

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

CASE No. EXP/403/ICANN/20

PROF. ALAIN PELLET, INDEPENDENT OBJECTOR

(FRANCE)

vs/

MEDISTRY LLC

(USA)

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

Expert Determination
ICC International Centre for Expertise
EXP/403/ICANN/20

TABLE OF CONTENTS

I.	Abbreviations /Defined Terms	3
II.	Parties of the Expert Determination Proceedings	4
III.	Expert Panel	6
IV.	Disputed gTLD.....	7
V.	Procedure.....	8
VI.	Summary of the Parties' Positions.....	10
VII.	Reasons	12
	(i) Interpretation of the Guidebook Standards	13
	(ii) Community Test.....	14
	(iii) Targeting Test	24
	(iv) Substantial Opposition Test	25
	(v) Detriment Test	31
VIII.	Decision.....	42

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 the subject of this Expert Determination.
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 of the Expert Determination Proceedings

Objector:

Prof. Alain Pellet, acting in his role as Independent Objector
16, Avenue Alphonse de Neuville
92380 Garches
France
Email: contact@independent-objector-newgtlds.org and
courriel@alainpellet.eu

Objector's Representatives:

Héloïse Bajer-Pellet
15, Rue de la Banque
75002 Paris
France
Email: avocat@bajer.fr

Phon van den Biesen, Esq.
De Groene Bocht, Keizersgracht 253
1016 EB Amsterdam
The Netherlands
Email: phonvandenbiesen@vdbkadvocaten.eu

Daniel Müller
20, Avenue du Général de Gaulle
78290 Croissy sur Seine
France
Email: mail@muellerdaniel.eu

Sam Wordsworth, QC
24 Lincoln's Inn Fields
London, WC2A 3EG
United Kingdom
Email: SWordsworth@essexcourt.net

Applicant:

Medistry, LLC
Mr. Brian David Johnson
3029 Prospect Avenue
Cleveland, Ohio 44115
USA
Email: bdj@secondgen.com

Applicant's Representatives:

The Cleveland Clinic Foundation
Mr. Kevin Michael Mooney, Esq.
3050 Science Park Drive – AC321
Beachwood, Ohio 44122
USA
Email: mooneyk@ccf.org

The Cleveland Clinic Foundation
Mr. David W. Rowan, Esq., Chief Legal Officer
9500 Euclid Avenue
Cleveland, Ohio 44195
USA

III.
Expert Panel

The sole member of the Expert Panel in this matter is

Fabian von Schlabrendorff
Clifford Chance
Mainzer Landstraße 46
60325 Frankfurt am Main
Germany
Tel. +4969 7199 1441
Email: fabian.schlabrendorff@cliffordchance.com

The sole member of the Expert Panel was appointed by the Chairman of the Standing Committee of the Centre 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 by way of a Community Objection is

.Med (Application ID: 1-907-38758).

According to the information submitted in the Application form, the Applicant, a limited liability company registered under the laws of Delaware, has been engaged by the Cleveland Clinic to apply for, obtain and operate the .Med gTLD under the guidance and direction of the Cleveland Clinic.

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 of the matter was transferred to the Panel on 31 July 2013 and the Panel fully constituted on this day.
- On 2 August 2013, the Panel addressed the parties and their representatives with a provisional timetable, suggesting that, subject to later assessment, it did not consider it necessary for the parties to file additional written submissions.
- On 2 August 2013, in reply to this communication, the Independent Objector sent a letter requesting to be allowed to file an additional written statement.
- On 2 August 2013, the Panel issued an order allowing the Independent Objector to comment on the Applicant's Response by no later than 12 August 2013, while granting the Applicant the opportunity to submit a reply by no later than 19 August 2013.

- On 2 August 2013, the Applicant voiced concerns regarding the scope of additional submissions. It asked to limit additional submissions to rebuttal and to extend the deadline for the Applicant to respond to 23 August 2013.
- On 4 August 2013, the Panel instructed the parties to limit their additional written submissions to those issues which arise from and are related to the other party's material and arguments. The Panel furthermore extended the time limit for the submission of the Applicant's additional written statement until 23 August 2013.
- The Independent Objector submitted an additional written statement on 12 August 2013, with the Applicant doing so on 23 August 2013.
- No hearing was requested by the parties or held necessary by the Panel.
- The Panel submitted its draft Expert Determination to the Centre for scrutiny 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, Art. 2 of the Procedure. 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 present case, 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 Medistry LLC engaged by the Cleveland Clinic for the purpose of obtaining and operating the applied-for string under the guidance and direction of the Cleveland Clinic.
- 7 The Independent Objector requests the Expert Panel to uphold the Objection and to determine that his advance payment of costs shall be refunded in accordance with Art. 14 (e) of the Procedure.
- 8 The Applicant requests the Expert Panel to hold that the Objector has failed to carry its burden and correspondingly find in favour of the Applicant. It also requests a determination that its advance payments of costs be refunded.
- 9 Both Parties have submitted divergent views concerning the question of whether the Objection meets the requirements of the Guidebook, namely whether there is 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
- 11 The Independent Objector is of the opinion that he has shown that there is a medical community which 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 the "medical community" is insufficiently delineated in the Objection by characteristics so vague that it is impossible to determine whether any particular individual or entity is or is not included within the Objection's medical community.

b) Targeting Test

- 12 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 in accordance with the general use of the term "medical" by the public and that the Applicant intends the .Med gTLD to be used primarily by the medical community in order to make health-related information available in the medical sector. The Applicant, although not presenting any detailed counterarguments, expresses the view that the Independent Objector fails to meet his burden of proof with regard to the targeting test.

c) Substantial Opposition Test

- 13 The Independent Objector, arguing that even a single comment can trigger a Community Objection and that the material content of comments and oppositions expressed and the importance of the rights and interests at stake also need to be taken into account, takes the position that the comments filed in relation to the Application show substantial grounds for opposition. The Applicant argues that the Independent Objector fails to show any opposition comments since the comments referred to by the Independent Objector are only advisory in nature and since, in its view, it is not permissible to extend the scope of opposition by reference to comments filed against other TLD applications.

d) Detriment Test

- 14 The Independent Objector submits that there is a likelihood of detriment to the medical community, since the Application gives enormous subjective control to a single organisation without any inclination of a possibility for the medical community to participate in the development and modification of the policies and practices of operating the TLD. He sees a significant risk of exclusion of potential registrants which is likely to cause detriment in the form of reputational damage as well as economic harm to significant parts of that community and deprive members of the medical community of the use and benefit from the competitive advantages of the new gTLD.
- 15 In the view of the Applicant, the Independent Objector fails to prove a likelihood of material detriment. The Applicant views the Independent Objector's claims as to a likelihood of detriment to be unsubstantiated and unsupported. In its opinion, the Guidebook factors weigh heavily in its favour. Moreover, the Applicant argues that the likely benefit to the reputation of the majority of the medical community from the Applicant's provision of a trusted space in the .Med TLD under the guidance of the Cleveland Clinic greatly outweighs any unlikely harm to any very small portion of the community. It argues that the Cleveland Clinic's position as a charitable institution, along with its ability to foster broad-based consensus in the global medical community, make the Applicant the ideal operator of the .Med TLD.

VII.
Reasons

- 16 The requirements for the Independent Objector's standing are fulfilled in the present matter; see above paragraph 6.
- 17 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).
- 18 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 at which the string may be explicitly or implicitly targeted.
- 19 With regard to each of these tests, the Guidebook provides a number of factors which a panel could consider and balance to determine whether or not the test has been met or not.
- 20 The Parties are in disagreement as to how to interpret these standards; in particular and with regard to all four tests, they also disagree on how this Panel should deal with the factors listed specifically with regard to each of the standards set forth therein. The Independent Objector, arguing that the factors provide guidance, but are neither exclusive nor limitative, takes the position that he bears no burden to specifically provide evidence on each of the factors listed in connection with each Guidebook standard. The Applicant agrees with that proposition in principle, but argues that the Independent Objector cannot ignore the Guidebook factors or weighing the factors, and appears to take the position that the Independent Objector must nevertheless provide some evidence in relation to each of the factors.
- 21 As this issue of the interpretation of the Guidebook standards is of relevance with regard to all four tests to be conducted in relation to the Community Objection sub judice, the Expert Panel considers it useful to deal with this issue up front before proceeding to each of the tests.

