THE INTERNATIONAL CENTRE FOR EXPERTISE OF THE

INTERNATIONAL CHAMBER OF COMMERCE

CASE No. EXP/412/ICANN/29

PROF. ALAIN PELLET, INDEPENDENT OBJECTOR

(FRANCE)

vs/

RUBY PIKE, 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.

NEW GENERIC TOP-LEVEL DOMAIN NAMES ("gTLD")
DISPUTE RESOLUTION PROCEDURE

THE EXPERT DETERMINATION

issued by the Expert Panel,
composed of

Mr. Piotr Nowaczyk (Chair)
e-mail:
piotr.nowaczyk@dentons.com

DENTONS
Rondo ONZ 1, 30th Floor
00-124 Warsaw
Poland
T: +48 22 24 25 705
F: +48 22 24 25 242

Prof. August Reinisch
e-mail:
august.reinisch@univie.ac.at

Department of European,
International and
Comparative Law,
University of Vienna
Schottenbastei 10-16
1010 Vienna, Austria

Mr. Ike Ehiribe
e-mail:
ehiribe@aol.com

Castaldi 7 Stones
Commercial & IP Chambers
88 Kingsway Holborn
London WC2 B6AA
England, United Kingdom

in Case No.
EXP/412/ICANN/29

PROF. ALAIN PELLET, INDEPENDENT OBJECTOR (FRANCE) v. RUBY PIKE, LLC (USA)

TABLE OF CONTENTS

TABLE OF ABBREVIATIONS

Name	Abbreviation
Rules for Expertise of the ICC	"**Rules**"
Appendix III to the ICC Expertise Rules, Schedule of expertise costs for proceedings under the new gTLD dispute resolution procedure	"**Appendix III**"
International Chamber of Commerce	"**ICC**"
ICC Practice Note on the Administration of Cases	"**ICC Practice Note**"
Attachment to Module 3 - New gTLD Dispute Resolution Procedure	"**Procedure**"
Module 3 of the gTLD Applicant Guidebook	"**Guidebook**"
The Independent Objector - prof. Alain Pellet (France)	"**IO**"
The Applicant - Ruby Pike, LLC (USA)	"**Applicant**"
The Applicant's parent company Donuts, Inc.	"**Donuts**"
ICC International Centre for Expertise	"**Centre**"
Domain name search tool	"**WHOIS**"
Prof. August Reinisch (co-expert), Mr. Ike Ehiribe (co-expert) and Mr. Piotr Nowaczyk (chair) appointed by the Centre to render Expert Determination	"**Expert Panel**"
Governmental Advisory Committee	"**GAC**"

Identification of the Parties, their Representatives and related entities

Objector

Name	Prof. Alain Pellet, Independent Objector
Contact person	
Address	16, Avenue Alphonse de Neuville
City, Country	92380 Garches, France
Telephone	
Email	contact@independent-objector-newgtlds.org

Objector's Representative(s)

Name	Ms. Héloïse Bajer-Pellet
Contact person	
Address	15, Rue de la Banque
City, Country	75002 Paris, France
Telephone	+33 1 53 45 47 47
Email	avocat@bajer.fr

Name	Mr. Daniel Muller
Contact person	
Address	20, Avenue du Général de Gaulle
City, Country	78290 Croissy sur Seine, France
Telephone	+33 1 39 76 52 29
Email	mail@muellerdaniel.eu

Name	Mr. Phon van den Biesen
Contact person	
Address	De Groene Bocht, Keizersgracht 253
City, Country	1016 EB Amsterdam, The Netherlands
Telephone	+31 20 7 37 18 69
Email	phonvandenbiesen@vdbkadvocaten.eu

Name	Mr. Sam Wordsworth
Contact person	
Address	24 Lincoln's Inn Fields
City, Country	London, WC2A 3EG, United Kingdom
Telephone	+44 20 7813 8000
Email	SWordsworth@essexcourt.net

Applicant

Name	Ruby Pike, LLC
Contact person	Mr. Daniel Schindler, Mr. John Nevett
Address	10500 NE 8th Street, Suite 350
City, Country	Bellevue, WA 98004, USA
Telephone	+ 1 424 254 8537
Email	rubypike@donuts.co; secondary@donuts.co

Applicant's Representative(s)

Name	The IP & Technology Legal Group, P.C. dba New gTLD Disputes http://www.newgtlddisputes.com
Contact person	Mr. John M. Genga, Mr. Don C. Moody
Address	15260 Ventura Blvd., Suite 1810
City, Country	Sherman Oaks, CA 91403, USA
Telephone	+ 1-888-402-7706; +1-818-444-4582
Email	john@newgtlddisputes.com, don@newgtlddisputes.com

Disputed gTLD

gTLD Objector objects to [.example]

Name	.Hospital (Application ID: 1-1505-15195)

I. PARTIES

1. The objector in this case is the Independent Objector (hereafter referred to as the "**IO**"), Prof. Alain Pellet, appointed by ICANN to serve for the entire new gTLD program and object to highly objectionable gTLD applications on Limited Public Interest and Community grounds as it is stated in paragraph 3.2.5 of the Guidebook.

2. The Applicant (hereafter referred to as the "**Applicant**") is an American company – Ruby Pike, LLC, an affiliate of Donuts, Inc. which has applied for 307 new gTLDs representing a variety of common dictionary names.

