

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

CASE No. EXP/395/ICANN/12

PROF. ALAIN PELLET, INDEPENDENT OBJECTOR

(FRANCE)

vs/

CORN LAKE, LLC (USA)

(USA)

(Consolidated with Cases No.

EXP/399/ICANN/16

PROF. ALAIN PELLET, INDEPENDENT OBJECTOR (FRANCE) vs/ EXCELLENT FIRST
LIMITED (CAYMAN ISLANDS)

and

EXP/400/ICANN/17

PROF. ALAIN PELLET, INDEPENDENT OBJECTOR (FRANCE) vs/ SPRING REGISTRY
LIMITED (GIBRALTAR))

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.

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

**NEW GENERIC TOP-LEVEL DOMAIN NAMES (« gTLD »)
DISPUTE RESOLUTION PROCEDURE**

**EXP/395/ICANN/12
(consolidated with EXP/399/ICANN/16 & EXP/400/ICANN/17)**

BETWEEN

PROF. ALAIN PELLET, INDEPENDENT OBJECTOR (France)

Objector

AND

CORN LAKE, LLC (USA)

Applicant

EXPERT DETERMINATION

BEFORE

Mr. Tim Portwood

Expert Panel

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TABLE OF ABBREVIATIONS

Abbreviation	Definition
ACC	Association of Corporate Counsel
Applicant	Corn Lake LLC
Applicant Additional Written Statement	The Additional Written Statement submitted by Applicant on 6 September 2013
Application	The new gTLD application by Applicant “.Charity”, application ID: 1-1384-49318
Centre	The International Centre for Expertise of the International Chamber of Commerce
Community Objection	An objection to a gTLD application falling with the definition of “Community Objection” in section 3.2.1 of Module 3 of the Guidebook (and also contained in Article 2(e)(iv) of the Procedure)
Costs	As per the meaning set out in Article 14(a) of the Procedure
Expert	Mr. Tim Portwood
Expert Panel	The expert panel comprising the Expert.
GAC	ICANN’s Governmental Advisory Committee
Guidebook	The gTLD Applicant Guidebook issued by ICANN (version 2012-04-06)
ICC Practice Note	The ICC Practice Note on the Administration of Cases under the Procedure

IO or Objector	The Independent Objector (Prof. Alain Pellet)
IO Additional Written Statement	The Additional Written Statement submitted by IO on 22 August 2013
Objection	The Objection Form dated 12 March 2013 transmitted by IO to the Centre on 13 March 2013 by email
Parties	The IO and the Applicant
Party	The IO or the Applicant as the case may be
Procedure	The New gTLD Dispute Resolution Procedure issued by ICANN as the Attachment to Module 3 of the Guidebook
Response	The Response (as per the meaning set out in Article 11(b) of the Procedure) submitted by Applicant on 23 June 2013
Rules	The Rules for Expertise of the International Chamber of Commerce (in force as from 1 January 2003)

1. THE PARTIES

1. IO:

PROF. ALAIN PELLET, Independent Objector, an individual residing at:

16, avenue Alphonse de Neuville,
92380 Garches,
France.

2. IO is represented in this Expert Determination proceeding by:

Ms Héloïse Bajer-Pellet
15, rue de la Banque,
75002 Paris,
France

Mr. Daniel Müller
20, avenue du Général de Gaulle ;
78290 Croissy sur Seine,
France

Mr. Phon van den Biesen
VDBK Advocaten,
De Groene Bocht,
Keizersgracht 253,
Amsterdam, 1016 EB;
The Netherlands

Mr. Sam Worsworth
Essex Court Chambers,
24 Lincoln's Inn Fields,
London WC2A 3EG,
United Kingdom

3. Applicant:

CORN LAKE, LLC, a company incorporated under the laws of the State of Delaware, USA, with offices at:

Corn Lake, LLC
10500 NE 8th Street,
Suite 350,
Bellevue,
WA 98004,
USA

4. Applicant is represented in this Expert Determination proceeding by:

Mr. John M. Genga and Mr. Don C. Moody
The IP & Technology Legal Group, P.C.
15260 Ventura Blvd.,
Suite 1810,
Sherman Oaks,
CA 91403,
USA