(i) Interpretation of the Guidebook Standards

- 22 In the view of the Expert Panel, there can be no doubt that the standards set forth in the Guidebook for community objections are very broad in their character. This emanates from the language used to describe them (clearly delineated community, substantial opposition, strong association between string and community, likelihood of detriment to a significant portion of the community) and it is further demonstrated by the fact that the authors of the Guidebook have seen the need for each of the standards to provide a list of factors more detailed in character which a panel could balance to determine whether a standard has been met.
- 23 The task of this Expert Panel is to apply the Guidebook standards to the case before it. It goes without saying that under the broad concepts provided for in the form of the Guidebook standards, this requires the Expert Panel to consider a variety of aspects of the case before it. In this regard, the factors listed in connection with each Guidebook standard provide guidance. In each case, there is some almost identical wording: "A panel could balance a number of factors to determine this, including but not limited to ...", or "[f]actors that could be balanced by a panel to determine this include but are not limited to...", or "[f]actors that could be used by a panel in making this determination include but are not limited to ...". This language clearly shows that the list of factors mentioned is an open one. The Expert Panel agrees with the Independent Objector and notes that the Applicant has yet to present any arguments opposing the view that the factors are neither exclusive nor limitative. The language used also contains no hint whatsoever that the Expert Panel would be required to consider and balance any of the factors listed, whether on an exclusive basis or not.
- 24 The Panel therefore concludes that the factors listed provide guidance for the understanding of the standards, but that they themselves are not standards. Most of the time, the way a factor is described in the Guidebook already shows by simple logic that it cannot be meant to represent a standard or requirement: Concepts such as "level of formal boundaries", "length of time", "global distribution", "level of recognised stature or weight", "representative nature", "distribution or diversity", "associations by the public", "level of certainty", "nature and extent of concrete or economic damage" all describe aspects of a situation to be considered, but do not in any way define which "level of formal boundaries" or which "nature and extent of concrete or economic damage" is required to fulfil the standard in question. But even factors formulated in other ways, which may make them sound more like a standard, are not meant to be standards in the view of the Expert Panel.
- 25 The language of the Guidebook standards in Art. 3.4.5 very clearly reflects this, since it explicitly states what an objector has to prove with regard to each test.
- The objector must prove that the community expressing opposition can be regarded as a clearly delineated community;

- The objector must prove a strong association between the applied-for gTLD and the community;
- The objector must prove substantial opposition within the community;
- The objector must prove that the application creates a likelihood of material detriment to the rights or legitimate interests of a significant portion of the community.

26 This does not mean, however, that the Panel would therefore feel entitled to ignore the factors listed in connection with each of the Guidebook standards. The contrary is the case. In the view of the Panel, these factors are listed to provide guidance. It therefore stands to reason that the parties are entitled to refer to aspects of the case at hand under the guidance of the lists of factors in the Guidebook and that the Expert Panel is required to carefully consider the parties' allegations and evidence that they have structured around the factors accordingly. But beyond this the Expert Panel is also called to consider any other aspect or factor of the Application to which the Independent Objector or the Applicant refer, provided it is useful and of relevance in determining whether the Guidebook standards have been met in the present case.

(ii) Community Test

27 The Independent Objector has proven that the community expressing opposition 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.

28 Module 3 of the Guidebook provides no definition of the understanding of the term "community". It only provides certain factors which may be assessed and balanced by the Expert Panel to determine whether a community is clearly delineated from others. It therefore needs to be assessed how the term "community" is to be interpreted in the sense of the Guidebook. The Independent Objector has shown – as is undisputed by the Applicant – 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 goals¹.

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

29 This understanding complies with ICANN's understanding. ICANN – the Guidebook's originator – expressed in its 2007 ICANN Final Report² that a "community" should be interpreted broadly and will include, for example, an economic sector, a cultural community or a linguistic community³.

30 Referring to the factor of public recognition listed in the Guidebook, the Independent Objector has convincingly demonstrated that the medical community addressed by the .Med gTLD is such a recognised community. He has shown that it constitutes a group even though it consists of a variety of professionals and institutions whose activities, and this is not disputed by the Applicant, are of critical importance to the achievement of the public policy goal of public health and whose general work and mission is directed towards 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 of acting in the best interests of the patient, fairness and equality in the distribution of healthcare and resources, non-maleficence, and respect for patients, who have the right to be treated with dignity and honesty.

31 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 as recognised within that community itself as well as among the general public.

32 In the view of the Expert Panel, the Independent Objector has convincingly demonstrated that membership of the medical community as defined is determined by three formal boundaries and that, therefore, the medical community invoked by him as expressing opposition to the Application is a clearly delineated community in distinction 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 obtain a specifically granted license or authorisation.
- Members of the medical community usually work in specific sectors of activity, including healthcare and medical services, pharmaceuticals, or in the development of medical and similar technologies.

² Final Report – Introduction of new generic top-level domains dated 8 August 2007, accessible at <http://gns0.icann.org/en/issues/new-gtlds/pdp-dec05-fr-part08aug07.htm>

³ See above, page 9 of the Objection

- 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.

33 The Applicant does not object to the Independent Objector's description of the medical community; it admits its existence (additional written statement, p. 6). However, the Applicant argues that because the "medical community" invoked by the Independent Objector is "heterogeneous, expansive and comprised of many, varying entities of different types", it is anything but clearly delineated. In its view, the factors referred to by the Independent Objector are too undefined and vague and their application does not therefore result in a clear delineation of the medical community. Referring to declarations made by the Independent Objector in a letter sent by the Independent Objector to the Applicant in January 2013 with regard to the Independent Objector's investigation of the Applicant's applied-for TLD for potential objections, the Applicant also points out that the Independent Objector himself expressed the view at that time that the medical community is not "clearly defined" and that, for that reason, a Community Objection is not warranted. Finally, the Applicant argues that the Independent Objector fails to carry its burden of proof regarding the existence of a clearly delineated medical community under the Guidebook factors, which, in its view, weigh heavily against the Independent Objector's position.

34 In the view of the Expert Panel, none of these arguments are sufficient to invalidate the finding that the Independent Objector has successfully shown that the medical community invoked by him as expressing opposition can be regarded as a clearly delineated community.

35 As concerns the Applicant's first line of argument concerning the alleged vagueness of the factors referred to by the Independent Objector in defining the formal boundaries of the medical community, the Expert Panel is not convinced that the Applicant's detailed critique of the operational limitations of these criteria, to the extent they are to be recognised, justify the conclusion that the medical community cannot therefore be regarded as a clearly delineated community under the Guidebook standards.

36 The Applicant argues that these factors are too undefined and vague and that the application of the factors presented by the Independent Objector does not therefore result in a clear delineation of the medical community. Hence, it is of vital importance how the term "clearly delineated" is to be interpreted in the sense of the Guidebook. As shown by the Independent Objector (Objection, para. 17) and stated in the Guidebook, the community is to be delineated from internet users in general⁴. The required degree of delineation is "clearly", which broadly means "precisely" or "easy to perceive"⁵. The three factors shown by the Independent Objector are – if applied to persons – factors which separate certain internet users – e.g. those

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

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

with a degree in medicine or health services, working in a hospital and applying certain technical terms – from other internet users who have not qualified in medicine or are active in another field. Application of the factors shown by the Independent Objector enables an observer to sort and categorise individuals meeting the requirements shown by the Independent Objector from those individuals who do not meet these requirements. Consequently, the factors for a clear delineation shown by the Independent Objector are sufficient to clearly delineate members of the community from non-members.

37 The Applicant claims that to apply these criteria to professionals in the relevant community leads to vagueness and indefiniteness. The Applicant, referring to doctors, nurses, EMT, pharmaceutical salespersons, insurance providers, actuaries, billing companies, accountants, med-tech, software programmers/providers and clinical trial participants, argues that the level of qualification and the institutions granting the authorisation or qualification remain undefined by the delineating factors offered by the Independent Objector. It further criticises the fact that it remains unclear whether the members of the community defined as members working and exercising in specific sectors of healthcare and medical services comprise a larger group than those defined by the delineating factor of authorisation or qualification and who or what is included.

38 These arguments ignore 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 in other disciplines such as accountants, software programmers, insurance providers and other professionals of whatever kind who may work in various (support) roles in specific healthcare sectors, but who do not themselves exercise any healthcare and medical services, pharmaceuticals or medical technology role. The factor of authorisation or qualification applied to individuals working in a healthcare or related role provides for a sufficiently clear delineation of professionals belonging to the medical community.

39 In contrast to accountants, actuaries, billing companies, software programmers and other people to which the Applicant refers, these individuals also make use of a specific and complex system of technical terms and phrases relating to healthcare and medicine, a factor which also creates a clear delineation between members of the community and general internet users.

40 The Applicant's question regarding the level of authorisation required and the institution which is granting it is of an entirely secondary nature and, in the given context in the view of the Expert Panel, rather irrelevant. The factor of authorisation or qualification provides a sufficiently clear criterion for identifying and separating those who belong to the medical community from those who may be regarded as general internet users. It is not the question of how the authorisation or qualification is achieved, or what level of it is achieved, but rather

whether there is an authorisation or qualification which has to be obtained as a prerequisite for working in the medical sector.