II. PROCEDURAL HISTORY

3. On 12 March 2013, the IO filed via email a Limited Public Interest Objection against the Application of Ruby Pike LLC, for the gTLD string .Hospital (Application ID: 1-1505-15195). Copies of the Objection were transmitted via email to the Applicant and to ICANN on 13 March 2013.

4. On 29 March 2013, the Dispute Resolution Service Provider, namely the International Centre for Expertise (hereafter referred to as the "**Centre**") of the International Chamber of Commerce (hereinafter referred to as the "**ICC**") informed the IO that it had conducted an administrative review of the Objection (Article 9 of the Procedure) and that the Objection was in compliance with Articles 5 - 8 of the Procedure and with the Rules.

5. On 15 April 2013, the Centre further informed the Parties that ICANN had published its Dispute Announcement pursuant to Article 10(a) of the Procedure on 12 April 2013. It invited the Applicant to file a Response within 30 days of the transmission of this invitation (Article 11 (b) of the Procedure).

6. On 15 May 2013, the Applicant filed via email its Response to the Objection with Annexes. Copies were transmitted to the IO and its representatives, as well as to ICANN.

7. On 28 May 2013, the Centre informed the Parties that the Response was in compliance with Article 11 of the Procedure and with the Rules and confirmed receipt of the Applicant's payment of the Filing Fee in the amount of EUR 5,000.

8. On 19 June 2013, the Centre informed the Parties that the Chairman of the Standing Committee of the Centre appointed Mr. Piotr Nowaczyk as the Chairman of the Expert Panel and Prof. August Reinisch, and Mr. Ike Ehiribe as Co-Experts on the Expert Panel. The Centre also invited both Parties to make the required advance payment of costs for the Expert Panel to be fully constituted.

9. On 1 August 2013, the Centre confirmed receipt of the Parties' required advance payment and transferred the case file to the Expert Panel after confirmation of the full constitution of the Expert Panel.

10. By an email of 2 August 2013, the IO requested to file an additional written statement in order to address new issues that were raised in the Applicant's Response. The Expert Panel granted this request. In Procedural Order No. 1 dated 5 August 2013 it set a deadline of 12 August 2013 for the IO's additional written statement. In its Procedural Order No. 2 dated 9 August 2013 the Expert Panel clarified, at the request of the Applicant, that the scope of the additional written statement shall be limited to: (1) the allegation of bias raised by the Applicant; and (2) the interpretation of the new gTLD Dispute Resolution Procedure.

11. The IO accordingly filed the additional written statement via email on 12 August 2013. Electronic copies were transmitted to the Applicant and its representatives, as well as to ICANN.

12. In Procedural Order No. 3 dated 13 August 2013, the Expert Panel set a deadline of 20 August 2013 for the Applicant's response to the IO's additional written statement and limited the scope of the response to the matters raised in the IO's additional written statements. The Applicant's response was submitted accordingly on 20 August 2013. Electronic copies were transmitted to the IO and its representatives, as well as to ICANN.

13. In Procedural Order No. 4 dated 28 August 2013, the Expert Panel acknowledged that the Objection was not dismissed in the course of the Quick Look Procedure for the reasons that would be presented in an Expert Determination.

14. Pursuant to Article 6(a) of the Procedure, all communications by the Parties, the Expert Panel and the Centre were submitted electronically.

15. There was no hearing in this case, as the Expert Panel decided it was not necessary, as well as, it was not requested by the parties.

16. The draft Expert Determination was transmitted for scrutiny to the Centre within the 45 day time limit in accordance with Article 21 (a) and (b) of the Procedure.

III. APPLICABLE RULES AND THE LANGUAGE OF THE DISPUTE RESOLUTION PROCEDURE.

17. All proceedings before the Expert Panel shall be governed by the following rules:

- Rules for Expertise of the ICC (hereafter referred to as the "**Rules**"),
- The ICC Practice Note on the Administration of the Cases (hereafter referred to as the "**ICC Practice Note**"),
- Attachment to Module 3 of the gTLD Applicant Guidebook, New gTLD Dispute Resolution Procedure of the gTLD Applicant Guidebook (hereafter referred to as the "**Procedure**"),
- ICANN gTLD Applicant Guidebook (hereafter referred to as the "**Guidebook**").

18. The language of all submissions and proceedings is English (Art. 5(a) of the Procedure).

IV. PARTIES' CONTENTIONS

A. The Independent Objector

19. The IO confirms that he is not affiliated with any of the gTLD applicants and remains impartial and independent as required under the Guidebook. Responding to the Applicant's allegation of bias, the IO stated that he has not favoured any particular interests, including medical interests and that he has not targeted the Applicant's Application since he has filed objections against gTLD applications for strings entirely unrelated to health and the healthcare sector, including .Amazon, .Charity, .Indians and .Patagonia.

20. The IO asserts that he acts pursuant to paragraph 3.2.5 of the Guidebook, providing him with the standing to file the Objection, since there was more than one comment made in opposition to the Application in the public domain. Later, the IO also asserts that the above-mentioned procedural restriction concerning his standing did not allow him to file objections to other sensitive applications.

