THE INTERNATIONAL CENTRE FOR EXPERTISE OF THE

INTERNATIONAL CHAMBER OF COMMERCE

CASE No. EXP/404/ICANN/21

PROF. ALAIN PELLET, INDEPENDENT OBJECTOR

(FRANCE)

vs/

CHARLESTON ROAD REGISTRY INC.

(USA)

Expert Determination

ICC International Centre for Expertise

EXP/404/ICANN/21

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I.

Abbreviations / Defined Terms

Abbreviation	Full Text
Appendix III	Appendix III to the ICC Expertise Rules, Schedule of expertise costs for proceedings under the new gTLD dispute resolution procedure
Application	The application which is subject to the present Expert Determination Proceedings.
Centre	ICC International Centre for Expertise
Checklist	Guidance to Experts and Checklist for Expert Determination
Community Objection	An objection in accordance with Art. 3.2.1 Guidebook and Art. 2 Procedure, that there is substantial opposition to the application from a significant portion of the community at which the string may be explicitly or implicitly targeted.
DNS	Domain Name Space
Expert Determination Proceedings	Proceedings for Expert Determination related to the New gTLD Dispute Resolution Procedure
Expert Panel, also Panel	Expert appointed as sole member of the Expert Panel for the purpose of rendering this Expert Determination.
GAC	Government Advisory Committee
gTLD	generic Top Level Domain
Guidebook	ICANN gTLD Applicant Guidebook, Version 2012-06-04
ICANN	Internet Corporation for Assigned Names
ICC Practice Note	ICC Practice Note on the Administration of Cases under the Attachment to Module 3 of the Guidebook
Objection	The objection filed in the present Expert Determination Proceedings
PIC	Public Interest Commitments
Procedure	Attachment to Module 3 of the Guidebook, New gTLD Dispute Resolution Procedure
Response	The response filed in the present Expert Determination Proceedings
Rules	Rules for Expertise of the ICC
WHO	World Health Organization

II.

Parties to the Expert Determination Proceedings

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III.
Expert Panel

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The Expert was appointed by the Chairman of the Standing Committee of the Centre as sole member of the Expert Panel on 21 June 2013 pursuant to Art. 3(3) of Appendix I to the Rules.

IV.
Disputed gTLD

The gTLD the Applicant has applied for and to which the Independent Objector objects is

.Med (Application ID: 1-1139-2965).

The Applicant is a company registered under the laws of Delaware and is wholly owned by Google Inc.

V.
Procedure

1 The rules applicable to this Expert Determination are the Rules for Expertise of the ICC ("Rules"), supplemented by the ICC Practice Note on the Administration of Cases ("ICC Practice Note") under the Attachment to Module 3 of the gTLD Applicant Guidebook, New gTLD Dispute Resolution Procedure ("Procedure") of the gTLD Applicant Guidebook ("Guidebook").

2 The language of these Expert Determination Proceedings is English, including all submissions by the parties.

3 In accordance with Art. 4 (d) Procedure, the place of the proceedings is the location of the Centre, i.e. Paris, France.

4 In accordance with Art. 6 (a) Procedure, all communication by the parties, the Expert Panel and the Centre was transmitted electronically.

5 The procedural steps taken were as follows (summary):

- On 12 March 2013, the Independent Objector filed a Community Objection.
- On 22 May 2013, the Applicant filed a Response.
- On 21 June 2013, the Chairman of the Standing Committee of the Centre appointed the Expert as sole member of the Expert Panel acting in this matter.
- Following the parties' full payment of the advance of estimated costs, the file for the matter was transferred to the Panel on 31 July 2013 and the Panel fully constituted on this day.
- On 2 August 2013, the Expert Panel addressed the parties and their representatives with a provisional timetable. The Panel invited the Independent Objector to comment on the Applicant's Response by no later than 12 August 2012 and invited the Applicant to reply thereto by no later than 19 August 2013.
- On 14 August 2013, the Applicant requested an extension of time until 23 August 2013 for submitting its additional written statement. The Panel granted this extension the same day.
- On 12 August 2013, the Independent Objector submitted his additional written statement; on 13 August 2013, he submitted a new version containing the correction of a typographic mistake concerning the gTLD string.
- On 23 August 2013, the Applicant submitted its additional written statement.

- No hearing was requested by the parties or held necessary by the Panel.
- The Panel presented its draft Expert Determination for scrutiny to the Centre within the 45-day time limit pursuant to Art. 21 (a) and (b) of the Procedure.

VI.
Summary of the Parties' Positions

6 The Expert Determination to be rendered in this matter concerns a Community Objection in accordance with Art. 3.2.1 of the Guidebook. Such an objection can be filed on the grounds that 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 the presentcase, the Community Objection has been filed by the Independent Objector who according to Art. 3.2.5 of the Guidebook is granted standing to file Community Objections "notwithstanding the regular standing requirements for such objections". The Application for .Med has been submitted by Charleston Road Registry Inc., a wholly owned subsidiary of Google Inc.

7 The Independent Objector requests the Expert Panel to uphold the Objection and to determine that its advance payment of costs shall be refunded in accordance with Art. 14 (e) of the Procedure.

8 The Applicant requests the Expert Panel to dismiss the Objection.

9 Both Parties have submitted divergent views concerning the question of whether the Objection meets the four requirements of the Guidebook, namely proof of a clearly delineated community, of a strong association between the applied-for gTLD string and the community, of substantial opposition within the community, and of a likelihood of material detriment to the rights or legitimate interests of a significant portion of the community. The Parties are in disagreement regarding all four requirements.

10 In brief, the positions are as follows:

a) Community Test

The Independent Objector is of the opinion that he has shown that the medical community constitutes a clearly delineated community, even if it is not entirely homogeneous and comprises several kinds of professionals and institutions. The Applicant disagrees, arguing that no common baseline of traits is shared across the entire medical community that can be used to delineate those that belong to the community from those that do not. In its view, there is a great diversity worldwide among members of the so-called medical community.

b) Targeting Test

The Independent Objector takes the view that the .Med TLD, despite the Application not having been framed as a community-based TLD, is explicitly targeted at the medical community, or at least parts of it, as the Applicant intends the .Med gTLD to be used primarily by the medical community in order to make information available in the medical sector. The Applicant submits that the Independent Objector has not shown that there is a

strong association between the applied-for gTLD string and the medical community. It its view, "med" is a generic term used by a significant number of people who do not necessarily share similar goals, values or interests.

c) Substantial Opposition Test

The Independent Objector, arguing that even a single comment can trigger a Community Objection and that also the material content of comments and oppositions expressed and the importance of the rights and interests at stake need to be taken into account, takes the position that the comments filed in relation to the Application, viewed in conjunction with similar concerns expressed in other comments with regard to .Med applications of other applicants, and if also taking into account the GAC Early Warning of the French Government regarding applications for health-related strings, show grounds for opposition which are clearly substantial. The Applicant, on the other hand, argues that the number of expressions of opposition relative to the composition of the community is not substantial, that the comments referred to by the Independent Objector show a concern for responsible use and operation of the domain, but not an opposition to a particular party operating it.

d) Detriment Test

The Independent Objector, arguing that he does not have to provide proof of detriment or harm, but is only asked to establish the likelihood of such detriment to the community or to internet users more generally, submits that the Application for the .Med TLD leaves significant doubts as to whether the TLD will be managed in the interest and with any kind of involvement of the medical community, and that it creates an important risk of misappropriation of a string generally linked to the medical community by a commercial entity, which is likely to undermine consumers' trust and confidence in the medical community and its members. The Independent Objector submits that this will ultimately cause harm to the reputation of the community and material, economic damage to their members.