41 In his additional statement, the Independent Objector points out that the Applicant, while disputing the possibility of delineating the medical community by means of diplomas, licenses or credentials, proposes for itself to make use of such criteria in order to select future registrants for the .Med TLD. The Applicant defends itself against such implication concerning its own understanding of the possibility of delineating professionals in the medical sector, arguing that a criterion for membership of the medical community (including those who are not a registrant of a domain in the .Med gTLD) has a different function to a criterion for registrants to be admitted according to allocation guidelines. The Panel agrees that allocation guidelines and criteria for defining a clearly delineated community logically serve different purposes. However, in the view of the Expert Panel, the Applicant's argument nevertheless fails to refute the inescapable truth of the Independent Objector's observation: The fact that the factor of qualification for the Applicant obviously works as a criterion to separate those who may register from those who may not confirms that the same factor also works as an operable criterion to delineate members of the medical community from other internet users or the general public.

42 The Applicant furthermore objects that the criterion of complex language used by members of the medical community is impermissibly vague. The Applicant argues that it is not able to identify what "terms" are meant or if anyone would be confused by them. That the Applicant, which has behind it one of the foremost institutions of hospital care in the United States, takes this position is somewhat of a surprise to the Panel.

43 The Applicant does not deny that complex language as such is used in the medical community, but instead, merely as a point of procedure, takes the position that the Independent Objector would be required to identify the terms used in that complex language before the Applicant could respond and determine "if anyone would be confused by them". However, neither procedural fairness nor anything in the Guidebook would require that an Objector has to go into such detail regarding the presentation of a delineating factor. The Applicant, who states as the mission of the applied-for .Med TLD to provide a "trusted name space wherein users can come to find trusted sources for medical information under the guidance of the Cleveland Clinic", is beyond any doubt in a position to respond to the Independent Objector's claim whether such language is in use and can serve as a delineating factor for identifying the members of the medical community. And the Applicant in fact responds by arguing that many members of the general public are fluent in medical terminology and many of them educate themselves daily on health topics. The Applicant even asserts that under the factor of complex medical language "virtually any educated adult could be considered a member of the medical community".

44 However, the Panel feels that this line of argumentation taken by the Applicant cannot successfully invalidate the Independent Objector's demonstration that members of the

medical community can be additionally delineated by the use of a specific and complex medical language not used by general internet users. The Expert Panel does not doubt that there are general internet users who educate themselves in medical terminology; likewise, it is not atypical that patients by necessity and also out of interest learn about the medical terminology applicable to the particular illness for which they are being treated. And, of course, it is safe to assume that there exist individuals who, even without health or medicine-related education, educate themselves in the use of medical terminology to some degree.

45 But the Applicant's claim that there are many members of the general public who are fluent in medical terminology and that, as a consequence, "any educated adult could be considered a member of the medical community under the Objector's factor", lacks credibility and is contradictory in itself. It is hardly possible to recognise the existence of medical terminology based on and diffused by health or medicine-related education, and, at the same time, claim that many educated adults are also fluent in medical terminology without having obtained such education. The Panel cannot therefore see why the medical community as shown by the Independent Objector, in addition to the other factors presented, cannot also be delineated by the use of a specific complex professional language. The fact that some people without medicine-related education may informally also acquire skills in medical language does not disqualify the use of language as one of several factors delineating members of the medical community from general internet users.

46 The Applicant argues furthermore that the medical community as shown by the Independent Objector is too heterogeneous, expansive and composed of many various entities of different types that it cannot be a clearly delineated community. The Applicant argues that the factors shown by the Independent Objector cannot be used in the case of institutions. It therefore comes to the conclusion that it remains unclear how any institution, such as governments, governmental medical regulatory bodies, an international medical agency or a hospital, a professional association, an insurer, a medical billing company etc., can qualify as being a member of the medical community.

47 The essence of this argument appears to be that the delineating factor of a licence or authorization as a characteristic criterion for identifying members of the medical community does not work in the case of institutions or entities. However, while this is true, it does not as such invalidate the Independent Objector's demonstration of the existence of a clearly delineated medical community. There is no requirement in the Guidebook that the factors applied to the identification of the members of the community need to be applicable to all of them, persons and institutions alike. On the contrary, with regard to many communities, it must be expected that factors determining membership of persons are different from factors determining membership of institutions.

48 The Applicant's argument overlooks the fact that the Independent Objector, demonstrating which individuals and which institutions form part of the membership of the medical community, has taken exactly this approach. He has shown that individuals can be

characterised by the factor "qualification, licence or authorization". And he has shown that all those engaged in activities related to the diagnosis and treatment, preventive or curative, of diseases, the medical professions and healthcare professionals as well as the institutions which deliver these services to users of the healthcare system, including medical treatment centres or medical schools, belong to the medical community (Objection, p. 9). What this boils down to is that the formal boundaries of qualification, licences and authorizations apply to individual members but do not apply in the same way to institutions belonging to the medical community (although some institutions belonging to the medical community may also require some type of public authorization to operate, such as hospitals, diagnostic laboratories etc). Accepting this does not invalidate the operability of the factor "qualification, licences, authorizations" as a formal boundary by which professionals belonging to the medical community can be distinguished from general internet users.

49 The issue which remains, however, with regard to institutions belonging to the medical community, is to what extent the Independent Objector has successfully shown that the medical community can, from this perspective, also be regarded as clearly delineated. The Independent Objector presents two further factors of delineation which are also of assistance in delineating institutions belonging to the medical community. Firstly, members of the community usually work and exercise in specific sectors of activity, which includes healthcare and medical services, pharmaceuticals, development of medical technologies, and secondly, the medical community has developed a highly specific and complex system of technical terms and phrases, hardly understood by the general public.

50 While these factors present less of a formal boundary than the qualification, license or authorisation factor, they still serve in the eyes of the Panel as useful criteria allowing institutions belonging to the medical community to be distinguished from those not pertaining to it. The list of factors mentioned in the Guidebook for illustrative purposes, and which may be considered by a panel, shows that not only the level of formal boundary but also other factors, such as the level of public recognition of the group as a community at a local and/or global level, can play a role in determining whether a community should be regarded as a clearly delineated community. Under this guidance, the Independent Objector's claim that institutions involved in healthcare and medical services, pharmaceuticals and the development of medical technologies are recognised as belonging to the medical community is convincing. The medical community is therefore more than an amorphous mass of professionals and institutions and forms a clearly delineable community distinguishable from the general public.

51 As demonstrated by the Independent Objector, the general public perception also includes the assumption that members of the medical community act in accordance with a certain code of moral principles. True enough, it is not to be disputed that there may be a number of borderline cases, both in the case of individuals and in the case of institutions, where under this criterion it may be doubtful whether such persons or entities belong to the medical community or not. Doubts may arise, e.g. in cases of institutions involved in multiple

activities, even as regards their primary interests, if these do all belong to healthcare and related activities. But such borderline cases, if they do not become dominant, will always exist, particularly among institutions, with regard to any specific community to be considered under a Community Objection, and can therefore hardly serve as such to invalidate the Panel's finding that the Independent Objector has successfully shown that the medical community invoked can be regarded as a clearly delineated community.

52 The Applicant seeks to reinforce its critique of the Independent Objector's definition of a clearly delineated medical community by advising the Panel of the position taken by the Independent Objector in this regard prior to filing the Community Objection. However, in the view of the Expert Panel, this evidence does not speak against the position taken by the Independent Objector in the Objection and provides no basis for the Panel to arrive at a different finding.

53 The Applicant refers to a letter of January 2013, in which the Independent Objector states: "The medical community is extremely heterogeneous and is composed of entities of very different and various types [...]. It is therefore quite doubtful that they will represent a clearly delineated community." The Applicant argues that this reasoning in the letter of the Independent Objector is highly persuasive and should be determinative with regard to the issue of the medical community not being clearly delineated.

54 The Panel does not agree. As shown above, the Independent Objector has successfully demonstrated that a medical community is recognised as existing and has presented factors that can be applied to clearly delineate its members from general internet users. That a given community is heterogeneous in character does not mean that it is not clearly delineable. The delineation is obviously more difficult in such a case but as demonstrated here by the Independent Objector it is possible to delineate members of the medical community, including institutions, from the general public. By providing factors of delineation as above discussed, he has to the satisfaction of the Expert Panel shown, how the admittedly heterogeneous medical community can be separated from other internet users. In the face of this evidence, the Panel cannot see any relevance as to the position on the community issue taken by the Independent Objector prior to filing the Community Objection. Obviously, by doing so the Independent Objector has given up any prior doubts concerning the provability of a clear delineation of the medical community and the Panel is unable to draw any evidentiary consequences from this.

