

**INTERNATIONAL CENTRE FOR DISPUTE RESOLUTION**

**New gTLD String Confusion Panel**

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**Re: 50 504 T 234 13**

**CHARLESTON ROAD REGISTRY INC., OBJECTOR**

**and**

**DERCars, LLC, APPLICANT**

**String: <.CARS >**

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**EXPERT DETERMINATION**

**The Parties**

The Objector is Charleston Road Registry Inc., 1600 Amphitheater Parkway, Mountain View, CA 94043, email: [tas-contact12@google.com](mailto:tas-contact12@google.com). It is a newly formed American corporation which is a subsidiary of Google Inc. The Objector is represented by Brian Winterfeldt , Katten Muchin Rosenman LLP, 2900 K Street NW, North Tower, Suite 200, Washington , DC 20007-5118, [brian.winterfeldt@kattenlaw.com](mailto:brian.winterfeldt@kattenlaw.com).

The Applicant is DERCars, LLC, 150 Granby Street, Norfolk VA 23510, email: [gfridelltd@dominionenterprises.com](mailto:gfridelltd@dominionenterprises.com). It is a newly formed subsidiary of Dominion Enterprises and is incorporated under the laws of the Commonwealth of Virginia. The Applicant is represented by David Weslow, WILEY REIN LLP, 1776 K Street, NW, Washington, DC 20006, email: [dweslow@wileyrein.com](mailto:dweslow@wileyrein.com).

### **The New gTLD String In Issue**

The new gTLD string applied for and objected to is: <.CARS>

### **The Prevailing Party**

The Objector has prevailed and the Objection is sustained.

### **The New gTLD String Confusion Process**

The Internet Corporation for Assigned Names and Numbers (“ICANN”) prepared a gTLD Applicant Guidebook (the “Guidebook” or “Applicant Guidebook”) for use in the New gTLD Program for the creation and delegation of new generic top level domains (“gTLD”). Module 3 of the Applicant Guidebook contains Objection Procedures which set out grounds on which objections may be made in respect of applications for a new gTLD. Attachment to Module 3 is another document entitled the New gTLD Dispute Resolution Procedure also dated 2012-06-04 which sets out the mechanisms and procedures for a timely and efficient resolution of objections to applied for new gTLDs. Article 1(b) of the Procedure states:

“The new gTLD program includes a dispute resolution procedure, pursuant to which disputes between a person or entity who applies for a new gTLD and a person or entity who objects to that gTLD are resolved in accordance with this New gTLD Dispute Resolution Procedure (the Procedure)”.

As expressed in the Guidebook and the Procedure, there are four (4) grounds of objection to an application for registration of a new gTLD. The first of these grounds is referred to and defined in the Procedure as a String Confusion Objection. Article 3(a) of the Procedure mandates that “String Confusion Objections shall be administered by the International Centre for Dispute Resolution [the ‘ICDR’]”. The other three types or

grounds of objection are referred to other dispute organizations for administration and determination pursuant to different procedures. In accordance with the mandate in Article 3(a) of the Procedure, the ICDR developed its Supplementary Procedures for String Confusion Objections dated 10 January 2012 (the “ICDR Rules” or “Rules”) which also govern this expert determination, though subject to the Procedure in the event of a discrepancy between the two.

In accordance with the Procedure and the ICDR Rules, the ICDR has received and administered the Objection of Charleston and the Response of DERCars in this particular String Confusion Objection and has duly appointed the Expert herein to make this Expert Determination as required under the Procedure and ICDR Rules.

The Guidebook, Module 3, defines the ground of a String Confusion Objection at Article 3.2.1 as follows:

**“String Confusion Objection** – The applied-for gTLD string is confusingly similar to an existing TLD or to another applied-for gTLD string in the same round of applications”.

The applicable dispute resolution principles and standards are also addressed in the Guidebook, Module 3, in Articles 3.5 and 3.5.1 which for ease of reference are reproduced in full as follows:

*3.5 Dispute Resolution Principles  
(Standards)*

Each panel will use appropriate general principles (standards) to evaluate the merits of each objection. The principles for adjudication on each type of objection are specified in the paragraphs that follow. The panel may also refer to other relevant rules of international law in connection with the standards.

The objector bears the burden of proof in each case. The principles outlined below are subject to evolution based on ongoing consultation with DRSPs, legal experts,

and the public.

### 3.5.1 String Confusion Objection

A DRSP panel hearing a string confusion objection will consider whether the applied-for gTLD string is likely to result in string confusion. *String confusion exists where a string so nearly resembles another that it is likely to deceive or cause confusion. For a likelihood of confusion to exist, it must be probable, not merely possible that confusion will arise in the mind of the average, reasonable Internet user. Mere association, in the sense that the string brings another string to mind, is insufficient to find a likelihood of confusion.* [emphasis added].

A String Confusion Objection is also described in Article 2(e)(i) of the Procedure and parrots the language of the Guidebook, Module 3, as follows:

**“(i) ‘String Confusion Objection’ refers to the objection that the string comprising the potential gTLD is confusingly similar to an existing top-level domain or another string applied for in the same round of applications.”**

It is noteworthy that the Guidebook, Module 3 and the Procedure make no comment on and provide no guidance with respect to the issue raised in this Objection as to whether the singular and plural forms of a generic word or term in pending applications may or may not be permissible gTLDs or may or may not provide a legitimate ground for objection in the context of the String Confusion Objection.

It is within this framework established by ICANN and the ICDR that the String Confusion Objection in this case is to be determined.

### **Procedural History of this Case**

As noted above, the Applicant DERCars applied for the gTLD <.CARS>, which application was delivered to ICANN and originally posted on 13 June 2012 as Application ID 1-909-45636 (see Objection, Annex 3). The purpose and mission of this new gTLD was also stated in its application at paragraph 18.1 as follows:

“DERCars, LLC (“DERCars”), a wholly owned subsidiary of Dominion Enterprises (“Dominion”), has filed this application for a .CARS gTLD with the intention of bringing to market a trusted, hierarchical, and intuitive namespace for consumers that will contain listings of motor vehicles for sale, as well as a repository of goods and services related to cars”.

The Applicant then described in greater detail the proposed purpose, benefits and services for meeting the business needs of its parent, Dominion Enterprises, a Virginia general partnership, and its clients, and thereafter, in a subsequent stage of development, of non-clients.

The Objector Charleston has itself applied for the new gTLD <.CAR> by way of application also originally posted on 13 June 2012, bearing Application ID 1-1683-84431 (see Objection, Annex 2). The stated purpose or mission of the proposed gTLD <.CAR> was described, in part, in the paragraph 18.a of the Objectors application as follows:

“The mission of this gTLD, .car, is to provide a dedicated domain space in which registrants can enact second-level domains that offer content related to cars, including the sale, purchase, rental, financing, servicing, repair, insurance and/or management of cars, as well as automobile industry-related information, such as new product development and trends(e.g. alternative fuel sources).”