The Applicant denies that the Independent Objector has met his burden, arguing that the conclusory statements made by the Independent Objector cannot establish a likelihood of material detriment. It criticises the fact that the Independent Objector has failed to suggest or otherwise hypothesise any specific scenario under which its operation of the .Med TLD would be harmful to those within the so-called medical community. In the view of the Applicant, the Independent Objector offers no evidence that the Applicant will not act in accordance with the interests of the very broad medical industry, or that it will interfere with the core activities of the so-called medical community; he offers no allegations concerning concrete or economic damage to the broad medical community and no evidence of intent on the part of the Applicant to harm the reputation of the community. Instead, the Applicant argues that its operation of the .Med string will significantly improve the provision of online information on health-related issues and that material detriment will be a factual impossibility

as the Applicant will adopt the GAC Safeguard Advice by way of formal and enforceable commitments in its registry agreement.

VII.
Reasons

11 The requirements for the Independent Objector's standing are fulfilled in the present matter; see above paragraph 6.

12 In order to evaluate the merits of the Community Objection presented here, the Expert Panel is called to use the principles of adjudication (standards) provided for in the Guidebook for Community Objections (Art. 3.5 Guidebook). The Panel may also refer to other relevant rules of international law in connection with the standards (Art. 3.5 Guidebook).

13 In the case of a Community Objection, the Panel is to conduct four tests in order to determine whether there is substantial opposition from a significant portion of the community to which the string may be targeted. In accordance with Art. 3.5.4 Guidebook, for an objection to be successful the objector must prove that

- the community invoked by the objector is a clearly delineated community;
- there is a strong association between the community invoked and the applied-for gTLD string,
- community opposition to the application is substantial; and
- 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.

14 The Guidebook does not provide definitions of these four standards; however, with regard to each standard the Guidebook enumerates a number of factors which a panel could balance to make its determination. The Expert Panel makes reference to these factors in its reasons, but also considers other factors whenever appropriate. In the view of the Expert Panel, the factors provide some guidance, but there is no burden on the Independent Objector to provide evidence for each of the factors. The parties seem not to disagree on this. The Independent Objector, however, carries the burden regarding the fulfilment of each of the Guidebook standards.

15 The Expert Panel finds that the Independent Objector has met this burden with regard to all four tests.

(i) Community Test

16 The Independent Objector has proven that the medical community invoked by him can be regarded as a clearly delineated community. In particular, the Independent Objector has

shown that the medical community is a community which can be clearly delineated from other internet users.

17 The Guidebook itself provides no definition of the understanding of the term "community". It only provides certain factors which can be assessed and balanced to determine whether a community is clearly delineated from others. Hence, it is to be assessed how the term "community" is to be interpreted in the sense of the Guidebook. The Independent Objector has – undisputed by the Applicant – shown that the term "community" refers to a group of people living in the same place or having a particular characteristic in common (page 9 of the Objection). The distinctive element of a community is the commonality of certain characteristics, e.g. sharing a common territory, region or place of residence, a common language, religion, connectivity or other characteristics, values, interests or goals[1].

18 This understanding complies with ICANN's understanding. ICANN – the Guidebook's originator – expressed in its 2007 ICANN Final Report[2] that a "community" should be interpreted broadly and will include, for example, an economic sector, a cultural community or a linguistic community[3].

19 Referring to the factor of public recognition listed in the Guidebook as a factor that can, among others, be taken into account in determining whether the community invoked is a clearly delineated community, the Independent Objector has convincingly demonstrated that the medical community addressed by the .Med gTLD is such a community. He has shown that it is a group, although consisting of a variety of professionals and institutions, which can be delineated from other internet users. The activities of the members of that community, and this is not disputed by the Applicant, are of critical importance to the achievement of the public policy goal of public health, and are directed to the diagnosis and treatment, preventive or curative, of diseases. These professionals and institutions 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-maleficence, the respect for patients who have the right to be treated with dignity, truthfulness and honesty. This understanding of the term "community" and its application to the medical community invoked by the Independent Objector in the case at hand is in the Panel's view to be seen as a common understanding of the common characteristics of the medical community, within that community itself as well as among the general public.

20 In the view of the Expert Panel, the Independent Objector has convincingly demonstrated that membership of the medical community as defined is additionally determined by three formal

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1 http://oxforddictionaries.com/definition/english/community.

2 Final Report – Introduction of new generic top-level domains dated 8 August 2007, accessible at http://gnso.icann.org/en/issues/new-gtlds/pdp-dec05-fr-parta-08aug07.htm

3 See page 9 of the Objection

boundaries and that, therefore, the medical community invoked by him as expressing opposition to the Application can be regarded as a clearly delineated community with regard to other internet users. The Independent Objector refers to the following factors:

- Membership is directly linked to the qualification to exercise a specific healthcare or medical profession. Access to such professions is regulated by public institutions, and in order to access a medical profession and the medical community, one needs to have successfully completed a specific scientific or professional education programme or to get a specifically granted license or authorisation.

- Members of the medical community usually work in specific sectors of activity, including healthcare and medical services, pharmaceutics, but also the development of medical and similar technologies.

- Despite the variety of actors it includes, the medical community has developed a highly specific and complex system of technical terms and phrases, hardly understood by the general public.

21 The Applicant objects on various grounds, denying that the Independent Objector has met his burden to establish that the medical community can be regarded as a clearly delineated community. However, the Expert Panel concludes that the Applicant's arguments do not hold and do not disprove the Independent Objector's case.

22 In the following, the Panel will deal with the Applicant's arguments issue by issue.

23 The first line of the Applicant's arguments relates to the factor of the public recognition of the medical community as a community of professionals and institutions in the healthcare sector which shares the values and moral principles of patient care as described by the Independent Objector. The Applicant cannot avoid admitting the existence of such a characteristic (in the Applicant's words "a specific mission – towards patients", see additional written statement, p. 5), but it declares this criterion to be too broad as to have any significance for the purpose of recognising a medical community. In the Applicant's perspective, the medical community encompasses "a large variety of stakeholders who do not always share similar primary interests." (Response, p. 6). It claims that there is no common baseline shared across the entire medical community (additional written statement, p. 5).

24 In support of its view, the Applicant makes reference to the Independent Objector's statement on "closed generics" of spring 2013. In this statement, published on the Independent Objector's website, the Independent Objector deals with the issue of "closed generic" gTLDs, declaring, inter alia, that in the case of strings based on a generic term he expects it to be difficult to prove the existence of a clearly delineated community since such strings will be used by different persons. The Applicant is not very clear about this, but obviously understands this reference as evidence that the medical community as identified by the

Independent Objector cannot be clearly delineated, including by the Independent Objector's own criteria of application.

25 This argument, however, cannot convince. The Independent Objector's statement referred to is a general statement by the Independent Objector on the issue of "closed generic" gTLD Applications which is of no applicability as such to the issue of the medical community here. In this statement, the Independent Objector repeatedly emphasises that each application is to be reviewed separately and has specificities which can justify an objection. Obviously, in the present case, the Independent Objector, and the Expert Panel agrees, views the generic term .med as sufficiently specific in its use to distinguish persons associated with that term, because they share a similar primary interest of providing healthcare to patients and can thereby be distinguished from the general public. The single fact that the Application concerns a generic TLD and that it may in such cases be more difficult than in others to establish the existence of a clearly delineated community can therefore not serve as an argument against the existence of a clearly delineable medical community. And this argument has no bearing whatsoever on the issue to what extent members of the medical community share a set of common moral principles and values.