55 The Panel also sees no merit in the Applicant's additional fairness and equity argument, presented in footnote 5 of its Response, claiming that the Independent Objector, having apparently seen himself unable to provide evidence for a clearly delineated medical community prior to the filing of the Community Objection, would now be estopped from taking a different position. In the first place it is, in the Panel's mind, highly doubtful whether a concept of "estoppel", if at all, could be applicable in this Procedure, in particular with

regard to declarations of a party made outside of the proceedings. But even if one would assume that a concept of estoppel could apply, the Applicant's argument fails.

56 Regardless of how one wishes to evaluate the Applicant's allegation that it "has been damaged" by the Independent Objector's actions and that it has not been given previous opportunity to provide the Independent Objector with input on the heterogeneous nature of the medical community, the Applicant has been provided with such opportunity in the present proceedings and has made use of it in its Response as well as in its additional written statement.

57 The Applicant also argues that the Independent Objector fails to carry his burden of proof regarding a clearly delineated community under the five factors mentioned in the Guidebook under § 3.5.4. As shown above, there is no requirement for the factors mentioned in the Guidebook to be "fulfilled". The Independent Objector only has to prove that the community can be regarded as a "clearly delineated community" which, in the opinion of the Expert Panel, he has successfully done by referring to and refining some of the factors listed in the Guidebook (public recognition, level of formal boundaries).

58 However, while there is no requirement in the Guidebook to pass a test of all the five factors listed in connection with the standard of a clearly delineated community, the Applicant is of course entitled to draw the Panel's attention to these factors and present counterarguments and counterevidence. In the present case, however, the Panel's consideration of the Applicant's arguments with regard to the five factors does not result in a change of the Panel's finding that the Independent Objector has met his burden of proof regarding the community test.

59 With regard to the Guidebook factor of public recognition, the Applicant argues that such recognition does not exist. The Applicant only recognises public recognition of many disparate communities, referring to the use of different medical terms by different groups, such as terms from a family primary care physician, a nutritionist, an insurance provider, a billing firm, or any of the various med-tech fields.

60 In the eyes of the Panel, this argument fails because it ignores the basis of the Independent Objector's argument: The Independent Objector has shown that there is public recognition of the existence of a medical community, defined as above shown by all those professionals and institutions essential in any health system whose general work and mission is the diagnosis and treatment, preventive or curative, of diseases. The Independent Objector has furthermore shown that these professionals and institutions have developed their own characteristic system of moral principles applying to the practice of medicine. The Applicant's approach of reducing the Independent Objector's position to the issue of the use of language therefore misses the main point. In addition, the argument itself is not convincing since it refers to the use of language by groups of people who might be working in the healthcare sector, but who are clearly not members of the medical community as identified by the Independent Objector,

such as insurance providers, billing firms, and others mentioned by the Applicant. Moreover, as far as the use of language is concerned, the delineating factor referred to by the Independent Objector is the use of complex language relating to medical practice. As these medical practices have become more and more specialized, the disciplines practised at Cleveland Clinic are likely to reflect this, the language used in the various disciplines of medicine has also become more specialised. In the view of the Panel, however, this does not in any way distract from the public recognition of a medical community as a whole.

61 The Applicant argues that the Independent Objector fails to identify any formal boundaries around the medical community; the three delineating factors presented by the Independent Objector are said to lack any formal, defined boundaries. This is not true. As has been shown above and explained in connection with the Applicant's critique of the operability of the three delineating factors identified (see paragraphs 30 to 32 and 33 to 36), these represent cases of formal boundaries which, in each case to a greater or lesser extent, allow professionals and institutions belonging to the medical community to be easily identified. Any borderline cases that may arise cannot refute this.

62 The Applicant claims that the vagueness of the Independent Objector's medical community precludes determination of the length of time of its existence. The Expert Panel observes that in view of the fact that the existence of a medical community has already found public recognition for a long period, the time of existence does not appear to be an issue of any true relevance.

63 With reference to the factor of distribution, the Applicant admits that the medical community is global. But it claims that the heterogeneity of the global community results in it being impossible to determine, from "jurisdiction to jurisdiction", whether an individual or entity is or is not a member of the medical community. The Expert Panel disagrees. The delineating factors identified by the Independent Objector are formulated in abstract terms, without involving any jurisdiction-specific aspects. The obvious differences with regard to required authorisation and the regulation of professionals involved in healthcare services with regard to individual jurisdictions cannot distract from the fact that, globally, a medical community is recognised as existing. The Guidebook standard of a clearly delineated community should not be understood to require uniformity of shared characteristics in every detail in the case of globally recognised communities. Such an interpretation would result in depriving globally recognised communities of the protection offered under the Guidebook rules.

64 The Applicant finally criticises, with reference to the Guidebook factor size, that the size of the medical community as seen by the Independent Objector cannot be determined as, in its view, it may merely include doctors, or it may include other professionals such as orderlies, nurses, medical insurance billing companies, international medical organisations etc. Since the global medical community as identified by the Independent Objector is obviously very large, including a considerable variety of professionals working in health services, this argument by the Applicant does not add anything to the size issue. Its apparent intention is,

however, again to demonstrate the apparent heterogeneity of the medical community. The Panel has dealt with this aspect above. The Applicant's argument is not convincing as it is based on including professionals such as medical insurance billing companies and non-professionals such as orderlies in the definition of a concept of the medical community which clearly, following the delineating factors identified by the Independent Objector, do not belong there.

65 In consequence, the Panel finds that the Independent Objector has met his burden of proof in terms of the medical community he invokes being regarded as a clearly delineated community.

(iii) Targeting Test

66 For a community objection to be successful the Independent Objector must prove that there is a strong association between the applied-for gTLD string and the community invoked by him. There is no opposition of substance from the Applicant regarding this issue.

67 The Panel finds that the Independent Objector has met the requirements of the targeting test. The Application in the present case has not been framed as a community-based TLD for the benefit of the medical community. But the Application, as pointed out by the Independent Objector, contains a number of references showing that it is the intention of the Applicant that the .Med gTLD is to be used primarily by the medical community in order to make health-related information available in the medical sector. Thus, the Application declares that the mission of the string is to provide a "trusted name space wherein users can come to find trusted sources for medical information". It further states that "multiple sectors of the health industry would be implicated in the sharing of trusted information" and that the applicants for a domain name within the .Med gTLD "will at minimum be required to state their qualifications to integrate clinical and hospital care with research and education."

68 The Independent Objector rightly points out that a relevant factor to be taken into account in determining whether an applied-for string is strongly associated with a community is not only the intended use as proposed in the application, but also the test as to whether the general public perceives such an association between the applied-for gTLD string and the community. As the Independent Objector correctly observes, the term "medical", according to the Oxford Dictionary, describes things or professionals "of or relating to the science of medicine, or to the treatment of illness and injuries", and such term is thereby generally 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, for diseases to users of the healthcare system, as well as the institutions involved in the delivery of such services.

(iv) Substantial Opposition Test

- 69 In order to prevail the Objector must 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.
- 70 The Guidebook standard of substantial opposition is a broad concept like the other three Guidebook standards and the term "substantial opposition" is as such not defined. In common language, opposition in its most general sense is defined as "resistance or dissent, expressed in action or argument"⁶ while the word "substantial" is used for something of "considerable importance, size or worth"⁷. Some further guidance can be gained from the factors which the Guidebook lists for the possible use of the panel in order to determine if "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, and historical defense of the community in other contexts.
- 71 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 exists 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, is as such not necessarily a determining factor from the outset. The Expert Panel is also convinced that it is possible and can be warranted to speak of "substantial" opposition also in consideration of the content and quality of the opposition expressed.
- 72 The Applicant insists that an objector needs to provide proof of substantial opposition and relies in so far on a line of argumentation intended to show that the Independent Objector fails to carry its burden of proof with regard to the six factors set forth in the Guidebook. But the Expert Panel does not see any argument of the Applicant directed against the consideration of other factors in addition to those listed in the Guidebook.
- 73 The Expert Panel accepts that the comments made by the National Association of Boards of Pharmacy (NABP), on which the Independent Objector relies for the purpose of demonstrating substantial opposition, represent an expression of opposition, i.e. resistance or dissent, to the Application, going beyond merely having an advisory character as the Applicant suggests. These are comments from an organisation of international scale

⁶ See <http://oxforddictionaries.com/definition/english/opposition>.