21. The IO asserts that the Limited Public Interest Objection is applicable in this case since the applied-for gTLD string is contrary to generally accepted legal norms relating to morality and public order that are recognized under principles of international law based exclusively on the fourth ground, which stipulates as follows:

"A determination that an applied-for gTLD string would be contrary to specific principles of international law as reflected in relevant international instruments of law." (paragraph 3.5.3 of the Guidebook)

22. The IO states that while the Objection is against the applied-for gTLD string, however, in addition, it should be considered in the context of the stated intended purpose as it may be derived from the description of the Applicant's position provided especially in the section titled "Mission/Purpose" (Section 18) in the Application form. Therefore, the IO does not find the applied-for string to be objectionable *per se*, but that the applied-for string and its intended operation may be objectionable from the perspective of specific principles of international law for morality and public order. The IO argues further that the Applicant's Application as presented does not guarantee the use of the applied-for string in full respect of these general principles of international law for morality and public order.

23. The IO recognizes the importance of freedom of expression as, also, a general principle of international law relating to morality and public order. At the same time, according to the IO, freedom of expression is not free of any limits but "*carries with it special duties and responsibilities*" (Guidebook, paragraph 3.5.3, at p. 3-22). The concept of raising Limited Public Interest Objections implies that these limits may lead to the rejection of certain applied-for strings.

24. The IO provides a comprehensive deliberation regarding the validity of his Objection. The Applicant has itself recognized that the gTLD is "*attractive to registrants with a connection to hospitals and medical treatment centers around the world.*". In the IO's view, hospitals are inextricably connected to health, which is commonly deemed to be a fundamental human right under international law instruments. In support, the IO refers to, among others, the following instruments of international law :

- the proclamation of the Universal Declaration of Human Rights the General Assembly of the United Nations which has declared "health" to be part of this listing of Human Rights (*Article 25, (1) Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and* ***medical care*** *and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control.*);
- the International Covenant on Economic, Social and Cultural Rights (*Article 12 (1) The States Parties to the present Covenant recognize* ***the right of everyone to the enjoyment of the highest attainable standard of physical and mental health***);
- International Convention on the Elimination of All Forms of Racial Discrimination (*Article 5 (e) Economic, social and cultural rights, in particular: (iv)* ***The right to public health, medical care****, social security and social services*);
- Convention on the Elimination of All Forms of Discrimination against Women *(Article 11 (1) States Parties shall take all appropriate measures to eliminate discrimination against women in the field of employment in order to ensure, on a basis of equality of men and women, the same rights, in particular (f) The* ***right to protection of health*** *and to safety in working conditions, including the safeguarding of the function of reproduction. And Article 12 1. States Parties shall take all appropriate measures to eliminate discrimination against women* ***in the field of health care*** *in order to ensure, on a basis of equality of men and women,* ***access to health care services,*** *including those related to family planning. 2. Notwithstanding the provisions of paragraph I of this article, States Parties shall ensure to women appropriate services in connection with pregnancy, confinement and the post-natal period, granting free services where necessary, as well as adequate nutrition during pregnancy and lactation*);
- Convention on the Rights of the Child (*Article 24 - 1. States Parties recognize* ***the right of the child to the enjoyment of the highest attainable standard of health*** *and to facilities for the treatment of illness and rehabilitation of health. States Parties shall strive to ensure that no child is deprived of his or her right of access to such health care services. 2. States Parties shall pursue full implementation of this right and, in particular, shall take appropriate measures: (e) To ensure that all segments of society,* ***in particular parents and children, are informed, have access to education and are supported in the use of basic knowledge of child health*** *and nutrition, the advantages of breastfeeding, hygiene and environmental sanitation and the prevention of accidents*);
- Convention on the Rights of Persons with Disabilities (*Article 25 - Persons with disabilities have the right to* ***the highest attainable standard of health without discrimination on the basis of disability.*** *They are to receive the same range, quality and standard of free or affordable health services as provided other persons, receive those health services needed because of their disabilities, and not to be discriminated against in the provision of health insurance*),

- WHO Constitution dated 22 July 1945 – "The enjoyment of the highest *attainable standard of* ***health is one of the fundamental rights of every human being without distinction of race, religion, political belief, economic or social condition.*** *The health of all peoples is fundamental to the attainment of peace and security and is dependent upon the fullest co-operation of individuals and States. (...) The extension to all peoples of the benefits of medical, psychological and related knowledge is essential to the* ***fullest attainment of health***".[1]

25. The IO asserts that the International Covenant on Economic, Social and Cultural Rights imposes on the parties the obligation to assure the right to health. By referring to the comments of the United Nations Committee on Economics, Social and Cultural Rights, the IO connects the above-mentioned obligation with the duty to guarantee accessibility and quality of health care facilities. Therefore, as the IO later asserts, states providing misleading health-related information violate their obligations under the Covenant. In this regard the IO refers to an European Court of Human Rights decision in *Guerra and others v. Italy*, [1998] ECHR 7, 26 EHRR 357, where the failure of a state to provide essential information relating to environmental pollution that would have enabled the applicants to assess the risk they and their families would be exposed to in a particular town was found to be tantamount to a violation of the applicant's right to respect for private and family life in breach of Article 8 of the European Convention of Human Rights.

26. The IO also states that not only public authorities, but also the private sector has responsibilities as regards the protection of human rights. In the IO's opinion the Applicant has not given due consideration to the fundamental rights and related obligations that are at stake and has not considered how to include safeguard mechanisms that at all times would rather strengthen instead of hindering these obligations and fundamental rights.