It was also stated that this gTLD would also meet the business needs of Charleston and its parent Google Inc. to help make information universally accessible by extending the utility of the DNS while enhancing the performance, security and stability of the Internet for users worldwide.

On March 13, 2013, Charleston, by its counsel, delivered the String Confusion Objection Form to the ICDR in accordance with the Guidebook and the Procedures objecting to the application for the gTLD string <.CARS> which had been filed by DERCars. This Objection included a 10 page written submission, with 5 Annexes

thereto. Following an administrative review by the ICDR, the Objection was registered for processing as confirmed by letter dated April 3, 2013 from the ICDR to Counsel for the Objector and to the Applicant DERCars.

On May 23, 2013, DERCars, by its counsel, delivered to the ICDR its Response to the Objection dated May 15, 2013 consisting of an 18 page written submission, together with 5 Annexes, including legal authorities, totaling 397 pages.

By letter dated May 23, 2013 to counsel for both parties, the ICDR confirmed receipt of the Response to the Objection and that the Response complied with Article 11 of the Procedure.

Thereafter, by letter dated June 13, 2013, the ICDR confirmed to counsel for the parties that John A.M. Judge had been appointed pursuant to Article 13 of the Procedure as the Expert to determine the Objection and requested challenges, if any, by June 18, 2013, together with payment of the requisite advance on costs by June 24, 2013. There being no challenges to his appointment, Mr. John A.M. Judge was appointed as the Expert.

Following payment of the required advances in respect of costs, Mr. Judge was instructed on June 27 to proceed with the substantive review materials as filed and with the determination of the Objection.

On 3 July 2013, counsel for the Objector, in response to a request from Mr. Judge, delivered by email copies of the legal cases and authorities relied upon by the Objector in support of its Objection.

#### **Basis for Objector's Standing to Object Based on String Confusion**

It is accepted by the Applicant DERCars that Charleston has standing to bring this proceeding. Charleston is a gTLD applicant for <.CAR> in the same round of

applications as DERCars for <.CARS> and therefore has standing in accordance with Article 3.2.2 of the Guidebook to bring this Objection.

### **Parties' Contentions**

#### **The Objector Charleston:**

In support of its Objection that the gTLD string <.CARS> so nearly resembles <.CAR> that it is likely to deceive or cause confusion in the mind of an average reasonable Internet user, Charleston relies on United States judicial authorities, mainly in trademark cases, and arbitration panel decisions under the Uniform Domain Name Dispute Resolution Policy ("UDRP") administered by the World Intellectual Property Organization ("WIPO") and National Arbitration Forum ("NAF") as being persuasive for this novel objection procedure. In particular, Charleston submits and relies upon the following factors to support a finding of confusion.

**The Strings are virtually identical in appearance.** It is submitted that the words .CAR and .CARS are identical but for the mere addition of the letter "s" which results in the pluralization of the root word. The Objector cites numerous trademark cases as well as WIPO and NAF decisions under the UDRP to support its position that there is confusing similarity between the singular and plural of domain names and marks. (see *Nabisco, Inc. v Warner Lambert Co.*, 220 F.3d 43, 46, (2d Cir. 2000); *In Re Pix of America, Inc.* 225 USPQ 691(TTAB1985); *In Re Curtice-Burns, Inc.*, 231 USPQ 990 (TTAB); *In re Pellerin Milnor Corp.*, 221 USPQ 558 (TTAB) 1983; *Mattel Inc. v Magic 8 Ball Factory*, WIPO Case No D2013-0058; *Lego Juris A/S v. Frederik Soleimani*, WIPO D 2012-2133; *Barnesandnoble.com LLC v Your One Stop Web Shop*, NAF Claim No. NFA 670171, amongst others). Using ICANN's String Similarity

Assessment Tool to compare .CAR versus .CARS, it is submitted by Charleston that these two strings share a 72% visual similarity. Therefore, it is said that it is probable, not merely possible that reasonable internet users and consumers will be confused when viewing .CAR versus .CARS.

**The Strings are virtually identical in phonetic sound.** It is further submitted that the word “CARS”, pronounced “kahrs”, is essentially and phonetically equivalent to the word “CAR”, pronounced “kahr”. They are both one syllable with the same primary accent on the initial “CA”, pronounced “kah”. It is submitted that the pluralization by the addition of the letter “s” results in a high degree of confusing similarity in sound. It is also submitted that similarity of sound is particularly important when goods are of a type frequently purchased by verbal order, such as automobiles and auto parts and related services advertised over various media and purchased over the Internet.

**The Strings are virtually identical in meaning.** Charleston submits that the commercial meaning of the disputed terms is also a material factor and here there is no material difference between the .CAR and .CARS gTLDs. Both the Applicant and the Objector intend to use their respective gTLDs for the same or similar content which is automobile related content. The commercial meaning remains the same whether the singular or the plural word is used. Again the Objector references numerous trade-mark and domain name cases to support its submission that the commercial meaning of the terms remain confusingly similar where the letter “s” is added to pluralize a word. For example, in *Blue Bell Creameries L.P. v Private Whois/ Telecom Tech Corp.*, WIPO Case No. D2011-0316, the singular “Creamery” was used in the domain name while the



plural was used in the trademarks and the Tribunal there concluded that “the two would be indistinguishable in the recall of the average Internet user”.

**The Strings so resemble each other that they are likely to deceive or cause confusion.** By reason of the fact that the two strings are nearly identical in appearance, phonetic pronunciation and commercial meaning, it is submitted that the .CARS gTLD is therefore likely to deceive or cause confusion in the minds of the average reasonable Internet user.

**Additional Considerations.** Finally, the Objector raises two other factors which it says support a finding of likely confusion regarding the .CAR and .CARS gTLDs. First, it points to an ICANN practice in prior gTLD applications not to allow certain applications by Name.Space Inc. for both singular and plural names such as .FILM and .FILMS. None of these applications by Name.Space Inc. were allowed save one, .MUSEUM. Secondly, it is submitted that certain non-English speaking users, such as Koreans and French, will be particularly susceptible to the confusion created by the addition of “s” in the .CARS TLD. In languages such as Korean and French, it is said that the plural ending is largely “irrelevant”, thereby suggesting an increased likelihood of confusion if both .CAR and .CARS TLDs are delegated.

**The Applicant DERCars:**

DERCars disputes the Objection of Charleston as lacking merit due to the absence of any specific arguments under the law as to why the .CARS gTLD string is likely to result in confusion and also the reliance by Charleston solely on the pluralization of the word to suggest that confusion can be automatically assumed. DERCars asserts that

such an assumption is ill-founded and at odds with global norms for assessing consumer confusion and also at odds with the new reality that there will be in fact new gTLDs in both the singular and plural forms of words. The Applicant notes that a number of pending new gTLDs are proceeding in both singular and plural forms and are not subject to string confusion objections, such as .Auto and .Autos, .Photo and .Photos and Google's own application for .NEW versus many other applications for .NEWS.