2. THE EXPERT PANEL

5. On 4 July 2013 and pursuant to Article 3(3) of Appendix 1 to the Rules, the Chairman of the Standing Committee appointed Mr. Tim Portwood as the Expert. In accordance with Article 13 of the Procedure, the Expert is the sole member of the Expert Panel.
6. On 2nd August 2013, the Centre acknowledged receipt of payment of the Parties' respective shares of the advance payment of the estimated Costs and confirmed the full constitution of the Expert Panel.
7. The Expert's contact details are as follows:

Mr. Tim Portwood
Bredin Prat,
130, rue du Faubourg Saint Honoré,
75008 Paris,
France

3. SUMMARY OF THE EXPERT DETERMINATION PROCEEDING

8. The present Expert Determination proceeding concerns IO's Community Objection to Applicant's Application for the new gTLD ".Charity".
9. The Expert Determination is governed by and has been conducted in accordance with the Procedure and the Rules, supplemented by the ICC Practice Note.
10. IO transmitted to the Centre its Objection on 13 March 2013.
11. On 28 March 2013, the Centre informed IO that it had conducted the administrative review of the Objection pursuant to Article 9 of the Procedure and confirmed that the Objection is in compliance with Articles 5 to 8 of the Procedure and with the Rules. The Objection was therefore registered for processing under Article 9(b) of the Procedure.
12. The Centre wrote to the Parties on 12 April 2013 informing them that the Centre was considering consolidating the Objection with two other cases, namely EXP/399/ICANN/16 – a Community Objection filed by IO against an application by Excellent First Limited (Cayman Islands) for a new gTLD ".慈善 (Charity)" – and EXP/400/ICANN/17 – Community Objection filed by IO against an application by Spring Registry Limited (Gibraltar) for a new gTLD ".Charity".
13. On 7 May 2013, the Centre informed the Parties that it had decided to consolidate the present case with the two other above-referenced cases.
14. On 6 June 2013, Applicant filed with the Centre by email a Response form which failed to comply with Article 11(e) of the Procedure. Subsequently, on 23 June 2013, Applicant filed with the Centre by email its amended Response, the non-compliance with Article 11(e) of the Procedure having been remedied.
15. The Chairman of the Standing Committee having appointed the Expert on 4 July 2013, on 2nd August 2013, the Centre confirmed to the Parties the full constitution of the Expert Panel (comprising the Expert as sole member). On the same day, the Centre forwarded the file to the Expert Panel.
16. On 2nd August 2013, IO wrote to the Expert Panel requesting leave to file an Additional Written Statement.

17. On 8 August 2013, Applicant wrote to the Expert Panel objecting to IO's request for leave.
18. On 9 August 2013, having considered the Parties' submissions, the Expert Panel wrote to the Parties informing them of its view that it would be assisted by a second round of written submissions and inviting the Parties each to submit an Additional Written Statement in accordance with the following timetable: IO to file its Additional Written Submission on or before 22 August 2013 and Applicant to file its Additional Written Submission on or before 2nd September 2013.
19. On 10 August 2013, IO wrote to the Expert Panel requesting an extension of two days to the timetable for the Additional Written Submissions.
20. On 11 August 2013, Applicant wrote to the Expert Panel stating that it had no objection to IO's requests for a 2 day extension to the timetable.
21. On 13 August 2013, the Expert Panel granted IO's request, extending the deadline for the filing of IO's Additional Written Submission to 24 August 2013 and the deadline for the filing of Applicant's Additional Written Submission to 4 September 2013.
22. On 15 August 2013, Applicant requested a further extension of 2 days (i.e., 6 September 2013) for the filing of its Additional Written Statement to which IO indicated on the same day that it had no objection.
23. On 22 August 2013, IO filed by email its Additional Written Statement.
24. On 22 August 2013 the Expert Panel acknowledged receipt of IO's Additional Written Statement and confirmed that the deadline for the filing by Applicant of its Additional Written Submission was 6 September 2013.
25. On 6 September 2013, Applicant filed by email its Additional Written Statement.
26. No hearing took place.
27. The Expert Panel submitted the draft Expert Determination to the Centre for scrutiny under Article 21(b) of the Procedure within the time limit contained in Article 21(a) of the Procedure.
28. In accordance with Article 5(a) of the Procedure, the language of the proceedings is English.

29. In accordance with Article 6(a) of the Procedure, all communications by the Parties with the Centre and the Expert Panel were submitted electronically.
30. Pursuant to Article 4(d) of the Procedure, the place of the proceedings is Paris, France.