26 The Applicant criticises the Independent Objector's criterion for demonstrating the public recognition of a clearly delineated medical community as relating to the concept of "health" and "health TLD" rather than to the concept of "medical". The Applicant argues that "health" may be related to "medical", but that the two concepts are not the same and are not as closely connected as claimed by the Independent Objector. The Applicant also notes that the governments of France and Mali issued GAC Early Warnings against .health applications but did not do so in the case of .med applications. In consideration of this argument, it is to be admitted that although the concepts of "health" and "medical" are not identical, the Independent Objector's identification of the medical community relies in considerable degree on the involvement of its members in the health system of their respective country. In the view of the Panel, therefore, under the perspective of public recognition, the Independent Objector has successfully shown that the term "medical" must be seen in the context of public health systems and policies, and that thereby the community becomes delineable. The linguistic argument of differences in the concepts of "health" and "medical", as true as it may be, can therefore not disprove the Independent Objector's demonstration of the public recognition of the existence of a specific medical community, whose activities are of critical importance in a functioning health system to the achievement of the public policy goal of public health.

27 The Applicant also denies that the medical community can be delineated from the rest of the general public on the basis of the factor of shared moral principles and values applied to the care of patients. In support of this, the Applicant presents a number of arguments, none of which, however, can convince.

28 Thus, the Applicant submits that the sharing of a specific mission towards patients would not be unique to the medical field, but that this could also be said of other types of service industries, such as hotel, legal, and teaching industries. This argument which appears to define the medical sector in terms of a service industry of whatever sort, misses the main point of the Independent Objector's demonstration, namely the recognition of the existence of a clearly delineated medical community with their own characteristic system of moral principles that apply to the practice of medicine, and include principles to act in the best interest of the patient, fairness and equality in the distribution of healthcare and resources, non-maleficence, the respect for patients who have the right to be treated with dignity, and truthfulness and honesty. The Panel is unable to see how this medical-specific catalogue of moral principles can be put on the same level and confused with mission and principles that are followed in other professions.

29 The Applicant seeks further support for his claim, that there is no clearly delineated medical community definable by shared moral principles and values, in the observation that this community consists of a large variety of stakeholders and subgroups who do not share the same values and do not pursue the same interests. As far as the Panel can see, the Applicant tries to buttress his thesis by two arguments. First pointing out that the Independent Objector's description of the medical community represents a Western concept of medicine, the Applicant argues that most of the developing world does not adhere to such concepts. And secondly, referring to the example of different usages and legal aspects concerning euthanasia in European countries, the Applicant claims that moral principles followed in the medical community are highly subjective and differ greatly by geographical regions.

30 The Panel finds none of these arguments convincing. The Independent Objector's delineation of the medical community admits expressly that it is a community comprised of a variety of different actors, professionals and institutions. Although the Independent Objector has not specifically addressed this point, it is clear from his use of abstract criteria such as the moral principles, which he has identified as a common shared trait delineating membership of the medical community, that no distinction between Western medicine and traditional approaches to medicine is being made. Although both types of medicine may differ significantly in their practical approach and their reliance on science-based analysis and treatment, nothing in the Independent Objector's definition of the medical community suggests that a doctor treating his patients in accordance with the practices of traditional Chinese medicine would not adhere to essentially the same moral principles relating to the treatment of patients as his Western counterpart working in a hospital equipped with the newest technology.

31 The Panel therefore remains convinced that the medical community can be delineated by the criterion of specific moral principles. The Panel also questions the veracity of the Applicant's unsupported allegation that most of the developing world does not adhere to the concept of Western medicine. The involvement of the governments of developing countries in organisations such as the WHO or even in the GAC does suggest otherwise.

32 As regards the Applicant's reference to the different attitudes towards euthanasia in different national jurisdictions, the Panel believes that this example confirms rather than disproves the usefulness of the criterion of moral principles in defining membership of the medical community. If it were not for those principles the issue of euthanasia would hardly have developed in a "huge area of moral debate" as presented by the Applicant. Moreover, the debate on euthanasia is a social debate not specific to the medical community only but involving many other sectors of society as well. Finally, no argument has been made that the moral principles and values characterising the medical community are not under development anymore: That such principles result in debates, differences of opinion and developments is inherent to them.

33 The Panel therefore concludes that different approaches in different countries to the practice of medicine, including also examples of different answers towards issues faced by medical practitioners or institutions, cannot invalidate the finding that there is a medical community, delineated, inter alia, by the fact that its members have developed their own characteristic system of moral principles.

34 The Applicant also argues more generally that, although many stakeholders share common goals, the implementation of medical practice is far from standardised and the interests of sub-groups within the community are not always aligned. However, the Panel is not convinced of this argument. While medical practices are obviously not standardised all over the world and while the interests of the subgroups within the community may differ, the Independent Objector refers to healthcare and medical services as well as pharmaceutics but also to medical technologies, it is, to the belief of the Panel, still possible to delineate the members of the medical community (professionals and institutions) from other internet users by the specific sectors in which they work and exercise their profession or by the sectors they represent.

35 The Applicant's argumentation regarding a wide spectrum of actors in the "medical arena" (p. 5 additional written statement) does not invalidate the Independent Objector's evidence, either. The Applicant's overlooks the fact that the term "professional", as used by the Independent Objector in the given context, clearly applies not to professionals in general, but to professionals working in a healthcare, medical, pharmaceutical or medical technology role. Obviously, the delineating factor of a specific authorisation or qualification does not refer to professionals who work in various (support) roles in the specific sectors but who do not themselves exercise any role in healthcare and medical services, pharmaceutics or medical technology. The Applicant states on page 6 of its additional written statement that licenses are not required for patients. This is true. Patients are therefore not members of the medical community invoked by the Independent Objector. The same applies with regard to certain support functions in some medical sectors.

36 Furthermore, the Applicant focuses on the three formal boundaries used by the Independent Objector to further delineate the members of the medical community from the general public

(qualification to exercise a healthcare or medical profession; work in specific sectors of activity, including healthcare and medical services, pharmaceutics, and medical technologies; complex system of technical terms and phrases) and criticises these factors as not allowing for a clear delineation of the medical community. The Applicant argues that the medical community identified by the Independent Objector lacks formal boundaries and includes multiple facets. In the view of the Expert Panel, however, this critique also does not hold. As shown by the Independent Objector (Objection, para. 17) and stated in the Guidebook, the community must be delineated from internet users in general[4]. The required degree of delineation is "clearly", which broadly means "precisely" respectively "easy to perceive"[5]. In the view of the Panel, the factors (formal boundaries) which the Independent Objector has defined allow to clearly delineate the members of the medical community from other internet users.

37 First, according to the Independent Objector, membership to the medical community is directly linked to the qualification to exercise a specific healthcare or medical profession. Access to such professions is regulated and controlled by public institutions. In order to access a medical profession, one needs to have successfully completed a specific scientific or professional education program or to obtain a specifically granted licence or authorisation 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. Secondly, members of the community usually work and exercise (their profession) in specific sectors of activity. These include healthcare and medical services as well as pharmaceutics, but also the development of medical and similar technologies. And thirdly, the medical community, despite the variety of actors it includes, has developed a highly specific and complex system of technical terms and phrases.