The Applicant rightly notes that the burden of proof is on Charleston to establish string confusion on a balance of probabilities under Article 3.5.1 of the Guidebook, and specifically that the string <.CARS> so nearly resembles <.CAR> that it is likely to deceive or to cause confusion. DERCars characterizes the core of Charleston's argument as being that the plural form of a word is automatically confusing with the singular form. Such an argument is said to fail to meet the required test for three basic reasons which are fully developed in its Response. To a considerable extent these reasons overlap and can be summarized as follows.

**Confusion is not automatic and cannot be assumed when comparing the singular and the plural forms.** Such an assumption, the Applicant submits, is contrary to the confusion analysis applied by Courts, by UDRP Panels in respect of domain names and by ICANN's own String Similarity Panel and Board of Directors. DERCars notes that Charleston's reliance on the three factors of "sight, sound and meaning" is selective and incomplete as a reference to the nine factors used by courts, usually in a trademark context, for the confusion analysis. When the proper factors are taken into account, including context, it is clear, according to DERCars, that similar, even identical, marks may not create confusion. The UDRP cases relied upon by Charleston, such as *Mattel*

*Inc. v. Magic 8 Ball Factory*, WIPO Case D2013-0058 and *Barnesandnoble.com LLC v Your One Stop Web Shop* NAF. Claim No. FA 670171, are clearly distinguishable as they involved famous registered trademarks. Here, completely generic terms are being compared. It is submitted that consumers are much more cautious and discerning with respect to generic terms.

The Applicant also noted that ICANN's expert String Similarity Panel did *not* include both singular and plural forms of the same applied for string in the same contention set, indicating that the plural form alone did not create a possibility of user confusion. It also asserted that at the April 2013 meeting in Beijing between the ICANN Board and the Government Advisory Committee ("GAC"), ICANN confirmed that it did not believe that the singular and plural forms created "visual confusion". DER Cars also noted that certain singular and plural versions of strings were, in fact, proceeding without objections being filed, noting Charleston's own application for .NEW while seven other applications for .NEWS were pending. These particular arguments will be reviewed in more detail in the analysis.

Finally, in raising the specter of an estoppel, DERCars noted that Charleston itself has applied for other visually and phonetically similar strings such as .DOT, .DOC and .DOGS as well as .LLC and .LLP which would of necessity fail if Charleston's argument were accepted.

**Consumers are not likely to confuse the domains .CAR and .CARS when applying accepted tenets for likelihood of confusion analysis, particularly in the proper context.** Under this heading, DERCars consolidates a number of disparate and in part inconsistent submissions. First, it emphasizes that a new gTLD cannot be considered in

isolation but only in context with the entire name, the second level domain name.

Indeed, based on trademark cases involving domain names, it is said that the top level domains are not source indicators alone as it is the second level domain on which the consumer will focus (relying on *Nissan Motor Co. v. Nissan Computer Corp*, 204 F.R.D. 460, 466-467 in which the court there noted that “any permutations one may derive from adding a top-level domain to the second level domain ‘Nissan’ are indistinguishable as a matter of law”. The generic strings .CAR and .CARS cannot act as source identifiers. Indeed it is submitted that whether a term is “strong” or “weak” is significant for the confusion analysis, as consumers are less likely to confuse weak terms. Descriptive or commonly used terms would be weak, it being suggested that the word “car” clearly falls into this category. Given the generic terms in issue, they are “weak” and therefore are more readily or easily distinguished by discerning consumers.

In terms of a broader context, it is submitted by the Applicant that broader marketing channels and marketplace conditions should be considered, in particular the distinguishable service offerings of Charleston and DERCars and their parent companies. Even identical marks can co-exist without a likelihood of consumer confusion where they may be associated with differentiated and distinct products and services (Response at p. 9-10), which is the case when comparing the services of the parent corporations, Google and Dominion. It is noted, for example, identical terms already co-exist in [www.cars.com](http://www.cars.com), [www.cars.co](http://www.cars.co), [www.car.com](http://www.car.com), [www.car.co](http://www.car.co) and [www.car.ca](http://www.car.ca), all without confusion. These illustrate, it is submitted, that the presumption of confusion with singular and plural forms is therefore untenable.

However, it would appear that in these instances the top level domain differentiates these strings, a result inconsistent with the comments of the court in the Nissan case. In

any event, it is further noted by the Applicant (Response at p. 13) that even if a gTld is viewed as a source identifier, consumers in fact focus on the first portion of a delegated name. Therefore, if there is any confusion at the second level domain name, it is submitted that such confusion should be dealt with in the UDRP process and that any such confusion at the second level should not be attributed to the top-level domain. (Response at p. 13).

**The Likelihood of Confusion is Even Less Probable When Considering How “Average, Reasonable Internet Users” Interact Online.** Based on a number of court decisions, it is argued that consumers no longer form expectations based on domain names alone, but rather from the Internet websites in their entirety. Reliance is placed on various court decisions in which some U.S. courts have held that “consumers don’t form any firm expectations about the sponsorship of a website until they’ve seen the landing page – if then” (*Toyota Motor Sales, U.S.A. Inc. v Tabari*, 610 F.3d 1171 at 1179 (9<sup>th</sup> Cir.2010) or that similar domain names may cause a “diversion, not a likelihood of confusion”. For example, it is argued that if a consumer accidentally typed AUCTION.CARS instead of AUCTION.CAR, they would more than likely realize the error upon reaching the landing page. Therefore, rather than presume confusion at the top level domain, any confusion should be determined on a case by case basis, based on how the second level domain is actually used with the issue to be determined in the UDRP process.

**Response to “Additional Considerations” Relied Upon by Charleston: No *Per Se* Rule for Pluralizations.** Firstly, in response to specific arguments made by Charleston that prior applicant rounds for certain gTLDs gave rise to some precedent to the effect

that the pluralization of a word gave rise to objectionable confusion, the Applicant reviewed the materials and submitted that there simply was no precedent created by certain specific name applications. Secondly, in response to the Charleston submission regarding the difficulties created for non-English speaking users by plural terms, the Applicant disputed the evidence relied upon by Charleston and more importantly disputed as erroneous the conclusions which Charleston drew with respect to the impact of plural terms on the recognition of gTLDs. Of interest was the Applicant's submission that the number of non-English websites exceeds the number of English websites and that it is in fact unclear if non-English speaking users would even encounter the .CAR and .CARS gTLDs and in what context.

DERCars therefore concluded that it was not likely and certainly not probable that there would be confusion in the mind of the average, reasonable Internet user.

#### **ISSUE FOR DETERMINATION**

The issue for expert determination in this matter can be simply stated as follows:

Does the gTLD <.CARS> so nearly resemble <.CAR> that in the mind of the average reasonable Internet user, is it likely on a balance of probabilities to deceive or to cause confusion, or in other words is <.CARS> confusingly similar to <.CAR>?

Subsumed in this statement of the issue is the broader policy issue raised by these two applied for gTLDs and which permeates the submissions of both parties as to whether the pluralization of a generic term is likely to deceive or to cause confusion. This will be addressed in this expert determination for the specific question raised by this

Objection to the applied-for string, but this expert determination is not intended as a broader policy discussion or determination of this particular issue which is properly for consideration and determination by the ICANN Board.