⁷ See <http://oxforddictionaries.com/definition/english/substantial>.

representing the state boards of pharmacy in various countries, including the United States, Australia, eight Canadian Provinces, and New Zealand. Inter alia, in relation to the Application, NABP raised the concern that registries within the health and medical marketplace screen online drug sellers and other health practitioners' web sites for proper credentials. Referring to the recommendation of the ICANN Governmental Advisory Committee that gTLD strings referring to particular sectors, such as those 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 also be considered "community-based" strings, NABP's comments terminate by saying: "NABP believes that all medical themed gTLDs – whether community-based or not – should have certain safeguard mechanisms hard coded into the registry agreement in order to ensure patient safety and legitimate use of domain names."

- 74 As the Application filed by the Applicant is not designated as a community-based application and at the time did not contain any of the "hard coded safeguard mechanisms" to which NABP refers, its comments are, in the view of the Panel, to be understood as NABP's expressed opposition against the Application, even though the words "we oppose" are not employed. It cannot be overlooked that the substance of NABP's comments shows resistance to the Application and does not carry the Applicant's theory of a merely advisory character.
- 75 The additional arguments made by the Applicant do not hold either.
- 76 Though it may be true that the NABP has filed identical comments to all applicants in the "health" and "medical" field, this by itself does not mean and allow the conclusion that NABP did thereby not express opposition to the applications in regard to which it in each case specifically filed its comments. The Applicant's – unsubstantiated and unproven – allegation that subsequent conversations between the Applicant and the NABP confirmed that the NABP's intent was "not to provide an opposition specifically against Applicant" are also of no avail. As far as it is known to the Panel, NABP has not retracted its public comments.
- 77 The Applicant's reference to the fact that NABP has submitted its comments under the "community evaluation panel" category rather than the "community objection" category is also of no bearing. Under the comment procedure, this categorisation is undertaken by the commentator for the purpose of channelling the comments through the comment evaluation process of ICANN. It has no bearing on and no interpretative value as to the question of whether comments are provided in opposition to an application or not.
- 78 While there exists only one direct comment relating to the Application on which the Independent Objector can rely for his case of substantial opposition, the Expert Panel agrees that NABP's comments in opposition are of particular significance, providing evidence of the existence of "substantial" opposition under the Guidebook standard in the medical community.

- 79 This particular significance arises from the contents of these comments, referring to the importance of the rights and interests at stake in the area of health and medical themed gTLDs, referring to the interest of patient safety, the legitimate use of domain names, and the best interest of the community. And it is in this context that the Independent Objector refers to the comments filed by the American Hospital Association in opposition to other .Med applications and to the GAC Early Warning of the French Government concerning .Health applications.
- 80 It is to be conceded to the Applicant that the Independent Objector can of course not rely on comments concerning other applications to apparently increase the number of voices of expression in opposition to the Application in question here. But the Independent Objector is entitled to and in the understanding of the Expert Panel also does not do more than arguing his case of the significance of NABP's comments on the Applicant's Application when he refers to and presents arguments regarding comments directed against other .Med applications such as those of the American Hospital Association (AHA). The same applies to the Independent Objector's references to the GAC Early Warning of the French Government and the arguments presented in connection with this Early Warning.
- 81 As concerns the weight of NABP's opposition raised against the Application, the Expert Panel considers it remarkable that the AHA has filed similar comments apparently with regard to all other .Med applications and the .Medical application, expressing its apprehension that the delegation of the .Med gTLD will be detrimental to public health and safety, and to the interests of the healthcare community targeted by such gTLD. The Panel agrees with the Independent Objector that this fact underlines the importance of the comments raised by NABP against the Application.
- 82 The fact that the AHA has filed comments in opposition to all other .Med applications, but has refrained from doing so in the case of the Applicant, is presented by the Applicant as evidence for the lack of any substantial opposition against its Application. However, the Panel is unable to find the Applicant's position convincing.
- 83 The Applicant argues that the Cleveland Clinic is a member of the AHA, and claims that the AHA, representing many other members, purposefully decided not to file a comment against the current Application. However, this allegation remains curiously unsubstantiated and unsupported by any details. In view of the fact that various motivations may explain why the AHA refrained from filing any comments opposing the Applicant's Application, including even the possibility of omission by negligence, the Panel is unable to ascribe any probative value to AHA's behaviour. But even if the Applicant had established in understandable and verifiable detail that the AHA on purpose decided not to oppose the Application, such decision of the AHA would and could not change the fact that the NABP expressed opposition to the Application on grounds of public health concerns, and that the AHA raised essentially identical concerns with regard to all other .Med applications. The Panel's assessment of NABP'S opposition to the Application as demonstration of a case of substantial

community opposition warranting the filing of a Community Objection would therefore remain unaffected.

84 The GAC Early Warning of the French Government concerning .health applications, to which the Independent Objector refers, additionally supports his case and confirms that the grounds for opposition brought forward by NABP against the Application are clearly substantial. Although it is not related to the .Med applications in general or the Applicant's Application in particular, the Expert Panel is satisfied that it underscores the sensitivity of health and medical related themes by pointing out the "[c]onsumer protection in health is particularly important online, when network rules cannot be effectively enforced, creating new rules for consumers, industry and governments". The GAC Warning goes on by saying: "A .health TLD with insufficient measures to address these risks will undermine consumer trust and confidence and harm legitimate enterprise, competition and the growth of the health industry. ... health is a crossborder concern, and the domain instead must be seen as a TLD with a significant potential for the global community." The Expert Panel agrees with the Independent Objector that similar concerns can be applied to the closely related .med gTLD since the applied-for .Med gTLD has a comparable potential for and impact on the global community.

85 As regards the concerns raised by NABP, the Applicant claims that its Application addresses such concerns. The Applicant refers to the Application as well as to the Public Interest Commitments it has filed. The Expert Panel does not see how this argument can in any way affect the finding that substantial opposition exists within the medical community. First of all, the Applicant filed its Public Interest Commitments in spring of 2013, i.e. at a time after NABP had filed its comments. Assuming that the Applicant's Public Interest Commitments do indeed provide an objectively adequate answer to all of NABP's concerns, the question however remains what becomes of the opposition originally filed by NABP. Does the fact of opposition to an application once filed vanish and become null and void if the applicant responds to the concerns raised in an opposition to the application? The Applicant does not explain this and the Expert Panel does not accept such a consequence. Moreover, the Applicant fails to provide any substance and explanations as to its claim that its Application, together with its later PIC, successfully addresses NABP's concerns in all regards. The Expert Panel has no possibility of verifying the Applicant's claim. Therefore, even if one were to assume that previously existing substantial opposition could vanish as a fact to be considered under the Guidebook (which the Panel does not believe one may assume) the Applicant's argument would still fail for lack of substantiation.

86 The Applicant expresses the opinion that the Objection fails due to not arguing on and establishing the six factors suggested in the Guidebook. However, even if one were to assume that the Independent Objector did have the burden to provide evidence on each of the factors (which the Panel does not recognise), this line of argument cannot disprove the Panel's finding of successful proof by the Independent Objector of substantial opposition against the Application in the medical community.

87 With reference to the Guidebook factor "number of expressions of opposition", the Applicant repeats its argument that the Independent Objector has shown at most one advisory comment from NABP and that this one comment does not constitute a significant number when compared to the vast overall population of the medical community. This argument fails regarding the characterisation of NABP's comments as not expressing opposition, see above paragraphs 73 to 80. It is also unconvincing with regard to the number issue. The number of expressions of opposition can be a factor to be considered and "balanced" (see Art. 3.5.4 Guidebook) with other factors, but the Guidebook does not set it forth as a decisive factor at all. It does not even set it forth as a factor which should be taken into account in all circumstances or in most cases. The Expert Panel does not generally take the view that the number of expressions of opposition is irrelevant; in many cases it may indeed be a relevant factor. In the given case, however, while the number of expressions of opposition is in the view of the Panel very low, in particular if compared to the size of the medical community, the Expert Panel finds that the grounds for opposition expressed in NABP's comments are of such a force and importance, their importance underscored by expressions of opposition with regard to other .Med applications and by the GAC Early Warning of the French Government, that even that one and single direct expression of opposition with regard to the Application, if viewed in context, is sufficient to prove that there exists substantial opposition in the medical community in relation to the Application.

88 Referring to the second Guidebook factor listed, the "representative nature" of the opposition voiced, the Applicant criticises that NABP represents only one facet of the medical field, namely that of pharmacy. However, this argument, too, fails to invalidate the Panel's finding of proven substantial opposition. It fails because in the view of the Panel the grounds for opposition presented by NABP against the Application are of such a basic nature that it is irrelevant whether such opposition arises only in one sector of the medical community and not in a number of them. That the NABP as an association of pharmacy boards is a very weighty representative of an important subsector of the medical community, i.e. that of pharmaceuticals and their application, cannot reasonably be doubted. The Expert Panel therefore, quite in contrast to the Applicant's view, sees the NABP as a downright prototypical member of the medical community and therefore as much a representative of this community as a hospital such as Cleveland Clinic or an association of hospitals such as the AHA would be.