38 The Applicant argues that the application of these factors does not allow a clear delineation. As concerns the factor of education or authorisation, the Applicant claims that education necessarily differs greatly between physicians, veterinarians, dentists, and psychologists, not to mention the global differences from country to country for the same profession. In the Applicant's view, education therefore cannot be used as a baseline for what does or does not constitute a part of the medical community. It furthermore points out that there are some fields or practices, e.g. acupuncture or massage, which are regulated in some countries and not in others, and that the concept of licensing and credentialing is much more nebulous in the developing world. According to the Applicant, it is also an important issue whether governments are providing access to medical services or whether such services are based on a private sector system.

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4 Guidebook evaluation, question 20, page A-13.

5 http://oxforddictionaries.com/definition/english/clear.

39 The Panel acknowledges that many differences in governmental regulation of medical and healthcare professionals do exist. However, the Expert Panel holds that the factor of authorisation or qualification, though a general and rather abstractly formulated criterion, still serves as a useful and in most cases sufficiently clear formal delineation factor. What is decisive is the fact that in order to exercise a medical or health-related profession typically an authorisation or specific qualification is required. That there exist many variations from country to country is to be expected in the case of a global community such as the medical community just as it is to be expected that the requirements regarding the different kinds of profession, from doctors in various disciplines to nurses, pharmacists and medical technicians, vary. The fact remains, and this is why the Panel is satisfied that the medical community can be delineated, that work in medical or health services typically requires some form of authorisation/qualification. The fact that there are some differences between jurisdictions with regard to certain limited disciplines cannot invalidate this finding. This also goes for the Applicant's allegation that concepts of licensing and credentialing are "much more nebulous" in the developing world. This allegation has so little substance that the Panel has no means to assess it. But even accepting that there are jurisdictions where admission to medical and healthcare professions is not clearly regulated does not mean that this criterion, applied to the medical community with its global presence, does not work as a factor to delineate its members from the general internet users.

40 Furthermore, the Applicant argues that the factor of licensing, authorisation and qualification does not work as a delineating factor because of the considerable differences in the length of credential programs around the world which range from about nine months for becoming a healthcare advocate to over 8 years for becoming a physician in a specialist field. Referring to non-licensed individuals (government officials, business owners) or executive members of the WHO as well as patients currently being members of the community, the Applicant claims that the delineating factor offered by the Independent Objector does not provide a uniform standard determining whether a person qualifies or not. Thereby, the Applicant asserts that there is a need for a worldwide uniform system to determine whether professionals are qualified to practice medicine.

41 This line of argument does not invalidate the Independent Objector's proof of the existence of a clearly delineated community. In the view of the Expert Panel, the factor authorisation or qualification provides for a sufficiently clear delineation of professionals belonging to the medical community making use of a specific and complex system of technical terms and phrases which in addition create a clear delineation between members of the community and the general internet user. Thus the Applicant's argument regarding the credential programs is of an entirely secondary nature and in the given context simply irrelevant. The factor authorisation or qualification provides a sufficiently clear criterion for identifying and separating those who belong to the medical community from those who belong to the general internet users. It is not the question of how the authorisation or qualification is achieved and

how many years it takes, but rather whether there is an authorisation or qualification which can be achieved.

42 Moreover, the Applicant disputes the existence of a highly specialised language. It argues that there is no universal medical terminology since that terminology differs greatly between different areas, e.g. Western medicine is largely based on Latin and Greek. Also, according to the Applicant, the medical field is growing so rapidly that the terminology has failed to keep up. The Panel does not find that these arguments are of any particular weight. After all, the factor of language is only one of several criteria identified by the Independent Objector to delineate the medical community. The issue of whether there is a universal medical terminology or not is irrelevant since complex terminology does not need to be uniform terminology. It is sufficient for the members of the medical community to make use of specific terms and terminology (including their native language) regarding medical procedures, diagnosis and treatments to meet the requirement of a delineating factor. The Applicant by implication confirms the existence of a specialised complex language by pointing out that "there is a significant gap between the communication of technical medical languages used by medical "professionals", versus common lay terminology used for their patients".

43 The Applicant points out that the Independent Objector's claim of a clearly delineated medical community contradicts the Independent Objector's own written position taken before filing the Community Objection in February 2013. In particular, the Applicant refers to an article by the Independent Objector discussing the issue of "closed generic" gTLDs applications[6] which has already been discussed above (see paragraphs 24, 25). It also refers to and quotes from another statement made by the Independent Objector where it is elaborated that "[...] the health or medical community [...] encompasses numerous stakeholders, who do not always share the same interests." Furthermore, "[...] the community is extremely heterogeneous and is composed of entities of very different and various types."

44 It remains unclear what line of argument the Applicant is pursuing with his references to previous statements by the Independent Objector in which, according to the Applicant, in contradiction to his submission in these Proceedings, he expressed strong doubts as to the medical community being a clearly delineated community. In the present Proceedings, statements by the Independent Objector made outside of the Proceedings, are without relevance for the merits. The Panel's mission is to consider what the Independent Objector has presented in these Proceedings. All that the earlier statements by the Independent Objector, introduced by the Applicant in these Proceedings, can, therefore, provide proof of is what the Independent Objector declared in another setting.

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6 http://www.independent-objector-newgtlds.org/english-version/the-issue-of-closed-generic-gtlds/.

45 His prior statements are, at any rate, not determinative since the Independent Objector has in this case shown to the satisfaction of the Panel that the medical community is recognised as existing and has presented factors that can be applied to clearly delineate its members from other internet users. The fact that a given community is heterogeneous does not mean that it could not be clearly delineable. The delineation is obviously more difficult if a community is heterogeneous but, as shown above (see paragraphs 19 to 20, and 25 to 42), it is not impossible to delineate the medical community from others. By providing factors of delineation the Independent Objector has shown how this admittedly heterogeneous medical community can be separated from other internet users. The degree of difficulty in determining these factors does not mean that a clearly delineated community does not exist, but simply requires a bigger effort in the assessment of common and distinguishing factors.

46 The Independent Objector has provided the Panel with a comprehensive and applicable argumentation on the existence of appropriate factors to delineate the medical community from other general internet users and has therefore in so far met his burden of proof imposed on an objector by the Guidebook in case of a Community Objection.

(ii) Targeting Test

47 The Independent Objector has successfully proven a strong association between the applied for gTLD-string and the medical community. He has proven such strong association by defining the expectations which average internet users associate with the term ".medical". The Panel agrees with this approach.

48 A relevant factor to be taken into account in determining whether an applied-for string is strongly associated with a community is the test whether the general public perceives such an association between the applied-for gTLD string and the community. The Applicant does not object to this analysis.

49 As the Independent Objector correctly points out, the term "medical", according to the dictionary, describes things or professionals of or relating to the science of medicine, or to the treatment of illness and injuries, and is thereby in public perception (one of the listed Guidebook factors) associated with the medical community to be defined as the group of medical professions and professionals which deliver diagnostic services and treatment, preventive or curative, of diseases to users of the healthcare system. The term "medical" is also associated with the institutions, as noted by the Independent Objector, involved in the delivery of such services, including institutions of healthcare and medical services, pharmaceutics, development of medical technologies and medical schools. Hence, under the criterion of association by the public, a strong association between the term "medical" and the medical community cannot be denied.