## **DISCUSSION, ANALYSIS AND FINDINGS**

**Introduction and Elements to be Established.** The issue for determination as stated above raises four elements for consideration and comment, though in this case two are not in dispute. First is whether the string <.CARS> “so nearly resembles” <.CAR>. There is, and can be, no serious issue on this element. Indeed, the Applicant has, in part, argued that even if they were identical, the use of identical terms can be differentiated. It is plain and obvious on a considered review that the two strings in issue do in fact closely or “nearly resemble” each other. As for objective evidence, the ICANN String Similarity Assessment Tool comparative analysis of car vs. cars at Annex 4 of the Objection Submission generated a rating of 72%, which provides objective evidence that on a balance of probabilities the two strings “nearly resemble” one another. The second element is simply the burden of proof which is also not in dispute. Both parties agree, rightly, that the burden is on the Objector to prove the confusion elements on a balance of probabilities as is expressly required under Articles 3.5 and 3.5.5 of the Guidebook. No further discussion or comment is required on the articulation of the requisite standard, though the application of this standard will be discussed in the context of the remaining confusion elements. Third is the element on the standard of assessment of confusion, being the “the mind of the average, reasonable Internet user”. Both parties have made short submissions on this element which warrant brief review and comment. The fourth and disputed element for consideration and determination is whether the

resemblance in the strings “is likely to deceive or cause confusion”. It is this element which has attracted the core arguments from both parties and likewise will be the principal focus of the analysis in this determination.

**Position of the ICANN Board and String Similarity Panel.** Before embarking on the analysis of the disputed element, it is appropriate to address a specific argument relied upon by Applicant at page 7 of its submission that ICANN and its String Similarity Panel have recognized and implicitly approved the coexistence of the plural/singular versions of the same root word. In particular the Applicant has quoted representatives of the ICANN Board at the Joint Meeting of the GAC and ICANN Board in April 2013 in Beijing to suggest approval of the singular and plural roots. A review of that meeting and its aftermath indicates that no inference of such an approval can or should be made which would affect the independent analysis and determination to be made in respect of the Objection in this case under the Guidebook, Procedure and the ICDR SCO Rules

The Applicant has accurately noted that at the April 9, 2013 Joint Meeting of the GAC and the ICANN Board, the issue of plural forms of words was raised by a GAC member for discussion. The ICANN representatives noted at the meeting at 16:45 -18:00 on April 9, at pages 18-19 of the transcript, that the independent panel had looked at these strings and did not believe there was confusion. It was stated that the ICANN Board would not second guess the panel. However, the GAC was not satisfied with that position and shortly thereafter, by Communique dated 11 April 2013, gave advice to ICANN, as it was entitled to do, on a variety of issues relating to the New gTLD Program, including the belief by GAC that the singular and plural forms could lead to potential consumer confusion and that the ICANN Board should reconsider its decision



to allow this. Thereafter, ICANN accepted that advice on June 4, 2013 and, after receiving public comment on a variety of issues, embarked upon a reconsideration including the specific issue of singular\plural versions of the same string. The process is summarized in the Approved Resolution\Meeting of the New gTLD Program Committee of ICANN dated 25 June 2013, (see Item 2 d. of the Main Agenda at page 13 of 21 of the Minutes available online at [www.icann.org/en/groups/board/documents/resolutions-new-gtld-25jun13-en.htm](http://www.icann.org/en/groups/board/documents/resolutions-new-gtld-25jun13-en.htm). This reconsideration took place while the application process was already well underway with over 1900 applications being filed and indeed after the closure of the period for the filing of objections on 13 March 2013 in respect of those pending applications. It was noted in the June 25 Minutes that ICANN did not provide any instructions to the String Similarity Panel apart from the criteria specified in the Guidebook. It was noted that there were a total of 26 singular/plural applied-for English language strings, which pairings attracted a total of 21 string similarity objections filed against them. The Objection filed by Charleston in this matter is one of them. As was noted in the June 25 Minutes referenced above, the Applicant Guidebook, the Procedure and the ICDR SCO Rules are a complete set of procedures for the consideration of potential confusion issues in the string analysis. Therefore, the assessment of the String Similarity Panel is not determinative. The Guidebook and the Procedure do not suggest that the Panel opinion is even persuasive in any respect. Instead the Objection procedure provides for an independent expert determination. After a full and considered review of the GAC request for a review of the singular\plural issue and the pros and cons described in the public comments, the ICANN Board New gTLD Program Committee determined and resolved on June 25, 2013 that no changes should be made to the existing mechanisms

in the Applicant Guidebook specifically “to address potential consumer confusion resulting from allowing singular and plural versions of the same string”. This ICANN Committee noted that the principles of preventing user confusion and avoiding loss of confidence in the Domain Name System were built into the standards and procedures to address the string analysis. Those procedures include the objection procedure applicable to the Objection in this matter which the ICANN Committee noted was available to all applicants who had standing to file objections to another application. Since the application process was well under way and maintaining this status quo under the Guidebook and existing Procedure would not have any impact on the existing program governed by that Guidebook, the ICANN Committee followed the prudent course of making no change whatsoever the applicable standards and of offering no other comment. Any comment, after the fact, would have undermined the process already underway.

No conclusions or inferences can or should be drawn, one way or the other, from the fact that the String Similarity Panels appear to have allowed singular and plural versions to proceed, albeit with no specific or defined policy on this issue being established in the Applicant Guidebook or otherwise by the ICANN Board. Nor should any conclusions or inferences, one way or the other, be drawn from the fact that the GAC, out of a concern about confusion with singular\plural terms, requested reconsideration from the ICANN Board. After that reconsideration, no changes were made by the ICANN Board by way of a new policy statement or amendments to the Guidebook. The clear rationale was to not disrupt the current process or to change the rules mid-stream but rather to let the existing procedures in the Guidebook for the new gTLD applications unfold in the normal course. Of course, these procedures include the string confusion objection

procedure, as described above, which govern this Objection. Therefore, there can be no presumption or inference that all singular and plural strings are likely to cause confusion and by the same token, no presumption or inference that all singular and plural strings are permissible and are not likely to cause confusion.

The Guidebook does not contemplate any presumptions to be applied, one way or the other on the confusion issue. Nor is any particular deference or weight to be given under the Guidebook to the results of the String Similarity Panel, which is not required to give any reasons. The confusion procedure provided in the Guidebook is therefore being applied in this Objection, without any change arising from the reconsideration noted above since April 2013. It is for this reason that this Expert found it unnecessary to invite the parties to make any further submissions in connection with this reconsideration arising from the GAC request in April 2013 for advice from ICANN. The existence of that reconsideration process is therefore noted, but that process since April 2013 has had no direct bearing on the analysis or end result of this Expert Determination of the Objection in this matter.

**The Average Reasonable Internet User.** The standard for determining the existence of string confusion is the “mind of the average, reasonable Internet user”. This term is not defined in the Applicant Guidebook, the Dispute Resolution Procedure or the ICDR SCO Rules. Indeed it is a term that is not even discussed. As a result, there is no guidance whatsoever in this ICANN string objection procedure to assist in determining the scope of that standard.