27. The IO is of the view that the Applicant should demonstrate how, given the public interest at stake, the policies and decision-making of the Applicant will be properly connected to the public authorities, national as well as international, that are under a legal obligation to respect, protect and fulfill the right to health.

28. Moreover, the IO points out that the Applicant's parent company Donuts has applied for over 300 gTLDs and that the texts of those applications all seem to be entirely identical although the applied-for strings have a completely different character.

29. The IO argues that the fact that the additional four protection mechanisms employed by the Applicant for .Hospital are present in many of Donuts' applications that are completely unrelated to health confirms the Applicant's lack of awareness of the specifics of health-related gTLDs like the present one.

30. Since the Applicant did not provide any insight on the extent or content of the social consultations that were allegedly conducted, the IO maintains his Objection to the instant Application as long as the Applicant does not - after consultation and coordination with all stakeholders of the health community, including states and competent international organizations – provide solutions for the serious concerns raised by the IO and other entities in the past.

31. In his additional written statements, the IO refers to the Safeguard Advice issued by ICANN's Governmental Advisory Committee (GAC) on 11 April 2013 which states that extensive additional safeguards should be put in place for a whole range of gTLDs including .Hospital. According to the IO, this confirms the concerns expressed in the Objection and the sensitivity

---

[1] The emphasis is added by the Expert Panel in order to underline the relation to health and healthcare.

of a new .Hospital gTLD and demonstrates that those concerns are not to be considered as abusive, nor as harassment as alleged by the Applicant.

32. The IO requests the Expert Panel to hold that the Objection is valid. Therefore, the Expert Panel should uphold the present Objection against the .Hospital Application.

33. In the alternative, the IO requests the Expert Panel to hold that the Objection is valid as long as the Applicant does not provide solutions for the serious objections raised above. Accordingly, the Expert Panel should conditionally uphold the present Objection against the .Hospital Application (ID: 1-1505-15195).

34. In addition, the IO requests that its advance payments of costs shall be refunded in accordance with Article 14 (e) of the Procedure.

B. The Applicant

35. The Applicant is an American limited liability company owned by Donuts, through which the Applicant and other direct and indirect subsidiaries, have applied for 307 new gTLDs representing a variety of common dictionary terms. The Applicant introduces itself as a well-prepared, amply resourced and highly qualified organization committed to offering consumers new and varied generic domain name alternatives through safe, stable and secure registry operations.

36. The Applicant declares that it seeks to help redefine the domain name space in the Internet by offering domains that would serve a more specific segment of the Internet user population. The Applicant repeatedly identifies itself with goals explicitly articulated by ICANN in specific connection with its new gTLD program such as: augmenting consumer choice, bolstering competition and expanding avenues of expression on the Internet.

37. In its response, the Applicant challenges the IO's independence, relying upon the following arguments:

- The IO has filed relatively few objections overall, and Donuts' applications represent a significant proportion of them,
- The IO has brought objections only against applications for health-related gTLDs and has not brought such objections against other controversial gTLDs,
- The IO has a background in health-related matters and particular healthcare and policy interests since he has worked in co-operation with the World Health Organization (WHO),
- The IO's legal assistant has alleged relationship with a WHO consultant.

38. In the Applicant's view, the IO clearly has some bias that favours healthcare and hospital interests and opposes those who would provide a forum for such topics on the Internet.

39. The Applicant seeks the dismissal of this Objection following the Quick Look Procedure since it is, in the Applicant's opinion, manifestly unfounded. As the Applicant asserts, the ICANN's standards focus on the string itself not on the Applicant whereas the IO simply criticizes its activity, putting the instant Application aside. Such attacks in the Applicant's view may amount to "an abuse of the right to object."

40. The Applicant states that the Objection is based on nothing more than speculation regarding matters beyond the applied-for string or its intended use as stated in the Application. Then, it is acknowledged that the applied-for string is nothing more than the generic term "hospital" which can be used in a variety of perfectly legitimate ways, none of which are "contrary to morality and public order." The Applicant also provides examples of the use of the word "hospital" as a second level domain in a context that is unrelated to the medical sector.

41. The Applicant states that the Objection is unfounded because it does not fall within the scope of the ground on which the IO relied (paragraph 3.5.3 of the Guidebook). Moreover, the Applicant argues that the fourth ground cannot be interpreted so broadly, since it would be inconsistent with the idea of the whole provision. The Applicant refers to the commonly known rule of interpretation - *ejusdem generis* ("of the same kinds, class, or nature") - and concludes that the norms of international law quoted in the Objection do not belong to the same category of topics as genocide, torture, slavery, violence against women, racism, and child pornography/sexual abuse, which are included in the first three grounds.

42. In the Applicant's view, the IO offers no evidence to meet the Objector's significant burden of proof since the Objection relies upon, among others, such innocuous and amorphous factors:

- Whether Donuts affiliates have applied for three, three hundred or three thousand TLDs does not prove that the TLD applied for here will breach any international law restrictions;
- Whether the instant Application resembles or differs from the over 300 others submitted by related entities neither proves that the string does, nor demonstrates that Applicant intends to, violate widely accepted international law norms against violent, discriminatory, sexually abusive or similarly egregious behaviour.