4. ISSUES TO BE DETERMINED BY THE EXPERT PANEL

4.1. IO's Impartiality and Independence

4.1.1. IO's Position

31. IO confirms that he is acting exclusively in the best interests of the public who uses the global internet and not in accordance with what he himself might prefer or with self-interest¹.

4.1.2. Applicant's Position

32. Applicant argues that IO has overstepped his role as an independent objector by making submissions which attack Applicant's (and its parent's) philosophy for an open internet and which threaten freedom of expression and by ignoring the protective mechanisms required by ICANN, those added voluntarily by Applicant (and its parent) and the new safeguards recently implemented by ICANN based on the GAC's Beijing comments². Applicant points out also that IO has devoted the bulk of his efforts objecting to gTLDs applied for by Applicant's parent company in objections that lack merit. Applicant suggests in conclusion that IO is acting on the basis of what he wants for the internet and argues that this is not a basis for upholding the Objection³.

¹ IO Additional Written Statement, para. 2.

² Applicant Additional Written Statement, p. 3.

³ Response, page 9; Applicant Additional Written Statement, pp. 2-3.

4.2. IO's Standing

4.2.1. IO's Position

33. Relying upon section 3.2.5 of the Guidebook, IO denies that he has to prove that he is acting "on behalf of a 'clearly delineated community'" with which the applied-for string is strongly associated⁴.
34. IO argues further that an independent objector has *ipso facto* standing in the sense of section 3.2.2 of the Guidebook, the regular standing requirements for making a Community objection being expressly disposed of by section 3.2.5 of the Guidebook in the case of objections made by an independent objector⁵.
35. According to IO, under section 3.2.5 of the Guidebook, the only standing requirement for an independent objector to make a Community objection is the existence of "at least one comment in opposition to the application ... made in the public sphere"⁶.
36. IO points out that opposition comments to the Application have been made by, *inter alia*, the Charity Commission for England and Wales, the National Council for Voluntary Organizations and the Association of Charitable Foundations⁷. The standing requirement for IO has therefore been met, even if Applicant contests those comments⁸.

4.2.2. Applicant's Position

37. Applicant maintains that independent objectors are authorized by ICANN to file Community objections only "against 'highly objectionable' gTLD applications to which no objection has been filed" referencing section 3.2.5 of the Guidebook⁹.

⁴ IO Additional Written Statement, para. 3.

⁵ IO Additional Written Statement, para. 5.

⁶ *Ibid.*

⁷ Objection, para. 27.

⁸ IO Additional Written Statement, para. 5.

⁹ Response, p. 6.

38. Applicant accepts that the Guidebook grants independent objectors standing to make Community objections without fulfilling the regular standing requirements for such objections (again referencing section 3.2.5 of the Guidebook)¹⁰. Applicant argues further, however, citing section 3.2.2.4 of the Guidebook, that an independent objector making a Community objection must nevertheless “act on behalf of a ‘clearly delineated community’”¹¹ and that that community must be strongly associated with the applied-for gTLD string¹².
39. Applicant submits that IO neither acts on behalf of a clearly delineated community because no “charity community” exists (as shown by the absence of any objections to the Application from any person from that “community”) nor has shown any strong association between the generic term “charity” and that supposed community, the word “charity” describing a subject and not a community¹³.
40. Applicant concludes that IO lacks standing to make the Community objection.

4.3. The Community Objection

41. IO’s objection is a Community Objection to Applicant’s Application of “.Charity” as a new gTLD.
42. The Expert Panel is therefore to determine whether there is substantial opposition to the Application from a significant portion of the community to which the gTLD string “.Charity” may be explicitly or implicitly targeted (Article 2(e)(iv) of the Procedure).
43. Under section 3.5.4 of Module 3 of the Guidebook, the Expert Panel must be satisfied that IO had proven that (i) the community invoked by IO is a clearly delineated community; (ii) community opposition to the Application is substantial; (iii) there is a strong association between the community invoked and the applied-for gTLD string (“.Charity”); and (iv) the Application creates a likelihood of material detriment to the rights or legitimate interests of a significant portion of the community to which the string may be explicitly or implicitly targeted.

¹⁰ Ibid.

¹¹ Response, pp. 6-7.

¹² Response, p. 7.

