gTLD string <.cleaning>. The PIC submitted by Donuts are equally a mere generic document applicable to a great number of applied-for gTLDs of a great variety. This shows how little attention Donuts actually gives to the medical community and the public interest goals to which it is connected. Obviously, a TLD string which directly targets a community with the particularities and specificities of the medical community cannot be operated in the same policy environment and under the same security conditions of TLDs like <.creditcard> or <.cleaning>. The level of user trust and user protection is without any comparison when human health, as an essential human right and development goal, comes into play.

101. A closer look to the proposed Anti-Abuse Policy also shows that it has not been developed in order to meet any specific requirements of the medical community. In particular, Donuts' propositions do not include any abuse control based on the actual content of websites in the <.medical> TLD. What is more, Donuts refuses to take responsibility for any such control. As it has pointed out in its response to the IO's Initial Notice concerning the <.health> Application, "it is highly inappropriate to attempt to invest any registry operator with the power to assess or regulate speech that uses a broadly applicable dictionary term, and this should not be a consideration in any forum of ICANN's work as a technical coordinating body. Donuts will not do so, nor should any responsible registry so attempt." However, if there is neither an eligibility control to access domain names in the <.medical> TLD, nor any *ex post* control based on content of websites in this particular name space under the Anti-Abuse policy, there is no mechanism left to guarantee and to safeguard the public interest and the community

against the risk of abusing <.medical> domain names, e.g., by fake medical professionals' websites, the promotion of non-authorized goods and services or the dissemination of false, misleading, and/or inaccurate information.

102. The management and operation policies of the <.medical> gTLD as proposed in Steel Hill's Application address insufficiently the risks of abuse. In these circumstances, it is likely to undermine consumer trust and confidence in the medical community and its members. It will cause harm to the reputation of the community and material, economic damage for their members with the direct consequence of the loss of users' confidence and trust. In addition, it is likely to cause detriment, including economic damage, to the public and users of the Internet through inappropriate, false and misleading information in a sector as essential and sensitive as human health.

(ii) Applicant's submissions

103. The Objector cannot sustain its burden to prove "likelihood" of "material detriment." That independently required factor calls for proof of the following elements: (a) the nature and extent of potential damage to the invoked "community" or its reputation from the Applicant's operation of the string; (b) evidence that the Applicant does not intend to act consistently with the interests of the invoked community; (c) interference with the core activities of the invoked community by the Applicant's operation of the string; (d) the extent to which the invoked community depends on the domain name system for core activities; and (e) the level of certainty that detrimental outcomes will occur.

104. The Objector provides no evidence to establish any of these elements. He bases the Objection entirely on rank speculation. The Objector finds it striking that the Application has not been framed as a community-based gTLD but ICANN does not require an operator to apply as a community. Virtually any generic term could potentially be argued to implicate a "community," as the Objector does here. Allowing so-called community interests to stifle expression, restrain competition and impede growth in the namespace would defeat the very purpose of the new gTLD program.

105. Nor does the choice not to seek community status constitute proof of harm. The IO conjectures that harm may occur due to what he sees as a lack of mechanisms for the proposed TLD to protect the alleged community to the extent he deems necessary. Nor can he make such a showing. The overwhelming facts convincingly show otherwise. The Applicant has expressed its affirmative intent to act in the best interests of and to protect all users, including asserted communities, and to "make this TLD a place for Internet users that is far safer than existing TLDs." It will do so with 14 protections that ICANN demands for new gTLDs (but has never required for existing gTLDs). Moreover, for this and all its Applications, Donuts goes beyond these measures to implement eight additional safeguards, including to address the exact types of concerns raised by the Objector. And, as to domains over which it anticipated some might express particular concern – including the gTLD at issue here – Donuts is taking four further steps to assuage such concerns and shield users from potential misconduct. In light of such sweeping and unprecedented undertakings, the Applicant finds it difficult to imagine what more it could do or Objector could want.

106. The Objector suggests a need for registration eligibility criteria, without proposing what they might be. Existing gTLDs have no such requirement. The term "medical" about appears nearly 100,000 times in second-level domains. The Applicant has clearly stated its opposition to such constraints on access, expression and innovation: "[A]ttempts to limit abuse by limiting registrant eligibility is unnecessarily restrictive and harms users by denying access to many legitimate registrants. Restrictions on second level domain

eligibility would prevent law-abiding individuals and organizations from participating in a space to which they are legitimately connected, and would inhibit the sort of positive innovation the Applicant intends to see in this TLD."