43. Furthermore, the Applicant claims that the IO arguably infringes upon the Applicant's and the public's rights to freedom of expression. As the Applicant supports an open gTLD, and believes in permitting the public to exercise freedom of expression unless such use violates the law, it disagrees with the policy position taken by the IO.

44. The Applicant also remarks that it is the only applicant for the .Hospital applied-for string. Therefore, if the IO succeeds in his Objection, the gTLD will not be available to any members of the public.

45. The Applicant acknowledges its intention to operate open and unrestricted gTLDs for the benefit of all law-abiding users. The Applicant calls the Expert Panel to bear in mind, however, that — as is the case in all forms of progress — there may be some level of cost. Further, the net benefit to the worldwide community should be recognized instead of closing off great sections of opportunity due to perceived possible, though unlikely, harm.

46. As the Applicant asserts, it should be noted that the term "hospital" is usually used in numerous second-level domain names. The Applicant has found over 26,000 uses in second-level domain names of the same term that the IO here claims will run afoul of international precepts of morality and public order.

47. Moreover, the Applicant finds the opinion issued by ICANN's Government Advisory Committee ("**GAC**") and recalled by the IO even supportive for its Application since the Applicant implements most of additional safeguards sought by the Committee. Then, the Applicant states that there were no restrictions yet accepted by the ICANN's Board as to .Hospital. In the Applicant's view, the present comments of GAC regarding potentially "sensitive strings" constitute the second form of GAC Advise as provided by Guidebook: "(ii) *The GAC advises ICANN that there are concerns about a particular application "dot-example." The ICANN Board is expected to enter into dialogue with the GAC to understand the scope of concerns. The ICANN Board is also expected to provide a rationale for its decision*". Therefore, such advice has no relevance to the instant Objection because ICANN has no obligation to adopt all or any of the GAC recommendations regarding the subject string.

48. Therefore, the Applicant requests the Expert Panel to deny the Objection.

V. DISCUSSION AND REASONING

49. The Expert Panel is required to make the Expert Determination in accordance with the standards provided in Article 20 of the Procedure which states as follows:

(a) For each category of Objection identified in Article 2(e), the Expert Panel shall apply the standards that have been defined by ICANN.

(b) In addition, the Expert Panel may refer to and base its findings upon the statements and documents submitted and any rules or principles that it determines to be applicable.

(c) The Objector bears the burden of proving that its Objection should be sustained in accordance with the applicable standards.

50. Thus, the Expert Panel is bound also by the standards defined by ICANN. Paragraph 3.5.3 of the Guidebook, which is applicable to the case under consideration, and which states that "*An expert panel hearing a Limited Public Interest objection will consider whether the applied-for gTLD string is contrary to general principles of international law for morality and public order.*" The same paragraph provides a non-exhaustive list of international law instruments containing such principles which includes among others:

- The Universal Declaration of Human Rights (UDHR) (1948),
- The International Covenant on Economic, Social, and Cultural Rights (1966), etc.

51. As is later stated: "*Under these principles, everyone has the right to freedom of expression, but the exercise of this right carries with it special duties and responsibilities. Accordingly, certain limited restrictions may apply.*"

52. Most essentially, paragraph 3.5.3 also specifies grounds upon which an applied-for gTLD string may be considered contrary to generally accepted legal norms relating to morality and public order that are recognized under principles of international law such as:

- Incitement to or promotion of violent lawless action;
- Incitement to or promotion of discrimination based upon race, color, gender, ethnicity, religion or national origin, or other similar types of discrimination that violate generally accepted legal norms recognized under principles of international law;
- Incitement to or promotion of child pornography or other sexual abuse of children; or
- A determination that an applied-for gTLD string would be contrary to specific principles of international law as reflected in relevant international instruments of law.

53. Paragraph 3.5.3 also instructs the Expert Panel to conduct its analysis on the basis of the applied-for gTLD string itself. The Expert Panel may, if needed, use as additional context the intended purpose of the gTLD as stated by the Applicant in its Application.

54. The Expert Panel has considered those standards listed above, the relevant international law instruments and relevant case law cited by the IO and has reasoned as follows.

A. The IO's alleged bias

55. Paragraph 3.2.5 of the Guidebook requires the IO to be independent of and unaffiliated with any of the gTLD applicants; however, it does not state any procedural consequences within the objection procedure for breaching these obligations.

56. Having considered the procedural requirements that the IO is obligated to fulfill in order to file a valid objection, the Expert Panel does not accept the Applicant's assertion that the IO's objections are unduly directed at the Applicant as alleged. The Expert Panel is satisfied that

the IO is acting in the best interest of the public who use the Internet and has filed this Objection in the public interest.

57. The Applicant's allegations concerning the IO's bias favouring healthcare or medical interests are also unfounded for lack of any verifiable evidence to substantiate such allegations. The Expert Panel accepts, contrary to the Applicant's assertion and as contended by the IO that the IO only acted for the French Republic as Counsel in an advisory proceeding concerning a request by the World Health Organization which came before the International Court of Justice. Just for the sake of completeness, the Expert Panel equally finds no merit in the alleged relationship said to be existing between the IO's legal assistant and a consultant of the World Health Organization which in any event the Applicant failed to substantiate by furnishing credible supporting evidence. Thus, the Expert Panel finds that the Applicant's challenge to the IO's independence and impartiality is manifestly unfounded.