89 Concerning the third Guidebook factor, "level of recognised stature or weight among sources of expressions of opposition", the Expert Panel fails to grasp the Applicant's flat and unreasoned denial of the Independent Objector having shown any opposition of recognised stature or weight. In light of the above, the opposite is true.

90 Following its line of argument along the Guidebook factors, the Applicant notes the lack of distribution or diversity regarding NABP's comment. As the Independent Objector's case is based on one expression of opposition of substance, this argument of the Applicant is obviously inapplicable for logical reasons. In addition, the Expert Panel notes that the

Objector has shown expressions of opposition of a similar nature with regard to other .Med applications coming from the hospital sector. Admittedly, they are of no direct relevance with regard to the Application, in particular since the Applicant claims to have been purposefully spared becoming the subject of such opposition from the hospital sector. Yet, these cases do at least evidence that the basic concerns expressed in the community against the attribution of a .Med gTLD are shared in various sectors of the medical community.

91 Finally, regarding the fifth and sixth of the Guidebook factors, namely historical defence and costs, the Applicant alleges that the medical community has shown ample ability to defend itself in other contexts. This claim of the Applicant is so general and unsubstantiated, lacking any references to historical cases, that for that reason alone it has to be disregarded and cannot disprove the Expert Panel's findings.

92 Moreover, even if the Applicant were to substantiate his general assertion of the ample abilities of the medical community, the question would remain which sectors and what portion of the medical community can be ascribed to having this degree of sophistication, motivation and funding to allow to conclude that "this community is very capable of defending itself" and to draw from that conclusions as to the quality of opposition reflected by NABP's opposition comments regarding the Application.

93 The Panel's assessment and finding of the existence of substantial opposition to the Application is based to a considerable degree on the contents of the grounds for opposition voiced by NABP and on the standing, weight and representative quality of NABP as a commentator speaking for the medical community. In coming to this finding, the Panel has not excluded but included the assumption that within the medical community there are more entities of high sophistication, motivation and with the necessary funds to engage in government interaction and lobbying. The Independent Objector has provided some evidence of this by pointing out the activities of the AHA with regard to other .Med applications. In light of this, one might indeed expect that an application such as that of the Applicant could have drawn a higher number of expressions of opposition than the one comment filed by NABP. However, balancing the factors to be considered here such recognition is, in the eyes of the Expert Panel, not of such decisive weight as to result in a different assessment. Taking into consideration the substance and importance of the concerns raised by the NABP with regard to the Application and taking into account that similar comments of opposition have been raised against other .Med applications, the Expert Panel remains convinced that such expression of opposition deserves to be recognised as substantial, even though in view of the size and degree of sophistication of the medical community, a higher number of expressions of opposition could have been expected.

(v) Detriment Test

- 94 In accordance with Art. 3.5.4 Guidebook, in order to prevail the Independent Objector must prove that the Application creates a likelihood of material detriment to the rights or legitimate interests of a significant portion of the medical community. The Expert Panel finds that the Independent Objector has met this standard in the present case.
- 95 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 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".
- 96 The Expert Panel is called to apply the standard of "likelihood of material detriment" on the basis of the meaning of this broad concept, 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 reasonably to be of relevance in determining whether it has been proven or not that an application creates a likelihood of material detriment.
- 97 In the present case it therefore remains the task of the Expert Panel to determine what the standard of "likelihood of material detriment" requires the Independent Objector to prove. In common language, likelihood is understood as a "state or fact of something's being likely"⁸; probability is considered a synonym. Detriment can be defined as a "state of being harmed or damaged"⁹, whereas the adjective "material" in the given context can be understood to mean "significant, important"¹⁰. The Independent Objector stresses that the dispute resolution procedure has been put into place in order to assess and to remedy in advance any potential negative effects of the operation of a new gTLD and the Expert Panel agrees with this

⁸ See <http://oxforddictionaries.com/definition/english/likelihood>.

⁹ See <http://oxforddictionaries.com/definition/english/detriment>.

¹⁰ See <http://oxforddictionaries.com/definition/english/material>.

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.

98 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 showing of improbable potential negative effects of the operation of a new gTLD, on the other hand, must be regarded as not being sufficient.

99 The Expert Panel agrees with the Independent Objector's approach in the present case, in so far not contradicted by the Applicant, that, when conducting the detriment test, attention must be paid not only to the likelihood of detriment to the rights or legitimate interests of a significant portion of the medical community, but also the probable detriment to users and the public in general. If one follows the guidance of the Guidebook factors, material detriment can result from damage to the reputation of the community, from interference with the community's core activities, and /or from concrete or economic damage to the community or a significant portion of it. In order to assess the likelihood of such detriment, the Panel finds guidance in the Guidebook by a number of factors, including the level of certainty that alleged detrimental outcomes would occur, the dependence of the community on the DNS for its core activities, and any 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.

100 The Expert Panel notes that the language of the last-referred to Guidebook factor ("... not acting or does not intend to act in accordance with the interests of the community or of users more widely") confirms its position that potential harm to users in general is an element that a panel can take into account when assessing the issue of detriment. In the present case, in the view of the Expert Panel, there is even more reason to do so due to the importance of the rights and interests likely to be harmed concerning the medical community targeted and the public more generally making use of the applied-for gTLD. The Independent Objector has argued and the Applicant has not objected to it, that the applied-for gTLD refers to a community which belongs to those particular sectors, which the GAC has identified as targeted at a population or industry that is vulnerable to online fraud or abuse, and which according to the GAC should therefore be considered "community-based" strings. In the view of the Expert Panel, the Independent Objector has more clearly and thoroughly shown that the medical sector is one of high sensitivity and that therefore, in the event of establishing a gTLD string targeted at the medical community, the public interests of health and trustworthy medical services, that are of primary concern to national governments and international organisations, are at stake. It is therefore obvious to the Panel that such interests, in addition to the rights and interests of the medical community, weigh heavily when assessing the likelihood of detriment.

101 The Independent Objector has demonstrated to the satisfaction of the Panel that the Application raises considerable doubts as to whether the applied-for gTLD will be operated in the interest of the medical community and of users more generally. In the view of the Panel, this proves the likelihood of material detriment to the legitimate interests of a significant portion of the medical community.

102 As the Application has not been framed as a community-based gTLD, the Applicant and the Cleveland Clinic overseeing its activities, as correctly pointed out by the Independent Objector will not be committed to operate the TLD in a manner that allows the medical community to discuss and participate in the development and modification of practices for the TLD, including registration policies. The Applicant, as the Independent Objector has shown, has not framed its Application as being community-based and has not engaged in any commitment to operate the TLD for the benefit and in the interest of the medical community. Instead, as documented by a number of declarations contained in the Application, it is declared that the mission of .Med is "to perform as a new gTLD consistently with the mission and purpose of the Cleveland Clinic". It is further stated that "the Cleveland Clinic will set forth policies and practices relating to registration and use of domains in .Med" and that proposals towards creating a trusted, differentiated namespace for the exchange of medical-related information will be evaluated in its sole discretion as the steward of the .Med gTLD". The Applicant also states in its Application that "domain name registration in .Med will be limited to CC [i.e. Cleveland Clinic], its partners and other trusted parties from the medical and healthcare fields as CC so determines."

103 The Independent Objector additionally notes, which is not contradicted by the Applicant, that the Public Interest Commitments submitted by the Applicant on 6 March 2013 reiterate this policy and confirm the dominant role of the Cleveland Clinic in the operation of the .Med TLD.

104 In the view of the Expert Panel, such statements in the Application, reiterated in the Applicant's Public Interest Commitments, raise justified and considerable doubts as to whether the applied-for TLD will be operated in the interests of the medical community. There is no commitment to involve the medical community in the development and modification of policies and practices. Instead, as demonstrated by the Independent Objector, "[i]ts mission is limited to provide medical information trusted under the standards set by the Cleveland Clinic at its sole discretion."

105 In the view of the Expert Panel, the Independent Objector has successfully shown that such approach to operating the applied-for TLD is likely to result in material detriment to the medical community or a significant portion of it as well as to the general public.

106 The Panel finds the Independent Objector's concern justified that the Application creates a considerable risk of an exclusive misappropriation of a string generally linked to the medical community simply by giving extensive subjective control to a single player in the community

who is not representative of the community. This considerable risk is, in the understanding of the Panel, sufficient to establish a likelihood of detriment.