107. ICANN supports the same objectives. Indeed, they lie at the heart of the entire new gTLD program: "Evidence is appropriately required in all types of objection proceedings. Absent evidence, no objection should stand." The Objection would have the Panel gut these principles in deference to the self-interest of the Objector and its theoretical community. This would subvert the goals of the evaluation process and lead the namespace down a dangerous path.

108. Such censorship has no place on the Internet. The Applicant's content-neutral approach strikes the proper balance that promotes free speech and the growth of cyber media, while protecting users more thoroughly than both the current landscape and ICANN's new gTLD enhancements do.

109. The Objector fails to establish any of the Guidebook's remaining elements of detriment. He does not show interference with the "core activities" of any medical "community," or that it "depends" on the domain name system for such "activities." And he does not venture an assessment of "certainty" of harm. The Objector's fears and speculation do not satisfy its burden to prove that harm is "likely" from Applicant's operation of the truly generic TLD at issue. The Objection must fail.

110. The Applicant has every right to full consideration of its Application by ICANN. The Objector fails in every respect to meet its burden to divest the Applicant of that right. The Objection cannot succeed. The Applicant therefore respectfully urges the Panel to reject it and to direct the Objector to pay the costs reasonably incurred by the Applicant in opposing the Objection.

(iii) Objector's Reply

111. The factors listed in Article 3.5.4 of the Guidebook are only guidance and are not limitative or exclusive.

112. The Applicant asserts that the IO needs to submit "proof of harm" rather than merely to prove a "likelihood of detriment". This is to forget that during ICANN's preparations for the new gTLD program and its guiding policy, it has been proposed that "evidence of detriment to the community or to users more widely must be provided". This proposal has not been retained in the Final Report of ICANN's Generic Names Supporting Organization ("GNSO").

113. The IO has developed many elements establishing that there exists a likelihood of detriment, in particular because of the Applicant's unwillingness to propose preventive measures, to control the actual content of websites in the <.medical> TLD and to ensure controlled registration eligibility requirements. The Applicant continues to ignore the specificity of this string despite the fact that the GAC Beijing communiqué of 11 April 2013 listed the <.medical> gTLD within the "sensitive strings that merits particular safeguards" because, as had been underlined by the IO, this string is "likely to invoke a level of implied trust from consumers, and carry higher levels of risk associated with consumer harm".

114. Despite the detriment its position is likely to cause, the Applicant's ultimate parent continues to challenge most of the safeguard measures advised by the GAC, along the

same lines as in this Application. The Applicant, just like its ultimate parent, affirms its pro-open registry philosophy in its Response to IO's objection.

(iv) Applicant's Rejoinder

115. The Objector's Reply suggests that the Guidebook does not require objectors to provide evidentiary support for their arguments, as a "proposal" requiring "[e]vidence of detriment to the community" supposedly did not make it into the Implementation Guidelines of the GNSO that initiated the new gTLD program back in 2007. First, that is simply not true; the IO himself refers to the final guidelines, which state, "the objector must provide sufficient evidence to allow the Panel to determine that there would be a likelihood of detriment to the rights or legitimate interests of the community or to users more widely." Second, the multiple stakeholders who developed the Guidebook over five years emphasized that evidence is appropriately required in all types of objection proceedings. Absent evidence, no objection should stand. Third, the GNSO makes policy recommendations to the ICANN Board. The ICANN Board and stakeholders take those recommendations into account in establishing the Guidebook, but the Guidebook ultimately controls and not five year old recommendations. Indeed, the Guidebook as ultimately issued in 2012 could not state more clearly: "The objector bears the burden of proof in each case."

116. The Objector does not provide proof that "the Application" itself "creates a likelihood of material detriment to the rights or legitimate interests of a significant portion of" the alleged "medical" community. Rather, he continues to cite the Applicant's purported "unwillingness to propose preventative measures" as his primary reason for objecting. This does not discharge the Objector's burden and is false.

117. The IO misstates the record when he accuses the Applicant of "unwillingness to propose preventative measures." He completely ignores the eight protective mechanisms that the Application undertakes in addition to the fourteen steps that ICANN already requires for new gTLDs over and above what it demands of existing gTLDs, and the four further measures the Applicant will implement due to the sensitivity it acknowledges as to this particular string.