However, the use of this term, an average reasonable Internet user, is clearly intended as an adaptation of the legal construct or fiction of the “reasonable man” or the “reasonable

person” developed in national common law legal systems, such as England and the United States of America, to assist in defining the existence and scope of legal rights and obligations and, consequently liability, by determining the appropriate conduct expected of a typical member of a community in situations which may have an impact on or may harm others or their property. It is normally associated with the development of the principles of negligence and certain offences in criminal law. It is said to represent a common objective standard rather than an individualized subjective standard. The reasonable person is normally not regarded as the “average” person. Instead the concept represents a composite of a particular community’s judgment as to how a member of that community should act or respond in particular circumstances. It is intended to establish a minimum level of conduct or behavior and to avoid legal distinctions for individual liability solely by reason of the individual differences in the ability of people to perceive the impact of their conduct on others and to inadvertently cause harm. It is a community standard for the particular community and the circumstances in issue in a domestic or national law context.

The “average, reasonable Internet user” is therefore also a construct or a fiction established by the ICANN board in the Guidebook and Procedure to set a minimum standard for testing and determining the likelihood of an applied-for gTLD to deceive or to cause confusion. This term is analogous conceptually to the “reasonable person” standard recognized under certain domestic or national legal regimes. However, the community within which this standard is to apply is different from any local, domestic or even national legal standard. The community for a reasonable Internet user is, by virtue of the nature of the Internet, ubiquitous and global in nature, encompassing users in developed, developing and underdeveloped countries, English speaking and non-

English speaking countries and users. The population and scope of Internet users is far reaching and varied, and therefore more challenging to assess for the purpose of articulating the content of a standard for an “average, reasonable Internet user”.

Furthermore, as internet usage continues to dramatically expand, users will continue to range from first time novices through to occasional and regular users and ultimately to experienced knowledgeable users and arguably skilled IT professionals. In some countries internet penetration has achieved high percentage levels of the population while in other countries the level is significantly less, even modest, which may also reflect variations in the sophistication of the users. The average, reasonable user establishes a standard higher than that of the novice. However the combination of words “average” with “reasonable” moderates the standard, and indicates that the standard will most certainly also fall short of a standard set by experienced, frequent users at the other end of the spectrum. The parties have not submitted any evidence to breathe some life into the “average, reasonable Internet user” in order to clarify the standard of expected conduct. Therefore the comments herein must remain general and will be limited to the submissions of the parties and also to the context in which the specific string confusion Objection is made in this case.

The Applicant has referenced some trademark cases in its submission to raise or elevate the standard of conduct for an average reasonable Internet user. The Applicant suggests in its submission at page 14 that “(c)onsumers no longer form expectations about web sites from domain names alone” based on American trademark infringement cases like *Toyota Motor Sales U.S. A. Inc. v Tabari*, 610 F.3d. 1171 (9<sup>th</sup> Cir. 2010). Based on such authorities, it is submitted that expectations are established only after seeing the landing page or first online page of a website. As a result, it is suggested that the similar domain

names may create only a diversion, but not a likelihood of confusion as any error would be recognized upon arrival at the landing page and then corrected by a reasonable internet user. There are a number of difficulties with this analysis. First, the diversion-confusion distinction is wholly unsatisfactory as these are not mutually exclusive concepts. A diversion is an action which re-directs the mind or attention away from an intended course. While a diversion can be clearly and intentionally demarcated so as not to confuse, it may not be. A diversion may also exist simply because of confusion and uncertainty created in the first instance. This may occur where two domain names closely resemble one another. The distinction also assumes that the landing pages to which a user is directed will reveal the true ownership, origin or sponsorship of the particular websites and will readily clarify the initial confusion\diversion. It may not. More importantly, this distinction and the supporting analysis, if accepted, would essentially preclude any finding of string confusion in relation to two generic words, or the singular and plural versions of a word, as new gTLDs under the New gTLD Program. The proposed approach dictates considering a particular domain name only in the context of an existing website and its landing page.

That is of course impossible in this string objection procedure generally and in this particular Objection as the determination is not being made in the context of a particular or existing website at all. The gTLD subject to this Objection procedure is simply proposed, and is presently not in use with any particular domain name or website.

The facts of the *Toyota* case are clearly distinguishable. In the *Toyota* case, relied upon heavily by the Applicant, the US Federal Court of Appeals, sitting in California, was satisfied that experienced online consumers would form firm expectations of the origin

or sponsorship of a site only after going to the website landing page. The Court's assessment in *Toyota* was made in the context of an existing website for the defendant broker who assisted purchasers in buying a genuine Toyota product and the court found that, after some modification, the website did not suggest sponsorship with Toyota. That is not this case. There are no websites and no domain names to compare. We have the proposed for gTLDs and, at most, there are tentative business plans of the Applicant and the Objector as to how they would organize each of their businesses as registrars in their intended markets if successful in obtaining their applied-for gTLD.

In creating the New gTLD Program, ICANN itself was concerned about the issue of string confusion in generic domains and created the string objection procedures governing this Objection specifically to ensure a mechanism was in place during the delegation process to avoid likely confusion as between applied for top level domains, independent of any association with a specific existing website. Accepting the Applicant's submission and deferring to a user's ability to resolve an initial diversion or confusion upon reaching the landing page of a non-existent website would constitute an abdication of the responsibility to make the expert determination required under the Guidebook and Procedure as part of the application process for potential registrars of the new gTLDs.

For the purposes of applying the standard of an average reasonable Internet user in this string confusion analysis, it is also important to recognize that a user is not simply one who is accessing the Internet to go to websites or to search for information over the Internet, perhaps with a commercial interest in mind. Equally important, an Internet user is also a person or entity who applies to register a domain name for use with a

website and email address. With respect to the applied-for gTLDs in issue in this Objection, the first internet users of these potential gTLDs in the marketplace will be persons or entities who seek to register a second level domain with the top level generic domains in issue. It is therefore appropriate to consider how an average reasonable potential registrant for a domain name, as an Internet user, may view the two domains in issue. Such a user may or may not be a consumer in the traditional sense. Indeed it is likely that many registrants for these gTLDs will be commercial businesses seeking to obtain a domain for use in connection with an existing business and/or a website to provide online access to their business in the normal course. That appears to be the primary focus of the Applicant's business plan.

Therefore, it is accepted that the standard of the "average, reasonable Internet user" is an objective one, independent of the personal differences or idiosyncracies of individual users. That user will include a person seeking to register a second level domain in conjunction with the proposed-for gTLDs. Therefore, the objective standard is to be considered in relation to the applied for gTLDs and the potential domain names using those top level domains, without the benefit of observing or assessing any particular website potentially associated with any particular domain name.