107 The Panel finds it convincing that the TLD string in question here, according to the Application to be operated as a trusted name space for the use of the Cleveland Clinic, its partners and other trusted parties from the medical and healthcare fields as determined by the Cleveland Clinic at its sole discretion, creates the considerable risk that important parts of the medical community will be excluded from obtaining domain name space in the .Med TLD, simply because they do not share the same policy or opinions as the Cleveland Clinic or do not recognise that it has any leading role. The Panel has no reason to doubt the standing of the Cleveland Clinic as one of the most respectable and respected entities in the healthcare sector, above all in the United States. It also has no reason to doubt the good intentions of the Cleveland Clinic to exercise its intended stewardship of the .Med namespace in an impartial and even way. But the Panel notes that the Cleveland Clinic, as has been demonstrated by the Independent Objector, is not an institution representative of the entire, wider medical community. The intended structure and operation of the .Med namespace by this institution therefore raises, for this structural reason alone, the justified and considerable doubt that significant portions of the medical community will be excluded and will have no possibility to participate in the elaboration and enforcement of policies necessary for the operation of the .Med TLD.

108 The Expert Panel is satisfied that the Independent Objector has successfully shown that the indicated considerable risks of operating the .Med namespace by a single member of the medical community without the participation of the wider community results in likely detriment to significant portions of the community in the form of loss of reputation and even economic harm to members of the community. It cannot be reasonably denied that the exclusion of members of the medical community from the .Med namespace, which is intended to be operated as a trusted space targeted at that community, is likely to cause harm to the reputation of those excluded, loss of the benefits of competition, and ultimately also economic damages.

109 While competition is an issue controversially discussed within the new g TLD setting, it is, in the eyes of the Panel, correctly referred to by the Independent Objector as another relevant element of likely detriment to the medical community since the promotion of competition is, after all, one of the declared primary objectives of ICANN's g TLD programme, as can be gathered from ICANN's Final Report on the Introduction of New Generic Top-Level Domains¹¹ issued in August 2007. The intended operation of the namespace on the basis of registration policies developed solely in the discretion of the Cleveland Clinic indeed carries

¹¹ Generic Names Supporting Organisation Final Report on the Introduction of New Generic Top-Level Domains, 8 August 2007, Principle C (<http://gnso.icann.org/en/issues/new-gtlds/pdp-dec05-fr-prata-08aug07.htm#Toc43798015t>).

the likely risk of not allowing members of the medical community to participate which do not agree with the Cleveland Clinic's views, and the Panel agrees with the Independent Objector that even within sensitive sectors such as the health sector concerned here which require special safeguards, the general objectives of ICANN's programme, including the promotion of competition in the provision of registration services, and adding to consumer choices, still need to be adhered to.

- 110 The Expert Panel agrees with the Independent Objector that the intended structure and operation of the .Med namespace by the Applicant carries with it the more general but thereby no less real considerable risk of fostering an artificial link between the medical community, as it will be perceived by the average internet user through presence and content in the .Med name space, and the Cleveland Clinic, as the overseer of the string's operators, with consequential detrimental effects on competition in the provision of registry services, on consumer choice, market differentiation and on geographical and service-provider diversity. These detrimental effects concern the wider medical community as much as members of the general public seeking health-related information.
- 111 While the Independent Objector has not presented direct evidence on such a risk, the Expert Panel is satisfied that the existence of such a risk cannot be reasonably denied. The Panel is therefore convinced that this risk is also to be considered as representing a likely detriment caused by the Application to the medical community and the general public.
- 112 The Applicant denies that its Application creates any likelihood of detriment to the medical community by essentially using four arguments. In the first place, guided by and relying on the factors listed in the Guidebook, the Applicant argues that the Independent Objector has failed to carry his burden of proving a likelihood of material detriment to a significant portion of the community. As a second argument, the Applicant claims that its intended operation of the .Med namespace, contrary to the Independent Objector's submission, will be in the interest of the medical community and of users more generally, and will at any rate have beneficial effects for the general internet user in comparison to the present situation. Thirdly, the Applicant expresses the view that a Community Objection is not the proper forum or venue for the Independent Objector to voice his opinion as to whether the .Med TLD theoretically could have a "better" or "more global" or "less single entity" registration operator. And finally, denying that its operation of the .Med TLD will result in the exclusion of potential registrants, the Applicant argues that the model of registries imposing allocation guidelines which will preclude certain registrants is a business model accepted by ICANN, the GAC and the Guidebook.
- 113 However, in the view of the Expert Panel, none of these arguments give reason to change the above findings.
- 114 The Applicant introduces its first line of argument relying on the individual Guidebook factors by principally denying that its Application creates any risk of misappropriation of the

.Med string by a single organisation not representative of the medical community. It criticises the Independent Objector's concern that its operation of the .Med TLD is likely to exclude potential registrants which are part of the medical community as unsupported, unexplained and completely speculative, as claims which undercut any certainty of detriment.

- 115 The Expert Panel disagrees with this critique of the Independent Objector's showing and cannot accept it as valid. The Objector does not have to show certainty of detriment but only its likelihood. Likelihood comes in degrees and is not defined in the Guidebook.
- 116 It is submitted here that the purpose of the Community Objection is to protect communities from harm that might occur by way of attributing domain space to be associated with them to a specific applicant. It is therefore reasonable to assume that an objector is not required to prove more than a low level of likelihood of the detriment being expected to occur, as long as it still is an actual likelihood and not just an improbability. Particularly in cases where interests of public importance, such as providing the general consumer with reliable and competitive health-related information, is at stake, the Panel feels that proof of even a low degree of likelihood of detriment must suffice. The Applicant's critique of the Independent Objector's risk assessment describes it as speculation. In the view of the Panel, however, the risks invoked by the Independent Objector cannot be reasonably denied to exist.
- 117 The Independent Objector has shown by way of detailed analysis of the text of the Application that the Applicant intends to have the Cleveland Clinic, in its sole discretion, take control of the policies and practices of the operation of the .Med TLD. There will be no involvement of the wider medical community in this and, as stated, the domain name registrations will be limited to Cleveland Clinic, its partners and other trusted parties as Cleveland Clinic so determines. As already explained above, the Panel thinks that this evidence supports the Independent Objector's risk assessment and provides sufficient proof of the intentions of the Applicant who, rather than acting in accordance with the interests of the community, shows himself determined to act in line with the policies of the Cleveland Clinic and under its sole discretion only. As also shown above, this evidence provides sufficient support for the concern that, in this situation, potential registrants who are members of the wider medical community are likely to be excluded and that such exclusion is likely to result in detriment to a significant portion of the community in the form of reputational damage, reduced competition and economic harm, and ultimately detriment to the general internet user seeking health-related information.
- 118 The Independent Objector has convinced the Panel that these are risks rooted in the structure of the establishment and administration of the .Med string as proposed by the Applicant and he has sufficiently shown the likelihood of such detriments by pointing them out and explaining their origin. The Guidebook standards, including the standard of likelihood of detriment, are broad in nature, and it would not be in line with such broad standards, as the Applicant demands, to ask the Independent Objector to provide evidence on specific aspects of attitude or policies of the Applicant, which would additionally explain why the risks

indicated are likely to be realised. The Panel is also satisfied that any of the risks, if they are realised, are likely to affect a significant and not just a negligible proportion of the medical community. In light of the general nature of the detriments shown by the Independent Objector as being likely to occur, i.e. possible exclusion of registrants and negative effects on competition, it would, in the Panel's view, be unreasonable and an exaggeration to ask the Independent Objector for the submission of any more detailed evidence as to "who or what portion of the community would face such risks".

119 The Applicant's additional argument presented in this context, namely that the Independent Objector fails to claim any other form of material detriment to the community than the exclusion from the .Med TLD of a significant part of the community is, as already explained, obviously wrong. The Independent Objector has indeed shown that the Application also creates the likelihood of a detriment in the form of the risk of negatively affecting consumers' choice and competition for health-related information on the internet.

120 The Applicant denounces the Independent Objector's failure to adequately address the Guidebook factor of "nature and extent of concrete or economic damage". This commentary misses the point because the Objector, as long as he adequately deals with the likelihood of material detriment, is not required to deal with the factor of economic damage in the way imputed by the Applicant. Furthermore, neither the term "material detriment" set out in Art 3.5.4 of the Guidebook nor the illustrative guiding factor of the "nature and extent of concrete or economic damage" suggest that the harm to be demonstrated has to be economic damage of any kind. Instead, both terms lead to the very clear conclusion that the detriment to be shown may be of any nature whatsoever, including loss of reputation, as long as it is material. In addition, the Panel is satisfied that demonstrating damage to reputation sufficiently establishes the likelihood of economic harm.