50 To further demonstrate targeting, the Independent Objector refers to statements made by the Applicant in its Application (listed in the Guidebook as another factor that a panel might focus on). As pointed out by the Independent Objector, the Application contains a number of references showing that it is the intention of the Applicant that .Med gTLD be used primarily by the medical community in order to make health-related information available in the medical sector. For instance, the Application declares that the mission of the string is to provide a "forum for doctors and medical practices to offer content related to their professions". It further states that "the .Med gTLD will best add value to the gTLD space by limiting registration to only verified doctors". These statements, although the Application has not been framed as a community-based gTLD for the benefit of the medical community, convince the Panel that a strong association between the applied-for gTLD and the medical community has been proven.

51 The Applicant objects that "medical" cannot be associated with the medical community because it is a generic term and is used by a significant number of people who do not necessarily share similar goals, values or interests. The Applicant seeks to buttress this argument by introducing its own definition of a medical community, arguing that the Independent Objector's concept is too narrow and that there is a wider medical community including, in some countries, those practicing medicine without credentials such as midwives or traditional healers.

52 In the view of the Expert Panel, this line of argumentation is not suitable to disprove the finding of a strong association between the term "medical" and the medical community, in whatever way defined. First, simply because the name of the .Med TLD is generic in nature, it is not justified to conclude that, since such string *per definitionem* used by different persons, including e.g. the general user seeking health-related information, it has no targeting effect. The statements in the Application referred to above precisely show the Applicant's intention of targeting the string in particular to doctors, a no doubt significant subgroup of the medical community. The fact that patients or people to become patients can be expected to use the string, too, does not at all lessen the targeting effect as regards the medical community.

53 Moreover, the question of the definition of the boundaries of the medical community (the Applicant refers to the Independent Objector's narrow definition and its own wider concept) has obviously no bearing on the question of whether there is a strong association between the term "medical" and the medical community. The Applicant itself admits that what it views as the wider community "may have an even stronger association with the term "med" than the narrow definition used by the Independent Objector."

(iii) Substantial Opposition Test

54 In order to prevail the Objector must also prove that there is substantial opposition to the Application within the medical community (Art. 3.5.4 Guidebook). In the view of the Expert Panel, the Independent Objector has met this requirement.

55 The Guidebook standard of substantial opposition is a broad concept like the other three Guidebook standards and the term "substantial opposition" is not defined as such. In common language, opposition in its most general sense is defined as "resistance or dissent, expressed in action or argument"[7] while the word "substantial" is used for something of "considerable importance, size or worth"[8]. Some further guidance can be gained from the factors which the Guidebook lists for the possible use of the panel in order to determine whether substantial opposition exists with regard to an application, including reference to the number of expressions of opposition relative to the composition of the community, the representative nature of entities expressing opposition, the level of recognised stature of weight among sources of opposition, distribution or diversity among sources of expression of opposition, historical defence of the community in other contexts, and costs incurred by an objector in expressing opposition.

56 The Expert Panel agrees with the view expressed by the Independent Objector that the Guidebook standard "substantial opposition" as described does not limit the Expert Panel to considering the factors listed but allows it to look at any other reasonable criteria for determining whether the Objector has successfully shown that there is substantial opposition to the Application in the medical community. The Panel also agrees that the number of expressions of opposition, in relation to an application, although there must already for logical reasons be at least one, is as such not necessarily and from the outset a determining factor, and that it is possible and can be warranted to speak of "substantial" opposition also in consideration of the content of oppositions expressed and of the importance of rights and interests at stake.

57 The Independent Objector has shown that the Applicant's .Med application has triggered comments from the National Association of Boards of Pharmacy (NABP) and from the American Hospital Association (AHA). While by number these comments cannot be called substantial they raise, according to the Independent Objector, very important concerns relating to public health issues and the interest of the medical community and are therefore to be regarded as expressions of substantial opposition to the Application.

58 According to the information available on its website, NABP is an organisation of international scope, representing the boards of pharmacy in various countries, including the

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[7] See http://oxforddictionaries.com/definition/english/opposition.

[8] See http://oxforddictionaries.com/definition/english/substantial.

boards in the United States, in Australia, eight Canadian provinces and in New Zealand. In its comment on the Application, NABP demands that registries within the health and medical marketplace screen online drug sellers' and other health practitioners' websites for proper credentials. It draws attention to the necessity that "new generic top-level domains (gTLDs) relating to health and medicine are operated responsibly in the interest of patient safety" and it also expresses its view that all medical-themed gTLDs should be considered to be "community-based" strings and should be "subject to the more rigid contractual requirements to ensure that they protect the best interest of the community." Moreover, it underlines that all medical-themed gTLDs "should have certain safeguard mechanisms hard coded into the registry agreement in order to ensure patient safety and legitimate use of domain names."

59 Similar concerns concerning the protection of the community and of healthcare users have been raised by the AHA, which the Independent Objector identifies as a large organisation representing health systems and other related organisations that are accountable to the public, with more than 5,000 member hospitals and other healthcare organisations, and 40,000 individual members. AHA has pointed out that "[i]t 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 expresses concern that the Applicant will operate the .Med gTLD pursuant to private commercial interests, and not in the interest of public health and safety. And it expresses the view that the Applicant's management of the .Med gTLD without the participation of the targeted healthcare community will erode the public's confidence in the healthcare system.

60 The Expert Panel is satisfied that these comments referred to by the Independent Objector are expressions of opposition to the Application which clearly are of a substantial nature as required by the Guidebook standard. They are substantial because the grounds for objection, the targeted medical community in general and trust in health-related information, public health and the protection of healthcare users, are public interest issues of highest priority. The Independent Objector has shown such concerns, reflected also in the GAC Early Warning of the French Government concerning health applications. The GAC Early Warning points out the risks involved for consumers, legitimate enterprise, competition and the growth of the health industry in connection with the operation of health-related domains. The significance of the comments of NABP and AHA is in the view of the Expert Panel additionally underscored by the not to be doubted recognised stature of both the NABP and of the AHA as important representatives of the medical community, NABP being a representative of the pharmacy sector and AHA being a representative of the hospital and health system sectors.

61 The Applicant's arguments presented in support of its position denying the existence of substantial opposition do not convince the Expert Panel.

62 Thus, the Panel is not convinced of the reasonableness of the Applicant's interpretation of NABP's and AHA's comments as showing only a concern for responsible use and operation of the domain, but not as representing voices of opposition against the Application. While the

comments are held in general language, and while it is also to be recognised that the same wording has been used by these commentators in filings against other applications, the use of a general or standardised text does not disqualify the comments from showing opposition, i.e. resistance to the application filed. The Applicant's position by implication seems to be that only comments attacking "a particular party" operating a string are comments of opposition. But nothing of that is indicated in the Guidebook standard. The Guidebook does not define the term opposition in any way; and it does not require that a commentator must file comments containing the words "we oppose", "we object", or anything of this sort in order to allow comments filed to be regarded as an expression of opposition. Opposition is a broad concept, covering any form of resistance or dissent, and, applying this concept to the given case, the Expert Panel is convinced that the comments by NABP and AHA expressing general, but very strong concerns regarding the Application, are to be considered expressions substantial of opposition under the Guidebook standard.

63 The Applicant's additional argument that it intends to operate the .Med gTLD in compliance with the high requirements and standards upheld by organisations such as NABP and AHA cannot invalidate the finding of substantial opposition within the medical community against the Application. The same is true of the Applicant's presentation that it fully intends to comply with the safeguards proposed by the GAC Advice on health related gTLDs. Even if such full compliance on the part of the Applicant is to be expected, the fact that opposition to the Application has been expressed by representative members of the medical community remains unaffected.