**Likelihood to Deceive or to Cause Confusion.** This is the key issue for determination in respect of the Objection to the applied-for gTLD <CARS>. Before addressing the specific arguments raised by the parties, it is appropriate to briefly identify the underlying policies for the New gTLD Program as referenced in the gTLD Applicant Guidebook, including Module 3, which underpin and inform the string confusion test set out in that Guidebook. ICANN's core objectives include the maintenance of stability



and security of the domain name system. In the New gTLD Program, ICANN's objectives are to increase competition and choice in the domain name space, and to enhance innovation through new gTLDs, while lowering registration cost and abuse. (Applicant Guidebook, Preamble; ICANN 2012 Annual Report, at p. 7-10; ICANN New Generic Top Level Domains, About the Program at <http://newgtlds.icann.org/en/about/program>). In the development of the program procedures, a balance was sought between increasing competition and avoiding gTLDs which were likely to deceive or to cause confusion in the new strings to be applied for and ultimately delegated. The string confusion objection procedure was applicable to words which were generic, not distinctive, in contrast to traditional trademarks, and the legal rights and protections for those marks. The Applicant Guidebook in Module 3 also created a separate and independent objection procedure for the protection of existing legal rights, principally trademarks, in relation to the new applied-for gTLDs. Therefore, the string confusion test was not intended to be limited by or confined to traditional trademark rights and concepts which would otherwise support an independent legal rights objection as specifically defined in the Applicant Guidebook, Module 3. This new string confusion objection procedure was not aimed at protecting existing rights but rather but more broadly intended to ensure that increased competition and choice would be encouraged while maintaining a stable domain name system and avoiding or minimizing registration abuse.

Therefore, the meaning of "confusion" in this string objection procedure cannot be completely synonymous with the confusion analysis in the trademark context. The string confusion objection involves the comparison of two generic applied-for gTLDs which have not been used in connection with an existing business or product. By

contrast, valid trademarks must meet the distinctiveness requirements necessary under applicable trademark laws for use in connection with goods or services. The Applicant has itself recognized the limitations in applying the trademark cases at pages 6-7 of its Response. Therefore, the American trademark cases, relied upon extensively by both parties are of some persuasive assistance in certain aspects of the confusion analysis, but they cannot provide the entire framework necessary for the assessment of confusion in relation to generic, non-distinctive terms for the purposes of this determination.

The Guidebook, in establishing the string confusion objection and procedure, did not provide any definition of the term “confusion”, other than to specify in Article 3.5.1 of the Procedures in Module 3, that “mere association, in the sense that the string brings another string to mind, is insufficient ...” Therefore, before addressing the arguments of the parties and some of the authorities relied upon, it is useful to consider the plain and ordinary meaning of the English word “confusion”. The Oxford Dictionary (online version) defines “confusion” as: “1. uncertainty about what is happening, intended or required; 2. the state of being bewildered or unclear in one’s mind about something”. The Merriam-Webster Dictionary (online version) defines “confusion” as: “1. an act or instance of confusing; and, 2. the quality or state of being confused.” The Merriam-Webster Dictionary further defines “confuse”, *inter alia*, as: “1. to make indistinct, to blur; 2. to mix indiscriminately; to fail to differentiate from an often similar or related other”. These general definitions of the plain and ordinary meaning of the term “confusion” assist in posing more specific questions for this objections procedure for the gTLD <.CARS>. Is there a lack of clarity or uncertainty over what is intended, or more specifically is there a failure to differentiate as between <.CARS> and <.CAR>?

Is the uncertainty, lack of clarity or failure to differentiate more than a “mere association in the sense that one brings the other to mind”?

In answering these questions in light of the applicable standard of the “average reasonable Internet user” for the confusion test, one should first consider the perspective of a user who applies to register a domain name and thereafter the perspective of an online user who may seek to access that domain. If both the <.CAR> and the <.CARS> gTLDs are available, what would be in the mind of a user applying for a particular domain name, whether an existing mark or another generic term at the second level in conjunction with one or both of these gTLDs? How would an average reasonable applicant for a name react to, or what would that person think of the two gTLDs? The Objector gives examples of potential names such as SEDAN.CAR and SEDAN.CARS, or SHOP.CAR and SHOP.CARS, or AUCTION.CAR and AUCTION.CARS. It must also be recognized that many existing businesses will seek to use their names in connection with these new gTLDs such as GM.CAR and GM.CARS, or FORD.CAR and FORD.CARS. An individual with a business somehow related to automobile industry may simply seek to use that individual’s name, for example, ANYNAME.CAR or ANYNAME.CARS. Faced with these two gTLDs, any potential registrant, as an average reasonable Internet user, would feel compelled to register under both <.CAR> and <.CARS>. Any domain name registrant, knowing that both gTLDs were available, would be very concerned about registering under one alone and leaving the other for someone else to be able to register the same second level name. The reason is very simple in that they would want to avoid the prospect of either outright deception or likely confusion if they did not otherwise register under both gTLDs.

In my view, it is plain and obvious to and it would be in the mind of a potential name registrant, as an average reasonable Internet user, that the use of both <.CAR> and <.CARS> as gTLDs in connection with the same second level name would likely cause confusion. Indeed, they would conclude in their mind that confusion was highly probable, not just a conclusion on a balance of probabilities. Therefore, that user would feel compelled to register under both and thereby control the names under both gTLDs. If a domain registration was made under only one gTLD, say for example ANYNAME.CARS, there would be a real and legitimate concern that someone else may register the other, in this example ANYNAME.CAR, and cause confusion or worse, deception. A potential name registrant would make that assessment based on the overall impression of the domain name alone, being the second level name in combination with each of the gTLDs in issue, without any consideration of the content of websites yet to be online. It would be plain and obvious to the average and reasonable registrant, as an Internet user, that other Internet users, whether consumer or commercial users, would very likely be confused that the two domains names were associated with or sponsored by the same person.

In my view it is also plain and obvious that an average and reasonable internet user accessing the internet for information for various purposes, including online commerce, is also likely to be confused by the availability and use of the two gTLDs <.CAR> and <.CARS> in connection with the same second level name. To be clear, the user would form that conclusion on a balance of probabilities. That conclusion is based on the overall impression created by the two separate domain registrations under the two gTLDs. This test of the “overall impression” of factors to be perceived by the purchaser is also endorsed in the trademark cases relied upon by both parties (see *Nabisco v.*

*Lambert Company* 220 F.3d 43 at 46,47; *Dan Robbins & Associates v Questor Corporation*, 599 F.2d 1009 at 1013, found at page 145 of Annex 4 of the Applicant's Response). However, it is also appropriate to identify the specific findings and reasons which justify this overall impression.

As submitted by the Objector, the two strings applied for, <.CARS> and <.CAR>, are virtually identical in appearance, in phonetic sound and in meaning. The combination of all three elements makes the prospect of confusion compelling, not just likely on a balance of probabilities. The only difference is the pluralization of the singular term by the addition of one letter "s".