121 The Applicant furthermore finds fault with the Independent Objector not having adequately addressed the factor of dependence of the community for its core activities. It claims that much of the physical practice of medicine takes place outside of the DNS and that the medical community communicates via other means, resulting in a lack of dependence on the DNS for the community's core activities. This argument misses the point as an objector does not have to specifically address any factors but only the issue of likelihood of material detriment to a significant proportion of the community, which the Independent Objector has done in the present case. As to the merits, the Applicant's argument lacks credibility. It is evident and common knowledge that the DNS has developed into a communication system of primary importance to the medical community. As the issue of public health is increasingly taking on international dimensions, requiring global cooperation of governments in the fight against rapidly spreading diseases, it has become increasingly important for the medical community to be part of the speedy global exchange of information via the internet. This includes access to the .Med TLD as a trusted webspace. That information within the medical community is also exchanged via other means, including written texts in paper form, conferences, physician appointments, meetings etc. cannot be denied. But this fact cannot

distract from recognising the dependence of the medical community on the .Med TLD as a key information and communication tool targeted at the medical community. The Panel considers this argument of Applicant as simply unconvincing.

122 The Applicant also objects to the Independent Objector's alleged lack of dealing with the factor of "interference with the community's core activities". Here, the same applies as to the preceding point of critique. The Independent Objector is under no requirement to address this particular point and the Applicant has not shown that the detriments demonstrated by the Independent Objector likely to occur would not result in any interference in some of the core activities of the medical community, including the practice of medicine, research, and development of pharma products and medical technologies.

123 The Applicant claims that the Independent Objector completely fails to detail the nature and quantify the extent of the alleged damage to the reputation of the community, referring to the corresponding factor of the Guidebook. Again, according to the Panel's interpretation of the Guidebook standards, an objector is under no specific requirement to do so as long as he demonstrates to the satisfaction of the panel the existence of the likelihood of material damage. In the view of the Panel, the Independent Objector has done so successfully by demonstrating that the Application creates an important risk of an exclusive misappropriation of a domain space by a single organisation which is not representative of the wider medical community, a situation which is likely to result in the exclusion of a significant portion of the members of the wider medical community from being registered. The Independent Objector has also shown successfully that such exclusion is likely to result in damage to the reputation of those members of the medical community, also resulting in consequential economic harm. These detriments are of such a general nature and obvious pervasiveness in their likely effects on the medical community that, in the Panel's view, sufficient evidence of likely detriment to a significant portion of the medical community has been provided. There is no need for the Independent Objector to provide additional evidence and further details regarding the nature and even quantity of the alleged damage to the reputation of the medical community.

124 Addressing the issue of reputational damage, the Applicant alleges that, if at all, only a very small portion of the medical community might be negatively affected. The Expert Panel, however, sees no reason why it should be assumed that the loss in reputation to which the Independent Objector alludes, should affect only a small part of the community; the Applicant has not provided any support for this allegation. The further argument of the Applicant, according to which it appears logically excluded that there could be any significant damage to the community (because, as the Applicant argues, either the .Med TLD rises to a high level of acceptance, meaning that all concerns raised with regard to its operation have been met and exceeded, versus it does not achieve that level of acceptance, meaning the absence of any person or entity within the TLD will have little impact on its reputation of that entity) is based on an untenable oversimplification of the issue at hand. The level of acceptance by which the .Med TLD may be operated is just as difficult to measure precisely as the loss of reputation for a member of the medical community being precluded

from admission to the DNS. The case stated by the Applicant bears no relation to the realities to be expected. The Expert Panel cannot therefore find any convincing value in this argument presented by the Applicant.

125 Referring to the sixth of the factors proposed by the Guidebook to be considered, namely that the Applicant has not proposed or does not institute effective security protection for user interests, the Applicant accuses the Independent Objector of conveniently ignoring that it has, via the Cleveland Clinic, indeed proposed and intends to institute effective security protection for user interests. In particular, the Applicant presents that it has addressed NABP's concerns to subject the TLD "to the more rigid contractual requirements to ensure that they protect the best interest of the community", via the Applicant's Public Interest Commitments.

126 The Panel, however, cannot see that the Applicant's Public Interest Commitments do significantly lower the risks arising out of the exclusive appropriation of a string generally related to the medical community by a single organisation which does not stand for and is not a representative of that community. It should firstly be noted that the Applicant has published its PIC under the express reserve to amend, modify, withdraw and otherwise change them in its sole discretion at any time due to any material activity or material change in the substance of certain aspects of Specification 11¹², e.g. modification of Specification 11 by the ICANN Board. This caveat raises the question to what extent actual reliance can be placed on Applicant's commitments.

127 More important, however, is that the Applicant continues in its PIC to emphasise the exclusive control of the Cleveland Clinic over the choice of registry, control and expelling measures for the string. The name space is to be provided "consistent with the Cleveland Clinic's mission of integrating clinical and hospital care with research and education in a digital world". The method of domain name allocation will be controlled "under guidelines, rules and criteria as set forth by the Cleveland Clinic in its sole discretion", and requests for proposal "will be reviewed by the Cleveland Clinic in its sole discretion". Additional restrictions, policies or practices "may be set forth by the Cleveland Clinic, in its sole discretion, during initial operations of the .Med gTLD". Instead of providing for participation of the wider medical community in the development and modification of policies and practices for the gTLD, the exclusive control of Cleveland Clinic is therefore maintained and even reinforced. In the view of the Panel, the Applicant's PIC cannot therefore serve as counter-evidence invalidating the Independent Objector having shown that there are considerable and justified concerns that the Applicant is likely not to act in accordance with the interests of the medical community and of users more generally.

128 The Applicant more generally argues that the participation of Cleveland Clinic in the .Med gTLD is beneficial. It asserts that its goal is to act in the interests of the community and of

¹² <https://gtldresult.icann.org/applicationstatus/applicationdetails:downloadpicposting/216?t:ac=216>

users in general, and that it realises this goal by engaging the Cleveland Clinic to provide policy and oversight for the .Med gTLD. It declares that the educational goals of the Cleveland Clinic are "very much consistent with the goals of providing a trusted source of medical information for the medical community to provide for users more widely" and it emphasises the charitable status and goals of the Cleveland Clinic which, according to the Applicant, do not allow it to operate in a manner to solely serve the Cleveland Clinic, but require it to provide benefit to the public, encompassing overall public health, thereby making the Applicant the ideal operator of the .Med gTLD.

- 129 In the opinion of the Panel, this argument does not provide sufficient assurances that the detriments shown by the Independent Objector to likely result from the Cleveland Clinic's sole control of the .Med namespace without any involvement of the wider medical community will not occur. The principles and goals pursued by the Cleveland Clinic may indeed be aligned with public health goals and make it a suitable operator of a string providing a trusted source of medical information to the medical community and to users more widely. The Panel has no reason to doubt this. But the risks connected with the operation of a string as sensitive as the .Med TDL by a sole operator not representative of the community remain nevertheless the same. According to the Application, the wider global medical community still remains excluded from the operation of the string and there is no guarantee, even though Cleveland Clinic may pursue goals consistent with the goals of overall public health and public benefit, that members of the medical community will not be excluded from registration because they do not accept Cleveland Clinic's assumed leadership role in determining policies and practices or do not agree with the Clinic's policies and practices or certain aspects of them. In the view of the Panel, therefore, the likelihood of detriment continues to exist.
- 130 The Expert Panel is finally unable to find any merit in the Applicant's argument that its business model of a registry imposing allocation guidelines which will preclude certain registrants is allegedly accepted by ICANN, the GAC and the Guidebook and that the Independent Objector should not be allowed to use a Community Objection to voice his opinion as to whether the .Med theoretically could have a "better" or "more global" or "less single entity" registry operator.
- 131 The Applicant's argument about the allegedly accepted "business model" of registries operating under guidelines precluding certain registrants, be it under the Guidebook, by ICANN or by GAC remains, in the eyes of the of Expert Panel, largely unsubstantiated and unsupported. In particular, the allegation lacks any detail as to which "certain registrants" may be precluded under such model or not. The Panel cannot recognise the existence of any accepted and defined "business model" which would allow the imposition of allocation guidelines precluding whatever sort of "certain registrants" at the sole discretion of the registry operator. Moreover, the Applicant does not show how such alleged "business model" relates to the present case where there is considerable and justified concern that, rather than "certain registrants", members of the medical community will be precluded from registering

in the .Med TLD, as it is foreseen that the power of definition of who may or may not obtain space within the TLD is placed solely into the hands of Cleveland Clinic, without any possibility of the wider medical community being represented and taking part in the shaping of policies and practices for operating the space which is so clearly targeted at it.

- 132 Also without substance is the Applicant's claim that the Independent Objector misuses the Community Objection to voice an opinion on a theoretically suitable applicant.
- 133 The Expert Panel therefore concludes that the Independent Objector has met his burden of proof with regard to the Guidebook standard of a likelihood of detriment to a significant portion of the medical community.

VIII.
Decision

134 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, Medistry LLC 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