64 Of no determinative effect either are, finally, the Applicant's arguments relating to the low number of comments directed against the Applicant's Application. The Panel accepts the Applicant's observation that the medical community, which the Independent Objector invokes as expressing opposition to the Application, is a large community with highly resourced and organised members. It also accepts that, in light of these conditions, the number of two comments in opposition to the Application is not a factor which weighs in favour of assessing the opposition as substantial. But, as already argued above, there are other aspects in this case, which lead the Panel to the conclusion that the low number of expressions of opposition is not of decisive relevance.

65 The determinative factor for recognising substantial opposition to the Application in the given context lies in the substance of the comments and opposition expressed by representative entities of recognised status of the medical community, and by the importance of the rights and interests at stake to which they refer, including the medical community in general and issues of public health and the protection of healthcare users. Even though there have been only a few such expressions of opposition, in the eyes of the Expert Panel, the Guidebook standard of proof of substantial opposition is therefore fulfilled.

(iv) Detriment Test

66 In accordance with Art. 3.5.4 Guidebook, in order to prevail the Objector must also 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. The Expert Panel finds that the Independent Objector has met this standard in the present case.

67 The detriment test, like the other tests provided for in the Guidebook, is based on a broad concept of "likelihood of material detriment" which is not defined. The Guidebook only provides a negative definition in so far as it explains that "[a]n allegation of detriment that consists only of the applicant being delegated the string instead of the objector, will not be sufficient for a finding of material detriment". Instead, as in the other cases, the Guidebook provides for a list of factors "that could be used by panel in making this determination". The parties disagree as to in what way the factors listed should be applied in the present case. In the first place, therefore, it is the task of the Expert Panel to explain how it interprets the Guidebook provisions on the detriment test and how it applies them to the parties' allegations relating to the issue of "likelihood of material detriment".

68 The Expert Panel is called to apply the standard of "likelihood of material detriment" on the basis of what this broad concept means, obviously formulated so broadly in order to cover many different constellations which may arise in the context of applications for new gTLDs. The factors listed in connection with it do not define it; they, as the Guidebook says, "could be used by a panel" in making its determination, and are, as explained above, to be regarded as guidance only, albeit as guidance to be taken into consideration. But they do not limit a panel in balancing other factors of an application for a new gTLD it considers of relevance in determining whether it has been proven or not that an application creates a likelihood of material detriment to the rights or legitimate interests of a significant portion of the community in question.

69 In the present case it therefore remains the task of the Expert Panel to determine what the standard of "likelihood of material detriment" requires of the Independent Objector to prove. In common language, likelihood is understood as a "state or fact of somethings's being likely"[9]; probability is considered a synonym. Detriment can be defined as a "state of being harmed or damaged" [10], whereas the adjective "material" in the given context can be understood to mean "significant, important"[11]. The Independent Objector stresses that the dispute resolution procedure has been put into place in order to assess and to remedy in

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[9] See http://oxforddictionaries.com/definition/english/likelihood.

[10] See http://oxforddictionaries.com/definition/english/detriment.

[11] See http://oxforddictionaries.com/definition/english/material.

advance any potential negative effects of the operation of a new gTLD and the Expert Panel agrees with this proposition as well as with the Independent Objector's conclusion that the "likelihood of detriment" standard and the burden for the objector must be seen against this background.

70 However, while an objector can obviously not be asked to prove actual harm or damage, but must engage in a risk assessment, the requirement of the standard remains to prove "likelihood of material detriment", which can only mean that an objector must show some probability that harm or damage may occur. The demonstration of improbable potential negative effects of the operation of a new gTLD, on the other hand, must be regarded as not being sufficient.

71 In terms of the degree of likelihood of material detriment to be proven, the Guidebook's list of factors provides hardly any guidance. The list contains as a possible factor to be considered the "level of certainty that alleged detrimental outcomes would occur" but this wording fails to clarify the required level. The other factors listed also give no indication how the term likelihood is to be understood. However, relevant guidance as to the degree of likelihood of detriment to be proven by the Independent Objector in the present case is to be gained from the importance of the rights and interests that according to the Independent Objector are likely to be harmed for the medical community here. In the eyes of the Expert Panel, the Independent Objector has successfully shown that in the case of potential detriment to the medical community, not only the interests of that community but more generally the interests of the public worldwide in health, health services and the provision of trustworthy information on health issues are involved.

72 The Expert Panel accordingly concludes that, in recognition of the importance of protecting these interests being directly related to the interests of the medical community, the Independent Objector meets the standard of proving the likelihood of detriment also by showing a low degree of probability that detriment will occur.

73 As concerns the detriment itself to the medical community to be proven by the Independent Objector, the Expert Panel finds it informative to look at the list of factors provided in the Guidebook. It takes from there that in the case of the medical community relevant criteria for assessing whether likely detriment has been proven, can be, inter alia,

- damage to the reputation of the community,
- evidence that the Applicant does not intend to act in accordance with the interests of the community or of users more widely.

74 As explained above, the Expert Panel does not think that the Independent Objector is under any requirement to provide proof of fulfilment of each of the factors listed in the Guidebook. But the Expert Panel has also looked at the other factors listed there, such as interference with the core activities, dependence on the DNS for core activities of the community and comes to

the conclusion as argued in more detail below that the Independent Objector has provided sufficient proof of a "likelihood of material detriment" to the legitimate interests of a significant portion of the medical community and of users of the string more widely.

75 The Independent Objector has shown to the conviction of the Expert Panel that the Application raises justified doubts making it likely that the string applied for will not be operated in accordance with the interests and with any kind of involvement of the medical community. And he has likewise successfully shown that such circumstances are likely to result in an impairment of the consumer's trust and confidence in the medical community and its members which impairment in turn will induce harm to the reputation of the community and material damage in the form of economic damages for its members.

76 As explained above, "likelihood of detriment" as an eliminatory element to be proven by the Objector does not mean that actual detriment needs to be proven, but can only mean that the Objector has met his burden of proof if he has shown that there is justification to assume that detriment is likely to occur. In the view of the Expert Panel the Objector has fulfilled this requirement by way of a three-step line of argument.

77 In the first place, the Objector has shown that there are justified grounds to doubt whether the Applicant, being a for-profit organisation, will operate the string in accordance with the interests of the medical community. As pointed out by the Independent Objector, the Applicant and Google are likely to manage and operate the .Med TLD pursuant to commercial interests. The following main aspects of the Application referred to by the Objector are to be noted here:

78 While the Applicant is free to present its Application in the way it believes most suitable, it has not framed it as a community-based gTLD. As a consequence, the Applicant and Google will not be required and have not committed themselves to "operate the TLD in a manner that allows the TLD community to discuss and participate in the development and modification of policies and practices for the TLD." It is of interest to take note in this context, as the Independent Objector does, of the GAC's view that certain sensitive strings, referring to sectors subject to national regulation (such as .bank, .pharmacy) or those that describe or are targeted at a population or industry that is vulnerable to online fraud or abuse, should be considered community-based strings. Undeniably, therefore, according to the view of the governments represented in the GAC, participation of the community targeted in the development and modification of policies and practices for a TLD is considered to be an element of significant importance, but one which in the given case is not assured to exist.

79 As the Independent Objector has shown, the Application also fails to give any assurance that the Applicant and Google would intend to operate the gTLD applied for in the interest of the medical community and would involve it in the development and definition of policies and practices for the applied-for TLD. The Independent Objector, quoting from the Applicant's relevant statement in its Application, concludes that the policy for the operation of the gTLD

has not been clearly established by the Applicant, and the Expert Panel agrees with this conclusion. It says in the Application, inter alia (emphasis added):

> "Charleston Road Registry, as the registry operator, will define the specialised meaning of the term and, based on this definition, will identify criteria for registrants to operate in the proposed gTLD. Only entities that meet these criteria will be entitled to register for a domain in the gTLD. Specialisation, therefore, arises from the Charleston Road Registry definition of a term, as well as through market dynamics as entities align their offerings(s) with the term."