As for appearance, the undisputed evidence is that ICANN's String Similarity Assessment Tool indicated a 72% visual similarity. While this is not determinative, it supports the finding that the burden of proving likely confusion on a balance of probabilities has been met. The weight of the American court decisions in trademark cases and the WIPO and NAF domain name cases as cited by the Objector are also persuasive and supportive of the finding of likely confusion which is not dispelled by the mere addition of the letter "s" to pluralize. The plural form is simply not a sufficient differentiator to avoid confusion. Indeed in a number of decisions, it is suggested that the use of a plural form of the singular may even serve to heighten or exacerbate the potential for confusion (see *Lego Juris A\G v Frederick Soleimani*, WIPO Case D2012-2133, at section 6.A., number 7 in the Objector's Authorities; *Insubuy Inc. v. Genetic Researches Community*, NAF, Claim FA 1209000114644188; *Home Retail Group v Home Retail Group\Rafique Holding*, WIPO Case D2012-2335, at section 6.A). Other cases note that use of the plural certainly does not lessen the inevitable confusion with

the singular (*Barnesandnoble.com LLC v Your One Stop Web Shop*, NAF Claim FA670171 at page 6; and, *PET 360, Inc. v. Private Registrations Aktien Gesellschaft*, WIPO Case No. D2012-0325, at Section 6A.). I agree with those comments on the impact of the plural form.

Phonetically, the term CAR is essentially equivalent to CARS and vice versa. Each is one syllable with the same stress pattern in pronunciation, the primary accent being on the initial “kah” sound in each word. The similarity of sound is significant as users relate to and remember on the basis of the sound of words and the likelihood of confusion is increased where the sound is essentially the same.

Finally, the ordinary meaning of the two words is essentially the same as they both refer to a vehicle and would both encompass automobile related content. There is no material difference in the plain and ordinary meaning of the terms simply by the addition of the letter “s” to the term “CAR” to create the plural. The trademark and UDRP decisions cited by Objector are also persuasive in this regard.

It is the combination of these three virtually identical factors of appearance, sound and meaning which make the likelihood of confusion compelling, not just probable, in suggesting a common source or origin. It is these three factors in combination which support the overall impression and which controls the determination of likely confusion with respect to the gTLD in issue. If any one or more of these three factors indicated a material difference, then the balancing of these three factors would be materially altered and the result may well be different. For example, <.CARS> and <.AUTOS> have essentially the same meaning but the visual and phonetic differences in these two gTLDs make any confusion unlikely.

The Respondent has raised a number of arguments and it is appropriate to briefly address those and to clarify why those submissions are not persuasive and cannot prevail.

i. It is argued that there will be other singular and plural forms of gTLDs based on the existing applications for which no objection has been made. These other gTLDs are listed at page 2 of the Response. However, those applications are not before this Panel for expert determination and they are not the subject of submissions on this Objection. Those other applications may well cause confusion or be likely to cause confusion. They may not. The fact that applicants for those domains, for their own specific reasons, have not filed objections does not provide any precedent one way or the other in this Objection. The mere fact that those applications remain in play is not a persuasive or cogent reason to allow the two applied for gTLDs in issue in this Objection to proceed separately, if, as I find to be the case, there is a likelihood of causing confusion by doing so.

ii. The Applicant asserts that the Objector, or its parent Google, has applied for a gTLD .NEW, but has not objected to seven other pending applications for .NEWS. Furthermore, the Objection in this matter would, if submitted by the Applicant, undermine other Google gTLD applications such as .DOT, .DOC, and .DOG, which are purportedly premised on errors. These are raised as an estoppel argument to suggest that the Objector should be estopped in making its arguments in this Objection proceeding and that its position is therefore untenable. This argument is not persuasive and is not accepted. As for the applications for .NEW and .NEWS, these illustrate that the mere addition of an “s” to a root word may in fact create a different word with a

different meaning and is not simply a plural of the root word which causes confusion. With respect to the other applications for .DOT, DOC, and DOG, they are sufficient differences amongst them in terms of visual, phonetic and meaning criteria that they are unlike the proposed gTLDs for .CAR and .CARS. In any event, if all of these gTlds were subjected to full argument and submissions, those other applications may or may not be proper. However, they are not in issue in this Expert Determination and they carry little or no weight for the determination to be made in this Objection.

iii. It is said that the Objector relied on only three factors from the trademark cases (appearance, phonetics, and meaning) and ignored the other six factors normally applied in the American trademark cases for determining confusion, thereby leading to the erroneous presumption of a likelihood of confusion between the singular and plural forms of a string. This submission is not persuasive. After a careful review of the cases submitted by both parties, it is clear that the other factors referenced by the Applicant are specific to the trademark context, relating to the distinctiveness of a mark, its relative “strength” or “weakness” in connection with actual usage in relation to specific goods or services in specific markets. Those additional factors are well suited to and are uniquely applied in the trademark context for assessing confusion with a trademark. However, those additional tests or factors are of little assistance in assessing the likelihood of confusion as between two proposed generic terms as gTLDS for future use in connection with a complete domain name and a future website by unknown domain name registrants.

iv. The Applicant asserts that String Similarity Panel of ICANN has already determined that the plural of a singular form does not alone generate or cause confusion.



As discussed earlier, that submission is not accepted. The String Similarity Panel made no express endorsement or policy statement regarding singular\plural gTLDs. In any event an assessment by that Panel for any particular application or set of applications was subject to the String Objection Procedure established under the Guidebook and now followed to date with respect to the applied-for gTLD <.CARS> and the Objection in respect of that application. That String Objection Procedure was reviewed by ICANN and remains in place without change. The String Objection Panel has completed its mandate, a mandate which is different from this Expert Determination. The practices of that Panel cannot usurp the mandate on this Expert Determination to provide an independent assessment of a String Confusion Objection on the basis of the submissions from the affected parties in an adversarial context in accordance with applicable Guidebook and Rules.

v. The Applicant asserts that similar, even identical, marks may not create confusion when looked at in their entirety and in the proper context. That is certainly true with respect to trademarks where the two identical marks may be used in connection with different products or services, in different markets and geographic areas. By analogy, it is argued that the Objector and Applicant have different business plans and distinguishable service offerings. However, those tentative business models and plans do not differentiate the potential usage of the two gTLDs in issue nor do they neutralize or clarify the confusion created in the mind of the average, reasonable Internet user who is likely unaware of the nuanced differences in their business plans and models which are in any event still preliminary and under development. For the task of assessing confusion in the two applied for gTLDs, the appropriate context is the combination with a second level name and the prospect that the exact same second level

name will be used with both. If one Internet user registers a name, say SEDAN.CAR, and another Internet user registers the same second level name as SEDAN.CARS, albeit with a different registrar having a different business model, there remains a compelling likelihood of confusion. The differences in the registrars cannot dispel that likelihood of confusion for the average reasonable Internet user who is in all likelihood oblivious to the different registrars and their models.