B. The IO's standing

58. Pursuant to paragraph 3.2.5 of the Guidebook, the IO may file Limited Public Interest Objections against "highly objectionable" gTLD applications to which no objection has been filed. Moreover, the IO shall not object to an application unless at least one comment in opposition to the Application is made in the public sphere.

59. The Expert Panel finds that the foregoing conditions were satisfied by the IO in these proceedings. Indeed, there was no other Limited Public Interest Objection against .Hospital. Since the importance of hospitals' role for the safety and health of a society cannot be overrated, the instant Application can be deemed to be highly objectionable. Furthermore, the IO states that there were several (10) comments that were made at https://gtldcomment.icann.org/comments-feedback/applicationcomment/viewcomments in opposition to the Application in the public domain.

60. In any event the Expert Panel has taken into account various other comments in the public domain which were brought to its attention by the IO. Specifically, the Expert Panel refers to the letter dated 11 April 2012 from the World Health Organization seeking a postponement of the assignment of .health related top level domains, and expressing concerns on the likelihood of the illegal promotion and sale of medicines including spurious/falsely–labeled/counterfeit and unapproved medicines through such .health related domains. The second is the Safeguard Advice issued by ICANN's Governmental Advisory Committee (GAC) on 11 April 2013 wherein the applied-for gTLD .Hospital is listed as one of the applied-for strings that requires extensive further safeguards such as: (i) increased WHOIS verification and checks; (ii) expanded terms of use by registry operators to mitigate abusive activity; (iii) increased security checks by Registry operators, constant record keeping by registry operators to identify frequent inaccurate WHOIS records and security threats; (iv) provision of mechanisms for the handling of complaints by registry operators arising from the provision of inaccurate WHOIS information or the facilitation of infringement activity contrary to applicable law; and (v) the identification of real and immediate consequences for providing inaccurate WHOIS information and engaging in infringement or unlawful activity.

61. The Expert Panel considers that the recent Resolution adopted by the World Health Assembly on 27 May 2013 on eHealth standardization and interoperability also confirms the IO's concerns relating to the applied-for gTLD, .Hospital. The World Health Assembly is recorded to have commented on health related global top-level domain names as follows: "*(...) health-related global top-level domain names in all languages, including ".health",* should *be operated in a way that protects public health, including by preventing the further development of illicit markets of medicines, medical devices and unauthorized health products and services (...).*" Therefore, the Expert Panel rejects the Applicant's allegations questioning the IO's standing.

C. The scope of the Limited Public Interests Objection

62. The scope of the Limited Public Interest Objection is expressly limited to the four grounds enumerated in paragraph 3.5.3 of the Guidebook. The fourth and relevant ground to these proceedings being ("contrary to generally accepted legal norms relating to morality and public order (...) recognized under principles of international law").

63. Although the list of grounds in paragraph 3.5.3 includes "or" instead of "and" so as the IO has asserted, there is no conjunction, the wording of this paragraph clearly indicates that this catalogue has an exhaustive character.

64. The fourth ground is an open clause that can be a subject of exemplification. The Expert Panel shares the Applicant's view that according to the *ejusdem generis* doctrine the fourth ground should be interpreted in order to establish a relatively homogenous class of grounds. In this case, it is a class of various violations of human rights.

65. However, the Expert Panel cannot agree with the conclusion that violation of the right to health under the fourth ground is less serious than for example "incitement to or promotion of violent lawless action" which is a violation of right to life and basic freedom.

66. In the Expert Panel's view, human rights such as right to life, freedom from slavery or personal immunity that are covered by the three first grounds are equally as important as the right to health. Thus, an objection against an application that is contrary to the right to health, a fundamental human right as is incorporated in international law instruments falls within the scope of the Limited Public Interests Objection.

D. The Quick Look Procedure

67. As was stated in Procedural Order No. 4 dated 28 August 2013, the Expert Panel did not dismiss the Objection under the Quick Look Procedure, which is aimed at eliminating frivolous and/or abusive objections.

68. Firstly, a Limited Public Interest Objection would be manifestly unfounded if it did not fall within one of the categories that have been defined as grounds for such an objection. As has been demonstrated above, the Objection falls within the fourth ground, which is stated in paragraph 3.5.3 of the Guidebook.

69. Secondly, in accordance with paragraph 3.2.2.3 a Limited Public Interest Objection should be dismissed when it abuses the right to object. The Expert Panel rejects the Applicant's argumentation that the IO attacks it rather than the applied-for string. As is clarified in the next section, the objection may provide additional context for the applied-for string. All the information about the Applicant provided in the Objection is admissible and is not found by the Expert Panel to be abusive, if it is connected with the purpose of operating the present gTLD.

70. Taking into consideration that the Applicant's parent company Donuts, has applied for multiple gTLDs, it is not surprising that a significant portion of the IO's objections were filed against Donuts' applications. Moreover, as was stated before, the procedural requirement for the IO is a veritable safeguard against frivolous objections. Therefore, there are no grounds to justify the Applicant's contention that the Objection is abusive or aimed at harassing the Applicant.