118. He also overlooks Donuts' Public Interest Commitments (PICs), which contractually bind the Applicant to employ the types of security measures that the IO claims are lacking – including, as discussed more fully in paragraphs 121-123 below, in response to recommendations that ICANN adopts from the GAC Beijing communiqué.

119. Second, the alleged lack of preventative measures does not in the abstract create a likelihood of material detriment. The Objector fails to articulate what specific detriment will likely result absent such measures, what particular measures the Applicant should employ, and how they would reduce the likelihood of whatever detriment the IO imagines might otherwise ensue.

120. Thus, the Objector fails to satisfy his burden to prove material detriment. To the contrary, the facts show the Applicant doing more than even the GAC recommends in many regards, and certainly in excess of what ICANN requires. Anything beyond that would be tantamount to saying that the Applicant may operate a <.medical> gTLD only as a community, and even the IO concedes that the Guidebook does not require that any and every gTLD string which targets a community must necessarily be applied for by a representative of the community. With no adequate proof of the essential element of material detriment, the Objection fails.

121. The Reply infers a likelihood of material detriment by contending that Applicant's ultimate parent continues to challenge most of the safeguard measures advised by the GAC. This misapprehends the GAC's role, the Applicant's policy position and the effect of its recommendations on the instant Objection. Indeed, if relevant at all, the GAC communiqué, in the context of the Guidebook standards, compels denial of the Objection. The Guidebook contemplates that the GAC may provide advice to the ICANN board to address Applications that are identified by governments to be problematic, e.g., that potentially violate national law or raise sensitivities. GAC Advice may take one of three forms: (i) that a particular Application should not proceed, which will create a strong presumption for the ICANN Board that the Application should not be approved; (ii) that the GAC has concerns about a particular string, as to which the ICANN board may enter into dialogue with the GAC to understand the scope of concerns, then decide what to do about them and provide a rationale for its decision; or (iii) that an Application should not proceed unless remediated, which will raise a strong presumption for the Board that the Application should not proceed absent such remediation.

122. The GAC's Beijing comments regarding potentially sensitive strings such as <.medical> take the second form, which does not call for rejection of the string or even create a strong presumption that such a result should occur, whether outright or absent remediation. ICANN has no obligation to adopt all or any of the Beijing recommendations regarding the subject string. Such advice, therefore, has no relevance whatsoever to a material detriment analysis.

123. The Objector further overlooks the ultimate impact the GAC's Beijing recommendations may have. ICANN in fact has accepted the protections suggested by the GAC at Beijing, and remains in dialogue with the GAC on the specific means of doing so with respect to Category 1 strings. Whatever specific measures ICANN enacts will require implementation by the Applicant in the form of a PIC, then embodied in a formal registry agreement by which the Applicant must bind itself to undertake those measures under penalty of losing the registry. Indeed, the Applicant supports much of the Beijing GAC advice. Ironically, then, the very GAC advice to which the IO points as evidence of a likelihood of material detriment instead provides for the precise protections for which the IO advocates against such perceived harm. ICANN will require the Applicant to do exactly what the IO claims it must do in order not to create a likelihood of material detriment. Thus, the only evidence of material detriment on which the Objector relies actually demonstrates just the opposite and defeats the Objection.

XIII. The parties' desired outcome

124. The IO requests the Expert Panel to hold that his objection against the Application in this case is valid. Therefore, the Expert Panel should uphold his Objection against the <.medical> Application. In addition, the IO requests that his advance payments of costs be refunded in accordance with Article 14 (e) of the Procedure.

125. The Applicant respectfully suggests that the Panel has no alternative under the Guidebook other than to reject the Objection. The Objector simply does not meet its burden to prove all four elements of a community objection, compelling its denial.

XIV. Determination

126. For this Objection to be successful, the IO must prove that there is substantial opposition to the <.medical> gTLD Application from a significant portion of the community to which the gTLD string may be explicitly or implicitly targeted.

127. The four tests laid down in the Guidebook are now considered. As mentioned in paragraph 43, the Objector must prove all four tests for the objection to prevail.

(i) Community test

128. This test requires the IO to prove that "the community expressing opposition can be regarded as a clearly delineated community". Article 3.5.4 of the Guidebook sets out a number of factors which a Panel could balance to determine this, including but not limited to:

- the level of public recognition of the group as a community at a local and/or global level;
- the level of formal boundaries around the community and what persons or entities are considered to form the community;
- the length of time the community has been in existence;
- the global distribution of the community (this may not apply if the community is territorial); and
- the number of people or entities that make up the community.