80 What this shows is not only that the policy for operation will still have to be formulated, but that the definition of eligibility criteria will be entirely in the hands of the Applicant and its understanding of the term "med" and of "market dynamics as entities align their offering(s) with the term". This shows no involvement whatsoever of the medical community nor any consideration of the expectations of the general internet user who as a (potential) consumer of health services uses the DNS with the interests of a patient. The Expert Panel agrees with the Independent Objector that this approach to and formulation of the policy for the operation of the string in the Application does provide justified grounds for doubting that the proposed gTLD will be operated by the Applicant and Google in accordance with the interests of the medical community and users of the string more widely.

81 The Applicant's declared intention to operate the .Med gTLD as a "forum for doctors and medical practices to offer content related to their profession" and to limit "registration to only verified doctors" provides further grounds for being concerned that the Applicant will not operate the string with the interests of the entire medical community in mind. The medical community, as the Independent Objector correctly points out, encompasses not only doctors, but includes a spectrum of other medical professions and entities, such as nurses or medical technicians and hospitals, and it must therefore be asked how a registration policy limiting access to doctors can serve the interest of the medical community.

82 The Applicant presents in its submissions filed in these proceedings some generally worded assurances as to the benefits its operation of the .Med string will bring to the medical community. Such assurances, however, cannot invalidate the finding that, as evidenced by the Application, there is no intention to involve the medical community in the development and modification of policies and practices for the operation of the applied-for string. In its additional written statement of 23 August 2013, though, the Applicant comments on the issue of registration policy as follows:

> "As noted before, the .Med TLD is only meant to be used by registered doctors and is not meant to represent all the actors in any purported "medical community" defined by the Independent Objector. The broad and imprecise nature of any conceivable the [sic] "medical community" prevents CRR from readily establishing precise details regarding .Med registration and use policies or specific eligibility criteria absent input from both regulatory and self-regulatory bodies in the medical space. Crafting specific registration and use policies and eligibility criteria to serve

the entire medical community – incorporating regulated, unregulated, private and governmental sectors – necessitates considerable time and research and will require outreach with the community, which CRR plans to do."

83 In the view of the Expert Panel, this recognition by the Applicant of the difficulties of devising a registration policy and eligibility criteria for the applied-for .Med string confirms the above findings. The above statement contains first the admission that the medical community is not served by opening the string as planned to registered doctors only. Secondly, the statement recognises the need in the given situation to invoke the community in "crafting specific registration and use policies and eligibility criteria to serve the entire medical community". And thirdly, the statement promises a plan to "outreach with the community". The latter statement made in the Applicant's last brief, however, blanket in nature and without any substantiation to it, cannot convince the Panel in light of the evidence to the contrary. It is not discernible how such a statement would change the formal declarations and commitments made by the Applicant in connection with its Application.

84 The Applicant reacts to the Independent Objector's demonstration of its intentions regarding the operation of the gTLD by presenting essentially two arguments:

- It asserts that its set-up and operation of the gTLD will bring benefits to the medical community rather than detriment.

- It points to the proposals made by it in connection with its Application concerning the institution of effective security protections.

85 As to the first argument, the lack of assurance that the string will be operated with the participation of the entire medical community has already been addressed above. In addition, it is to be noted here, and the Expert Panel agrees insofar with the Independent Objector's assessment, that the issue of the possible improvement connected with the operation of a new .Med gTLD in comparison to the present situation in the internet can hardly be a relevant factor to be considered in connection with the question whether likelihood of detriment is proven. The Guidebook Procedure has been established in order to assess and, if the Guidebook standards are met, to remedy in advance any likely negative effects of the operation of a new gTLD. The question if the new gTLD might or might not be an improvement to the currently existing situation has nothing to do with this purpose of the proceedings and is therefore not further considered here by the Expert Panel.

86 The Applicant's second argument relating to the proposals made by it for effective security protection likewise cannot refute the Independent Objector's proof that there exist justified grounds to be concerned that the operation of the .Med gTLD by the Applicant will likely not be in the interest of the medical community.

87 In considering this line of argument of the Applicant, the Expert Panel assumes, as alleged by the Applicant, that the various measures announced by it, including the measures contained in

its response to the GAC Safeguard Advice, would be formalised in Public Interest Commitments and would actually as claimed become a contractually enforceable element of its Registry Agreement with ICANN. The Panel recognises that, should the safeguards suggested by the GAC Safeguard Advice become binding commitments of the Applicant whose implementation could be enforced, the operation of the applied-for gTLD would in a number of respects become safer and better protected against possible abuses, likely to result in a better protection of the general public making use of the DNS. The Panel also recognises the Applicant's assurances given in its additional written statement, namely that its goals match the statements made by the NABP, the AHA, and the WHO, and that it intends to seek input from both regulatory and self-regulatory bodies in the medical space in order to develop eligibility and verification policies for registrants in the applied-for Top-Level Domain. However, such assurances, as long as it is not clarified in what way they actually will be implemented by the Applicant, do not, in the eyes of the Panel, appreciably lower the risk identified by the Independent Objector, namely that the string applied for will not be operated in accordance with the interests and with the involvement of the medical community.

88 It remains to be noted that all such measures, while they might improve the protection against abuses, are not directed at and will not make sure that the medical community will have the opportunity to participate in the development of the Applicant's policies and practices for the operation of the applied-for gTLD. The Applicant does not recognise the existence of a delineable medical community and provides no assurance as to which members and how they will be involved in the operation of the applied-for Top-Level Domain. Such assurance is also not provided for by any formal commitment of the Applicant to work with regulators and self-regulatory bodies in the area of verification policies (as announced in the Applicant's answer to the GAC advice), although, depending on what "to work with" actually means, this is likely to enhance the security of the DNS for use by the general public.

89 It is to be noted that the Applicant's Response to the GAC Advice, on which it relies as counterproof for its claim that its interests in operating the .Med TLD meet the goals and policies of the New gTLD Program and will in no way cause detriment, contains no hint of any intention on the part of the Applicant to approach the medical community and assure itself of its participation in the development and formulation of policies and practices for the operation of the new gTLD. In the view of the Expert Panel, the grounds for concern that the operation of the new gTLD is not likely to be in line with the interests of the medical community remain therefore unrefuted.

90 The Applicant also notes that the GAC did not advise that only registered health-related organisations should be able to manage a gTLD such as .Med, but limited its advice to apply additional safeguards only. In this context it also points to a similar position taken by the WHO which likewise did not come to this conclusion in its 66th meeting in which it adopted a resolution demanding that all health-related global top-level domain names be operated in a way that protects public health, ensure secure online management of health data and make use of names consistent with global public health objectives. To the Applicant, this confirms

that it should be allowed as a for-profit organisation to operate the .Med string provided it complies with the safeguards demanded by the GAC, and that such operation of the string cannot be regarded as detrimental to the medical community. In the eyes of the Expert Panel, this argument is of no relevance in the given context, since it is obviously not the position of the Independent Objector (and also not of the Expert Panel) that only health-related organisations should be allowed to operate health-related gTLDs. The concern here is that the applied-for gTLD .Med is envisaged to be operated by a commercially oriented entity or entities without a recognisable plan to involve the medical community in the development and implementation of its registration policies and practices, resulting in justified doubts that the gTLD will be operated in accordance with the interests of the medical community, which situation in turn can be expected to result in material detriment to a significant portion of that community.