E. The Application should be reviewed in light of its purpose

71. As the Applicant argues, the Guidebook expressly refers to an "applied-for gTLD string"; however, Paragraph 3.5.3 also authorizes the Expert Panel to use as additional context the intended purpose of the gTLD as stated in the Application to conduct its analysis on the basis of the applied-for gTLD string itself. The Applicant clearly states in answer to question 18 of the Application that the Applicant: *"intends to increase competition and consumer choice at the top level (...) In doing so, the TLD will introduce significant consumer choice and competition*

to the Internet namespace – the very purpose of ICANN's new TLD program." Moreover, pursuant to Article 20(b) of the Procedure, the Expert Panel may refer to and base its findings upon the statements and documents submitted and any rules or principles that it determines applicable. Because of the manner that the case has been presented by the parties, the Expert Panel, in deciding on the instant case, considers all the elements: .Hospital and the Applicant's purpose as well as other arguments raised by the IO. Since the procedure is designed to serve the best interest of the public who use the global Internet, the review cannot be limited only to the applied-for string that is just a signboard for the tremendous amount of information. Which information finally is going to be available for users depends on the intended purpose of the Applicant who stands for .Hospital and its acts. Therefore, in the Expert Panel's view, limiting the scope of procedure only to the name of gTLD may render the entire objection procedure pointless.

72. In the Expert Panel's opinion the Applicant's sole purpose for the Application as expressed in the Application documents is simply for commercial purposes. The Application supports the idea of unlimited availability of the instant gTLD for all Internet users. It presents simply a "market approach" whereas morality and public order require a "social approach" as is stated in following sections.

73. It is significant that the Applicant's answer to question "*18(c). What operating rules will you adopt to eliminate or minimize social costs*?" is completely meritless since it concerns only prices for registering second level domains. Such a disregard for social cost of operating .Hospital provides a very clear ind ication of the commercial purpose and mission of the Application.

F. Burden of proof

74. Article 20 c) of the Procedure requires the IO to prove that the Objection should be sustained in accordance with the applicable standards. In this case the standard, provided by paragraph 3.5.3, is the following: "*an applied-for gTLD string may be considered contrary to generally accepted legal norms relating to morality and public order that are recognized under principles of international law* (...) *as reflected in relevant international instruments of law.*" Therefore, the IO has to provide the necessary evidence that the Application is indeed contrary to those norms.

75. The Expert Panel finds that there is no binding provision, in either the Guidebook or the Procedure, stating a clear presumption in favour of the Application as the Applicant many times asserts. In the Application, the Applicant refers to archival notes of ICANN that allegedly provide such a presumption, but they no longer exist. Moreover, the Expert Panel is not obligated to follow all ICANN bylaws or its analysis.

G. The Application is contrary to generally accepted legal norms relating to morality and public order

76. In order to review the case under consideration, the Expert Panel has adopted, on its own initiative, definitions of "morality" and "public order" that are based upon common understanding and respective scientific sources.

77. Morality in the normative sense refers to a code of conduct that applies to all who can understand it and can govern their behaviour by it. Morality should never be overridden, that is, no one should ever violate a moral prohibition or requirement for non-moral considerations. All of those who use "morality" normatively also hold that, under plausible specified conditions, all rational persons would endorse that code (Stanford Encyclopedia of Philosophy, http://plato.stanford.edu/entries/morality-definition/, 09.09.2013). In the present case, the concept of morality is used jointly with the concept of public order.

78. Public order (or *ordre public* in French) has the same meaning as the term "public policy", used especially in Anglo-American legal terminology. Thus, the notion of public order is often used interchangeably with the term "public policy" (Josef Mrazek, Public Order (Ordre Public) and Norms of Ius Cogens in Czech Yearbook of International Law, Public Policy and Ordre Public 2012, p. 79-80). Despite this terminological confusion, public order is commonly understood as the pillar of the legal system and social order. The civil law system recognizes public order as a long-term constant and one upon which rests, not only, the constitutional and legal order. However, in light of the common law approach this term also represents a much broader legislative category which expresses to a certain degree the prevailing political view of social priorities. The Expert Panel adopts the broader notion of public order (public policy) which is close to the category of public interests and goes beyond the interest of individuals (Alexander J. Belohlavek, Public Policy and Public Interest in International Law and EU Law in Czech Yearbook of International Law, Public Policy and Ordre Public 2012, p. 118-119). Such a notion is aimed to ensure the safety and welfare of the society.

79. Morality and public order require all members of society, whether public or private entities, to be extremely cautious on issues of human life and health. It is a duty that should be fulfilled in the field of the development of the Internet as well.

80. The term "Hospital" is a generic term that is commonly associated with healthcare and emergency. This original meaning and health related connotation cannot be replaced or obscured by the commercial use of this name.

81. Misuse of the word "hospital" may cause significant harm to society. The market approach presented by the Applicant greatly increases that risk. The examples of second level domains given by the Applicant that are not related to healthcare but are welcomed to register at ".Hospital" might be a source of mistakes leading to endangering health or life.

82. It is important to bear in mind that people seeking health care are often vulnerable and easy to manipulate. A person suffering from a serious disease has a significantly lower ability to access the content of websites critically. Furthermore, a need for a hospital often occurs in the event of emergency – unreliable information about healthcare providers can cause serious harm to vulnerable people and to society at large since there is usually no time for a critical consideration of health related information obtained from the Internet in such circumstances. This is the main reason for the highest standard of requirements for the present gTLD.