vi. It is asserted that, according to the trademark and domain name cases, the top level domain is not a source indicator and the focus must instead be on the second level name. Therefore, it is submitted that any confusion at the second level should not be attributed to the top level but should be left to the UDRP process for resolution. It is true that courts and UDRP Panels have focused on the second level in the names and not the differences in the top levels among the existing top level domains such as .com, .biz or .net. to assess confusion in a trademark or domain name dispute. However, this submission is a double-edged sword for the purposes of the String Confusion Objection procedure for at least two reasons. First, where the exact same second level name is used in both <.CAR> and <.CARS> by different registrants, there is no differentiation at the second level. When the same second level name is combined with each of the applied for gTLDs, it is only the top level which arguably may provide the differentiation. However, as found above, the gTLD <.CARS> is essentially the same visually, phonetically and in meaning as <.CAR> and will clearly cause confusion by suggesting a common source or origin. If, as is suggested, current users are unlikely to focus on the top level as a basis for differentiation, then they are unlikely to appreciate the very subtle and immaterial distinction at the top level merely through the addition of the letter "s" in one of those names. Since no current top level domains provide for both

a singular and plural form of the same root term, current users are simply not attuned to appreciating such a fine distinction. Confusion is the likely result. Second, the quotes from trademark cases to the effect that the top level name is essentially “invisible” when assessing confusion are inapt and inapplicable on their facts for the task at hand in this String Confusion Objection procedure for new gTLDs. While the courts and panels in the trademark cases look at the second level of a domain name where the trademark in issue is actually used or referenced in order to assess the likelihood of confusion, the String Confusion Objection procedure directs the analysis to the top level and thereby to the prospect of confusion in the combination of the names at the top and second levels. It is also inappropriate to suggest that any resulting confusion for specific name registrations should be addressed only in the UDRP process and that the root of the problem, the two confusing gTLDs should be allowed to proceed separately at this time. To do so would establish a name registration framework which would inevitably invite and lead to name registration abuse, a result which ICANN seeks to avoid in its mission with the New gTLD Program. Such a framework would also add extra expense for user registrants and also undermine the ICANN objective of reducing costs by facilitating fair competition. The increased costs may arise in one of two ways if the two proposed gTLDs proceed. First, a user may feel compelled to incur the expense of registering under both gTLDs to avoid confusion. Second, if a user registers under only one of the two applied-for gTLDs (assuming both are granted), the door is left open for another user to register the same second level name under the other gTLD and the prospect of disputes and legal costs arising as a result is very real. The cases produced by both parties amply illustrate that confusing registrations can and are used to promote improper activities including identity theft, phishing for personal information,

deployment of viruses, and online fraud etc. Allowing both of the proposed gTLDs to proceed independently to delegation will encourage copycat registrations as between the two gTLDs and lead to ongoing costly legal disputes arising from the confusion which will only serve to undermine the stability of domain name system. There is no obvious or pressing justification which has been put forward for allowing both <.CAR> and <.CARS> to proceed. Instead of requiring future registrants to deal with the likely confusion in future UDRP proceedings, the confusion can be readily averted at this time, while still encouraging legitimate competition in the same name space for automobile related names. There are many other such names which can be used, some of which are subject to other gTLD applications, without allowing two virtually identical names as gTLDs which are likely to cause confusion or worse for the average, reasonable Internet user.

While the foregoing review of the Applicant's submissions is not exhaustive, it sets out sufficient reasons for my conclusion that the position of the Applicant must be rejected and that the applied-for gTLD <.CARS> is likely on a balance of probabilities to cause confusion with the applied-for gTLD <.CAR> in the mind of the average reasonable Internet user. Therefore both of these gTLDs should be placed in the same contention set in accordance with the Guidebook and Procedure.

Both parties made some additional submissions on the impact of the singular and plural gTLDs on non-English speakers which warrant a brief comment. In coming to this Expert Determination on this Objection, I have not relied upon the submission of the Objector that additional difficulties will be created for non-English speaking Internet users by the addition or subtraction of an "s" for a gTLD such as those in issue in this

Objection. The studies adduced by the Objector do suggest that the differentiation between the singular and plural terms can be very different, even non-existent in other languages such as French, Korean, Chinese and Japanese (see Swan and Smith, *Learner English*, Cambridge University Press, 2001, at pages 66, 304, 318 and 335). Those whose mother tongue is one of these other languages and who then learn English as a second language may continue to have difficulty with singular\plural distinctions when speaking and understanding English (see for example Lightbrown and Spada, *Effects on Second Language Learning in Focus-On-Form Corrective Feedback in Communicative Language Teaching*, Authority # 28 from Objector authorities, at pages 438-439). These studies suggest that the use of singular and plural gTLDs can be particularly problematic for non-English speaking Internet users or for those whose second language is English. This issue could further compound the likelihood of confusion which already exists for Internet users whose first language is English. However, only limited studies and no other evidence was adduced on this issue. The record before me is incomplete and inadequate to draw any clear conclusions on the applicable standard. This may be a potentially significant issue for a broader policy debate on the use of singular and plural terms as gTLDs. However, I have not relied on this submission in coming to my conclusion and determination. I am satisfied on a balance of probabilities that the use of the gTLDs of <.CARS> and <.CAR> will create a likelihood of confusion in the mind of an average reasonable Internet user whose first language is English. If and when ICANN conducts a policy review of the use of singular and plural gTLDs, this language issue and its impact on domain names may be deserving of closer scrutiny.

Finally, the Applicant has raised an argument about the motivation of the Objector Charleston and its parent company, Google Inc., which also merits comment. The

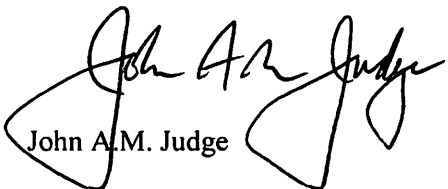
Applicant has submitted that Charleston\Google is motivated not by a desire to prevent consumer confusion but rather by a desire to force other applicants into a contention set auction where Google would enjoy a significant advantage due to its vast resources. Therefore it is submitted that the Objection should be dismissed and the application of DERCars should proceed. Based on the criteria governing this String Objection Procedure as mandated in the Guidebook, this argument is completely irrelevant. It is not within the purview of this Expert Determination to comment upon the motivation of any party, save perhaps if there was cogent evidence of bad faith on the part of a party which is clearly not the case here. As it is entitled to do, ICANN has set up the auction process to resolve competing applications which are in a contention set. Some of the stated objectives of ICANN with the New gTLD Program are to encourage competition for domain name registration, expand consumer choice and reduce the cost of registration. The auction process was a chosen vehicle to achieve these goals in relation to contention sets of competing gTLDs. The extent to which a large company with significant financial resources may conceivably dominate the auction process is a policy issue for ICANN to consider or reconsider in order to achieve its objectives of increased competition and reduced costs. This is not a matter on which any opinion can or should be expressed in this Expert Determination. Therefore this particular submission of the Applicant has been completely discounted and disregarded in the determination of this String Confusion Objection.

**Determination**

Therefore, The Objector has prevailed and the Objection is sustained.

This Expert Determination is made in Toronto.

Dated: August 27, 2013

A handwritten signature in black ink, appearing to read "John A.M. Judge". The signature is stylized with large, sweeping loops.

John A.M. Judge

Sole Expert Panelist