129. A community is "a social, religious, occupational, or other group sharing common characteristics or interests and perceived or perceiving itself as distinct in some respect from the larger society within which it exists": http://dictionary.reference.com/browse/community?s=t.

130. The focus of this test is on the community expressing opposition, not on the meaning of the word comprising the string. Accordingly this test does not require the string itself to describe or denote a clearly delineated community nor exclusively or nearly so to identify a closely connected group of people or organizations.

131. For the reasons put forward by the IO and set out in paragraphs 48 to 50 above, the Expert accepts as common knowledge that a clearly delineated community has developed globally over many centuries, comprising a large group of people and enterprises having in common an involvement in the provision of health care to the general public. That involvement distinguishes the group from the larger society within which it exists, both in its perception of itself and in its recognition by that larger society. There are formal boundaries around the principal participants in that community since medical practitioners, who spring to the public mind first when considering the group and who comprise a very large sector within it, are required under national laws to have formal qualifications before they may practise. Likewise with respect to nurses in many, if not all countries.

132. The expression "medical community" is apt to describe this clearly delineated community.

133. The IO has provided links to the public comments expressing opposition to the Application from two organizations representing members of the medical community, namely the AHA and the AAMC. The fact that these two organizations and their members are based in the United States of America and Canada does not detract from the worldwide nature of the medical community.

134. Accordingly, the Expert finds that the community expressing opposition can be regarded as a clearly delineated community.

135. The IO has proved that the Community test has been satisfied.

(ii) Substantial Opposition test

136. This test requires the IO to prove that opposition to the Application within the Community is substantial. Article 3.5.4 of the Guidebook sets out a number of factors that a Panel could balance to determine whether there is substantial opposition, including but not limited to:

- number of expressions of opposition relative to the composition of the community;
- the representative nature of entities expressing opposition;
- level of recognized stature or weight among sources of opposition;
- distribution or diversity among sources of expressions of opposition, including:
  - Regional
  - Subsectors of community
  - Leadership of community
  - Membership of community
- historical defense of the community in other contexts; and
- costs incurred by objector in expressing opposition, including other channels the objector may have used to convey opposition.

137. As mentioned, the IO has provided links to the public comments expressing opposition to the Application from the AHA, which has 40,000 individual members and more than 5,000 member hospitals, health systems and health care organizations; and from the AAMC, a non-profit association representing all 138 accredited US and 17 accredited Canadian medical schools; nearly 400 major teaching hospitals and health systems; and 90 academic and scientific societies. These organizations and their members represent a large number of the participants in the medical community in the United States and Canada, although they cannot be more than a small proportion of participants in the worldwide medical community.

138. The Expert accepts the IO's submission that, for the purposes of this test, the concept of substantial opposition is not confined to consideration of the number of those expressing opposition or on whose behalf opposition is expressed as a proportion of the community as a whole but may include consideration of the nature and importance of that opposition. In this regard, the Expert notes that the factors which the Expert may take into account are expressly not limited to those mentioned in Article 3.5.4. In this case the Expert finds the content of the expressions of opposition to outweigh in importance those quantitative factors.

139. In its public comments, put in evidence before the Panel by the IO by way of link to the relevant section of the ICANN website: https://gtldcomment.icann.org/comments-feedback/Applicationcomment/commentdetails/10889, AAMC set out its opposition as follows:

(a) It is imperative that the public view <.medical> gTLD, and its hosted websites and e-mail addresses, as trustworthy and legitimate sources of health related information, products and services. AAMC believes that a private, for-profit commercial enterprise that is not connected to the health care community should not be entrusted with the responsibility of operating the <.medical> gTLD. AAMC and its members are concerned that the applicant, Donuts LLC, will operate this gTLD solely to advance private commercial interests and not in the interest of public health and safety. This will inevitably erode the public's confidence in the health care system.

(b) The health care community and the general public need to be protected from a variety of fraudulent activities. We do not believe that this Application provides for adequate protections such as registrant eligibility requirements or validation procedures designed to prevent bad actors from abusing <.medical> domain names. In the absence of such protections, AAMC is concerned with the ease with which fraudulent activity – including fake health provider websites, illegal online pharmacies, fake electronic medical records websites – could occur and result in identity theft. Further, such fraudulent activities could cause consumer confusion and damage the AAMC and our members' reputations jeopardizing the public trust we have worked to earn and maintain.