83. The GAC's comments presented by the IO indicate that the Application may be considered contrary to generally accepted legal norms relating to morality and public order. The Application does not include the specific protection safeguards listed on page 8 of the GAC's comments. The issue is not whether ICANN will follow these suggestions or not, because this Expert Panel is only expected to examine the present Application and cannot take into account possible amendments that may be made in the future. The safeguards currently employed by the Applicant - the fourteen protections required by ICANN and the eight additional that Donuts.Inc has taken on voluntarily in all its applications are in the Expert Panel view not sufficient. This conclusion is based upon GAC's concerns. The Expert Panel relies on GAC's statement since it is the body representing interests of multinational governments. Currently, .Hospital has the same level of protection as .Creditcard, .Legal or .Investments. However, in the Expert Panel's view the sensitivity of .Hospital has a different dimension than gTLDs connected with banking or legal services since human life and health require greater care than pure commercial activity.

84. The Expert Panel has also taken into consideration the possibility of conditionally upholding the Objection as long as the Applicant does not provide sufficient safeguards. However, Article 21 (d) of the Procedure states expressly: "*The remedies available to an Applicant or an Objector pursuant to any proceeding before a Expert Panel shall be limited to the success or*

dismissal of an Objection and to the refund by the DRSP to the prevailing party, as determined by the Expert Panel in its Expert Determination, of its advance payment(s) of Costs pursuant to Article 14(e) of this Procedure and any relevant provisions of the applicable DRSP Rules." Therefore, in the view of the majority of the Expert Panel such a remedy is not available in the present procedure.

85. Having carefully considered the Applicant's Application, the response to the Objection and the response to the IO's additional written statements, the Expert Panel states that the Applicant has failed to appreciate the highly sensitive nature of the applied-for string .Hospital as articulated by the IO, and the Applicant's Public Interest Commitments filed on 6 March 2013 does not in any way address the concerns of the IO.

H. The great care of public health required by morality and public order is reflected in the right to health which is broadly recognized in many international law instruments

86. In this regard, the Expert Panel is convinced that the right to health is an important principle of international law, as is reflected in various documents. As it was pointed out by the IO's, Article 25 of the Universal Declaration of Human rights which provides as follows: "*Everyone has the right to a standard of living adequate for the health and well being of himself and of his family, including food, clothing, housing and medical care and necessary social services and the right to security in the event of unemployment sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control.*" Then, Article 12 (1) of the International Covenant on Economic, Social and Cultural Rights which states as follows: "*The States Parties to the present Covenant recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.*"

87. Furthermore, the Expert Panel draws support from the 1998 European Court of Human Rights decision in the case of *Guerra* v. *Italy supra* where it was decided that a failure by the state to provide timely information on environmental pollution issues so that the citizens of that state could assess the health risks to themselves and their families was tantamount to a violation of their right to respect for their right to private and family life in breach of Article 8 of the European Convention on Human Rights. As was submitted by the IO, having access to reliable and trustworthy health related information is part of the fundament right to health. Moreover, the Expert Panel accepts the argument presented by the IO that business enterprises should respect human rights by avoiding the infringement of human rights and addressing adverse human rights impacts with which they are involved (11 principle of "Guiding Principles" that were endorsed by the United Nations Human Rights Council in its Resolution 17/4 of 16 June 2011). Accordingly, the Expert Panel finds that both states and private entities are duly bound to ensure reliable access to health related information, goods and services. And where such mechanisms for ensuring safe and reliable health related information goods and services are non-existent or inadequate then the Application breaches the right to health. The Application falls outside the scope of freedom of expression.

88. Freedom of expression is connected with special duties and responsibilities as is stated in the Guidebook. In the case of registering .Hospital those duties include an application of very specific protection and an awareness of the importance of the role of hospitals in delivering credible healthcare objectives. The Expert Panel, in considering this Application, believes that the Applicant failed to avert its mind to these responsibilities.

89. The present case is an example of a hard case which requires not only the simple application of legal rules, but also balancing different values and rules (Ronald Dworkin, Taking rights seriously, 1977). Freedom of expression and the development of services in the Internet must be balanced with the right to health and even right to life. For the majority of the Expert Panel, there is no doubt that human health and its safety tips the scale in finding the Objection to be justified.

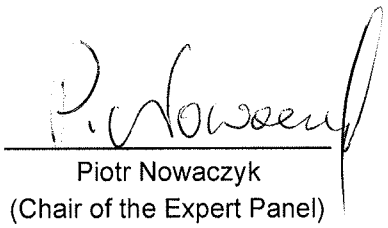
90. The Expert Panel's decision was not taken unanimously.

VI. DECISION

91. For the foregoing reasons, in accordance with Article 21 (d) of the Procedure, the majority of the Expert Panel renders the following Expert Determination:

(i) The Objection is successful. Therefore, the Independent Objector is the prevailing party.

(ii) The Centre shall refund the Independent Objector's advance payment of costs of the proceeding.



Piotr Nowaczyk
(Chair of the Expert Panel)

Ike Ehiribe
(Co-Expert of the Expert Panel)

11th December 2013.

August Reinisch
(Co-Expert of the Expert Panel)

DATE: 11 December 2013