91 The Independent Objector has demonstrated that there exists a considerable risk that the Applicant will not act in accordance with the interests of the medical community, evidenced by its intentions of developing and formulating policies and practices of operation of the TLD on its own, without any considered and established involvement of the medical community and its members. The Independent Objector has also demonstrated to the satisfaction of the Expert Panel that such approach is likely to result in an impairment of the reputation of the medical community and a significant portion of its members, by undermining trust and confidence in the medical community and its members. And the Expert Panel also finds that the Independent Objector has presented sufficient evidence that such impairment of reputation is likely to translate itself into material, economic damage for a significant portion of the medical community.

92 As already pointed out above, the requirement to provide proof of a likelihood of material detriment does not and cannot include a requirement of providing detailed evidence of harm suffered by individual members of the community. This is in particular so in the case of a global community such as the medical community. To place such a burden of proof on an objector would be rather excessive, making it virtually impossible for him to meet this requirement in the case of communities as large as the medical community. Moreover, such a requirement is certainly not supported by the Guidebook and its standards which require proof not of the detriment itself, but only of the likelihood of detriment, i.e. of the probability of detriment occurring in the future, based on the hypothesis that the applicant would be attributed with the new gTLS applied for. It cannot be otherwise and the Applicant's critique that the Objector "does not identify any specific scenario under the CRR's operation of the .Med TLD which would be harmful to those within the medical community" is therefore rejected. The Applicant is readily in a position to respond to the proof of likely detriment presented by the Independent Objector by submitting facts of relevance, data relating to the factors enumerated in Art. 3.5.4 of the Guidebook which would confirm its position that no detriment as described by the Independent Objector is to be expected.

93 The Applicant, referring to a number of the factors enumerated in the Guidebook as possible guidance in connection with the standard of likelihood of detriment, repeats a series of arguments intending to show that there is no proof of probable detriment; however, its argumentation along these lines is not suitable to invalidate this proof.

94 The Applicant argues that its Application provides for effective security protection of user interests which none of the health-related websites offer so far. For the sake of argument, the Expert Panel accepts this allegation as true and not disputed by the Independent Objector; however, as shown above, the issue before the Expert Panel is not whether an application would result in an improvement as compared to the previous situation. And as also shown above, although better protection of the end users of medical and health services is certainly to be welcomed, it is no answer to the lack of participation of the medical community in the development of registration policies and practices for the new gTLD.

95 The Applicant argues that the Independent Objector offers no concrete evidence that the delegation of the .Med TLD to CRR will interfere in any way with the core activities of the medical community. In fact, the Applicant argues that it will be providing a curated and trusted space for online medical activities that does not currently exist at all for end users. Apart from the fact that the Independent Objector has no burden to specifically show "interference with core activities", this argument of the Applicant repeats its claim of improving the internet in the specific context of the factor "interference with core activities". In the view of the Expert Panel, this argument is beside the point as communication via the med webspace envisaged by the Applicant to become the "curated and trusted space for online medical activities" would no doubt be one of the core activities of the worldwide medical community which needs to be protected.

96 The Applicant alleges that the Independent Objector has also not shown any dependence by the medical community on the DNS for its core activities. It its view, the .Med TLD actually creates unique opportunities to increase the possibilities of obtaining trusted medical information online. Again, the Independent Objector has no specific burden to prove dependence. Most important, however, the Applicant's argument appears to imply that by delegating the applied-for gTLD to it, the best of all worlds will happen to the medical community. However, it claims that its aim "in submitting an application for the .Med gTLD is not only to reach out to the public and those in the medical sector, but also to significantly improve the current model of accessing medical-related information online. Any protection offered under the proposed new .Med TLD will be a significant improvement upon the current model." The Applicant then goes on to describe in some detail how it aims to significantly improve the current model of accessing medical-related information online by way of offering special protection to end users, including an eligibility accreditation process, a Domain Name Abuse Policy, and an Advertising Policy. The Applicant refers to Google's membership of the Center for Safe Internet Pharmacies and promises to leverage on this experience and the relevant CSIP guidelines as part of its broad goal of creating a secure and reliable space for users. The Applicant also refers to Google's previous experience in the

health market in the form of Google Health that it claims established a number of targeted partnerships with industry leaders in the health field and will help to inform its decision-making for the operation of the applied string. The Applicant furthermore assures that the way it intends to develop and operate the TLD would remain only complementary to the efforts of the WHO to provide global access to the benefits of medical knowledge.

97 While the Expert Panel does not doubt that through Google Health and otherwise the Applicant will have access to very considerable experience in the operation of health-related information in the internet, it notes that the Applicant admits in this context also that "the precise details of the gTLDs policies are not finally elaborated in the Application", a fact which prevents not only the Independent Objector but also the Expert Panel from assessing on this basis whether the operation of the TLD as intended will create a detriment or not. Certainly, the Applicant's declarations of its intentions, however impressive they may be, cannot be a substitute for commitments taken in the Application.

98 Moreover, the Applicant's assurances that its TLD will be better managed and a safer DNS than anything available on the internet until now does not and cannot remove the justified doubts that Independent Objector has shown to exist concerning the Applicant's intentions to operate the TLD in accordance with the interests of the medical community and with the participation of the members of that community in the development and implementation of the TLD's policies and practices. While many of the improvements promised by the Applicant do indicate a way of direction to better protection of users with regard to obtaining health-related information online, none of the improvements proposed addresses in any substantial way the issue of the participation of the medical community. Instead, the Application continues to say in point 18 (h)(i)(1) that the Applicant "will define the specialised meaning of the term and, based on this definition, will identify criteria for registrants to operate in the proposed gTLD. Only entities that meet these criteria will be entitled to register for a domain in the gTLD. Specialisation, therefore, arises from the Charleston Road Registry definition of a term, as well as through market dynamics as entities align their offerings(s) with the term".

99 The Applicant has not provided a truly reassuring response as to how to handle its relationship with the medical community. The above-described significant risks arising out of operating the .Med string by a single commercial organisation without participation of the medical community targeted in the development of policies and practices remain.

100 Finally, it should be noted in this context that whatever improvements to the present situation the Application may offer, any assessment of the value of such improvements would be beyond the remit of the Expert Panel, which has the sole task of assessing applications under the Guidebook standards. The Guidebook standard of "likelihood of material detriment", however, is aimed purely at avoiding detriment to the community targeted. Nothing suggests that such standard also allows an assessment of any "improvements" in internet services that

may be connected with an application and taking them into account as a balancing factor speaking against finding detriment.

101 Taking into consideration and balancing all of the above, the Expert Panel therefore concludes that the Independent Objector has met his burden of proving likelihood of detriment to the interests of a significant portion of the medical community, and that the Applicant has failed in presenting convincing and decisive counterevidence.

VIII.
Decision

102 In consideration of the above and in accordance with Art. 21 (d) of the Procedure, I hereby render the following Expert Determination:

1. Prof. Alain Pellet's Independent Objector Community Objection prevails and is upheld.

2. The Applicant, Charleston Road Registry Inc. fails.

3. The advance payment of costs made by Prof. Alain Pellet, Independent Objector shall be refunded by the Centre.

Date: 30 December 2013

Signature: 

Fabian von Schlabrendorff

Expert