(c) AAMC and our non-profit members are not in a position to accept the financial burden of purchasing and managing domain names in the <.medical> gTLD. At this time there is no need for the new gTLD as we all operate successful websites within the current space. The delegation of <.medical> would force us to waste time and resources registering domain names to protect our names, reputations, and the public trust. The creation of <.medical> would further tax the resources of AAMC and our members and divert from efforts to heal, educate the public regarding health and wellness issues, and support research to discover cures and treatments.

(d) For these reasons AAMC believes that delegation of <.medical>, in the absence of alignment with the values of medicine, would not be in the health care community's nor the public's best interest.

140. In its public comments, put in evidence before the Expert by the IO by way of link to the relevant section of the ICANN website: https://gtldcomment.icann.org/comments-feedback/Applicationcomment/commentdetails/10943, the AHA expressed similar opposition as follows:

(a) For the reasons below, the AHA believes that the delegation of the <.medical> gTLD will be detrimental to public health and safety, and the general goals and interests of the health care community targeted by this gTLD.

(b) First, the AHA believes that a private, for-profit commercial enterprise that is not affiliated with, endorsed by, or otherwise connected to the health care community should not be entrusted with the responsibility of operating the <.medical> gTLD. It is imperative that the public view this gTLD, and the websites and email addresses hosted by domains in this gTLD, as trustworthy and legitimate sources of health related information, products and services. The AHA and its members are concerned that the applicant will operate the <.medical> gTLD pursuant to private commercial interests, and not in the interests of public health and safety. The applicant's management of the <.medical> gTLD without the participation of the targeted health care community will erode the public's confidence in the health care system.

(c) Further, both the health care community and the public it serves need to be protected from a variety of fraudulent activities. The Application for <.medical> does not provide for adequate protections. Unlike the Applications for other gTLDs that will serve highly sensitive industries (e.g., .bank), the Application for <.medical> does not include registrant eligibility requirements or validation procedures designed to ensure that <.medical> domains are not secured by bad actors. In the absence of such protections, the AHA and its members are

concerned that the applicant's procedures will both encourage and allow third parties to secure and use <.medical> domain names in the perpetration of fraudulent or other illegal activities (e.g., fake health provider websites, illicit online pharmacies, spamming, phishing attacks, identity theft, etc.), and will invite cybersquatting and other acts of trademark infringement that will cause consumer confusion, damage the AHA and its members' reputations, and otherwise cause material economic harm to the AHA's constituency.

(d) In addition, the health care community is not in a position to accept the financial burden of purchasing and managing domains in the new <.medical> gTLD, or the costs associated with enforcing its rights and protecting consumers from infringing and otherwise fraudulent activities in this gTLD. The majority of the AHA's members are not-for-profit organizations, and many are already under tremendous fiscal pressure. Accordingly, the creation of the <.medical> gTLD will further tax the resources of the AHA's members, interfering with their efforts to help the sick and infirm, and to educate the public regarding health and wellness issues.

141. Although the geographic distribution of the membership of these two organisations is limited relative to the worldwide membership of the medical community as a whole, they are nevertheless representative organizations having a wide range of members belonging to the medical community. This factor, coupled with the nature of the concerns those organizations and the IO have expressed regarding the health and safety of the general public, establishes that community opposition to the Application is substantial.

142. The IO has proved that the Substantial Opposition test has been satisfied.

(iii) Targeting test

143. This test requires the IO to prove that there is a strong association between the applied-for gTLD string and the community invoked. Article 3.5.4 of the Guidebook sets out a number of factors that a Panel could balance to determine this, including but not limited to:

- Statements contained in the Application;
- Other public statements by the Applicant;
- Associations by the public.

144. The Application contains the following statement by the Applicant:

"<.medical> is a TLD attractive to registrants with affinity or professional interest in medicine and medical products and services. This is a broad and wide-ranging worldwide group that could include, but would not be limited to, doctors, nurses, hospitals, medical practices, scientists, researchers, educators, journalists, and others. It also includes individuals, businesses, and professional organizations that support the practice of medicine, including hygienists, technicians, therapists, equipment manufacturers, suppliers, non-traditional medical practitioners, and many others".

145. Apart from the reference to journalists, this group includes those who perceive themselves and are perceived generally by society at large as members of the medical community, since they are all involved in the provision of health care. That such registrants having affinity [i.e. connection with] or professional interest in medicine and medical products and services would find the <.medical> string attractive demonstrates

that there is a strong association between the community invoked and the applied-for gTLD string.

146. The IO has proved that the Targeting test is satisfied.

(iv) Detriment test

147. This test requires the IO to prove that 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. Article 3.5.4 of the Guidebook sets out a number of factors that a Panel could balance to determine this, including but not limited to:

- nature and extent of damage to the reputation of the community represented by the objector that would result from the applicant's operation of the applied-for gTLD string;
- evidence that the applicant is not acting or does not intend to act in accordance with the interests of the community or of users more widely, including evidence that the applicant has not proposed or does not intend to institute effective security protection for user interests;
- interference with the core activities of the community that would result from the applicant's operation of the applied-for gTLD string;
- dependence of the community represented by the objector on the domain name system for its core activities;
- nature and extent of concrete or economic damage to the community represented by the objector that would result from the applicant's operation of the applied-for gTLD string; and
- level of certainty that alleged detrimental outcomes would occur.

148. In considering this test, the Expert notes the Applicant's submission:

> "Applicant has the same free speech rights as the general public to conduct its affairs using ordinary words from the English language. To hold otherwise would negate such rights, impede the growth of and competition on the Internet, and set dangerous precedent that takes choice away from the many and places control in the hands of a few."

149. In this regard, although the parties have not referred to the United Nations Universal Declaration of Human Rights, the Expert notes that while Article 19 of that Declaration provides:

> *"Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers",*

that right is qualified, under Article 29(2):

> *"In the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society".*

150. In keeping with Article 29(2), under ICANN's Community Objection process, where there is proven likelihood of material detriment to the legitimate interests of a significant portion of a clearly delineated community, the right of free speech is made subject to the interests of that community. This is so even in the case of a common dictionary word such as "medical", provided that the four tests of a Community Objection are satisfied.

151. As the Applicant notes, "the entire world population has a fundamental interest in, and is impacted by, medical matters". Hence the importance universally attached to public health and safety as an element of "general welfare in a democratic society", the protection of which must prevail over the right of free speech, in accordance with Article 29(2) of the United Nations Universal Declaration of Human Rights.

152. The Expert has considered the GAC communiqué to the ICANN Board of Directors of 11 April 2013, Donuts' comments thereon to the Board and the parties' comments thereon in this proceeding. Module 3 to the Guidebook describes the procedure whereby the GAC may give advice on new gTLDs to the ICANN Board concerning a specific Application and how that advice is considered by the ICANN Board once received.

153. Module 3 makes clear that the GAC process is separate from the Community Objection process. The outcome of any GAC advice which the ICANN Board accepts will no doubt be applied in relation to any new gTLDs identified by the GAC that survive any formal objections. Accordingly, the Expert regards the GAC advice in relation to the proposed <.medical> gTLD as having no bearing on the present objection.

154. Medical practitioners constitute a significant portion of the medical community. The universally accepted public policy underlying the requirement that medical practitioners be suitably qualified before they may provide medical services, including the service of prescribing certain medicines not lawfully obtainable without prescription, is that, in the interests of public safety, the public should be protected from harm. The essence of this public policy is the prevention of harm before it occurs.

155. The protection policy of the Applicant is not in accord with this approach since it is confined to taking action after harm has been done.

156. The Application recognises "the promotion, encouragement, sale, or distribution of prescription medication without a valid prescription in violation of applicable law" as abusive use of a domain and as "an illegal, malicious, or fraudulent action". Application, 28.3.0.

157. That such conduct already occurs online to a significant degree is noted in another of the public comments to which the IO has provided a link, namely that of Charna Sherman in connection with the LPI Objection to the <.medical> string, citing the National Association of Boards of Pharmacy:

> "...some 97% of Web sites selling prescription drugs online do so illegally – many of them selling unapproved, substandard, and counterfeit medicine..."

158. The Applicant makes clear that the protection of the public that it proposes does not involve consultation with any members of the medical community but will be implemented "at its sole discretion".

159. Nor does the Applicant propose prevention of abuse by limiting registrant eligibility. Instead it will require its registrars to take action against abuse after it has occurred:

> "The Applicant would make the <.medical> registry open to all consumers..." Response, Introduction.
>
> "The purpose of the TLD is open and the string itself is not tied to a specific community. That is the whole point of Donuts' selection of generically worded TLDs." Response 3, Nevett Declaration 7.
>
> "....the Donuts approach is inclusive, and second level registrations in this TLD will be available to any responsible registrant with an affinity for this string. We will use our significant protection mechanisms to prevent and eradicate abuse, rather than attempting to do so by limiting registrant eligibility...Donuts will not limit eligibility or otherwise exclude legitimate registrants in second level names. Our primary focus will be the behaviour of registrants, not their identity." Application 18(b).
>
> "The Anti-Abuse Policy for our registry will be enacted under the Registry-Registrar Agreement, with obligations from that agreement passed on to and made binding upon all registrants, registrars, and resellers." Application 28.2.0.
>
> "Our goal is to keep malicious activity at an acceptably low level, and mitigate it actively when it occurs—we may do so by using professional blocklists of domain names. For example, professional advisors such as LegitScript (www.legitscript.com) may be used to identify and close down illegal "rogue" Internet pharmacies". Application 28.7.0.

160. All of the numerous specific protections listed in the Application are designed to address abuses after they have occurred, including "terms of use that prohibit illegal or abusive activity", and including the four additional measures proposed by the Applicant "due to the level of end-user trust potentially associated with this string". Application 28.15.0.

161. Despite the level of end-user trust which the Applicant recognises as potentially associated with this string, there is nothing in the Application from which it may be concluded that second level registrations will be limited, as the Applicant claims, to "responsible" registrants. In the absence of registrant eligibility requirements, the prospect of irresponsible registrants is not merely possible but likely. This will contribute further to the already widespread sale over the Internet of unapproved, substandard, and counterfeit medicine and to create a misplaced sense of trust on the part of Internet users in the medical qualifications of registrants of second level domains in the <.medical> space.

162. It follows from the absence of protective measures designed to prevent irresponsible registrants from engaging in the kinds of abuse described above that the Applicant is not acting or does not intend to act in accordance with the interests of the medical community nor of users more widely. The Applicant's reliance solely on anti-abuse measures designed to be taken after abuse is detected constitutes evidence that the Applicant has not proposed and does not intend to institute effective security protection for user interests, since by then the damage will have been done to the reputation of and trust in medical practitioners and other members of the medical community as well as harm to the health and safety of the public at large.

163. The Expert concludes that, in addition to members of the medical community and members of the general public having a legitimate interest in research and discussion of

medical topics and in sharing their experiences, it is likely that second level registrants in the applied-for gTLD will include innumerable persons offering medical advice without being qualified to do so and offering real or fake prescription medication without a valid prescription, thereby putting the health and safety of the general public at risk. They will be able to get away with this until the completion of whatever action is taken to stop their abuse. But there is nothing in the regime contemplated in the Application to prevent others from taking their place. To the extent to which this happens, it is likely to shake public confidence in and cause damage to the reputation of the medical community, quite apart from harm to the health and safety of the public at large.

164. By allowing access to second level registrants lacking the qualifications required of medical practitioners and other members of the medical community (i.e. legitimate suppliers of medicines and medical services), the Applicant's operation of the applied-for gTLD string is likely to interfere with the core activities of the medical community by allowing the unqualified to misrepresent themselves as qualified; by creating doubt as to whether qualified members of the medical community are in fact legitimate providers of medicines and medical services; and by creating confusion as to whether medicines obtained online are unapproved, substandard and counterfeit.

165. It is therefore likely that, as a consequence of the Applicant's operation of the applied-for gTLD string, the trust in which the medical community is presently held will be eroded to such an extent that its members will need continually to demonstrate their legitimacy.

166. Accordingly, the Application creates a likelihood of material detriment to the legitimate interests of a significant portion of the medical community to which the string is targeted.

167. The IO has proved that the Detriment test is satisfied.

XV. Finding

168. For the above reasons, the Expert finds that there is substantial opposition to the <.medical> gTLD Application from a significant portion of the community to which the gTLD string may be explicitly or implicitly targeted.

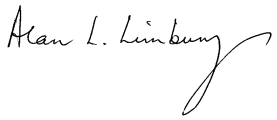
XVI. Decision

169. According to Article 21 (d) of the Procedure, I hereby render the following Expert Determination:

1. The Objection of the Independent Objector is successful, and the Independent Objector is the prevailing party.

2. The Centre shall refund the Independent Objector's advance payment of costs.

Date: November 21, 2013.



Signature:

Alan L. Limbury, Expert