¹³ Ibid.

4.3.1. IO's Position

44. According to IO, an objector making a Community Objection must satisfy four tests under section 3.5.4 of the Guidebook¹⁴. IO states these four tests as: (a) a Community test, namely that the community invoked by the objector is a clearly delineated community; (b) a Substantial opposition test, namely that community opposition to the application is substantial; (c) a Targeting test, namely that there is a strong association between the community invoked and the applied-for gTLD string; and (d) a Detriment test, namely that the application creates a likelihood of material detriment to the rights or legitimate interests of a significant portion of the community to which the string may be explicitly or implicitly targeted¹⁵.
45. IO argues that the four tests are met. He submits that the applied-for gTLD string “.Charity” targets the charity sector such that the Targeting test is satisfied, even though the Application has not been framed as a community based TLD for the benefit of the charity community¹⁶. IO states that the charity sector constitutes a clearly delineated community in the sense of the Guidebook, thereby fulfilling the Community test. IO claims that the opposition to the Application is substantial, meaning that the Substantial opposition test is met¹⁷. Finally, IO pleads that the Application creates a likelihood of material detriment to the rights and legitimate interests of the charity community, fulfilling the Detriment test¹⁸.
46. IO points out that the Guidebook does not limit Community Objections to applications for a new gTLD string made as a community gTLD¹⁹, referring to section 1.2.3.2 of the Guidebook: “All applicants should understand that a formal objection may be filed against any application on community grounds, even if the applicant has not designated itself as community-based or declared the gTLD to be aimed at a particular community”²⁰. The Applicant’s own purposes in making the Application, its own philosophy of how the internet should operate and its own understanding of the intent of ICANN in adopting the new gTLD program cannot prevail over the safeguards incorporated into the Guidebook. Those safeguards include the dispute resolution

¹⁴ Objection, para. 8.

¹⁵ Ibid.

¹⁶ Objection, para. 11.

¹⁷ Objection, para. 21.

¹⁸ Objection, para. 46.

¹⁹ IO Additional Written Submission, para. 7.

²⁰ IO Additional Written Statement, para. 8.

procedure such that a successful objection by an independent objector on any ground cannot be an unwarranted violation of the fundamental rights of freedom of expression²¹.

4.3.1.1. *The Community Test*

47. IO's position is that the Community test in the Guidebook does not require that the gTLD string describes a clearly delineated community (which would render the Targeting Test otiose) but that there exists a community identified by the objector comprising a group of persons clearly delineated from others including internet users in general²².
48. According to IO, the community in question is the charity sector²³, comprising all charitable institutions, including those that are specifically registered or regulated in some form in the states where they operate such that they must be not for profit institutions²⁴.
49. IO points out that the Guidebook does not provide a clear definition of the term "community". Instead, the Guidebook refers to a non-exhaustive list of factors to which the Expert Panel may refer including the recognition of the community at a local/global level, the level of formal boundaries, the length of existence, the global distribution, or the size of the community²⁵.
50. For IO, the distinctive element of a community is the commonality of certain characteristics, whatever they might be²⁶.
51. The common characteristics of the persons comprising the charity sector identified by IO are such persons' "charitable aims", "often the status of a not for profit institution", exemption from a range of regulatory requirements applicable to for-profit entities and funding through donations or public money²⁷.

²¹ IO Additional Written Submission, paras 8 & 9.

²² Objection, para. 18; IO Additional Written Submission, paras 10 to 15.

²³ Objection, para. 9.

²⁴ Objection, para. 11.

²⁵ Objection, para. 15 referencing section 3.5.4 of the Guidebook.

²⁶ Objection, para. 16.

²⁷ Objection para. 20.

52. Referring to Evaluation question No.20 of the Guidebook, Attachment to Module 2, IO argues that a relevant criterion is whether the group of persons comprising the community can be clearly delineated from the others – including internet users in general²⁸. Recognition of the community as such (by its members and others) is an important factor in this regard²⁹.
53. IO points out that the charity sector is delineated as a recognizable community, distinct from others by both its members and the public, referring to public comments made on the community ground point³⁰.
54. IO points out that charities and charitable organizations (i.e., the charity sector) are included in the “millions of persons and organizations worldwide involved in philanthropy, humanitarian outreach, and the benevolent care of those in need” explicitly targeted by the Applicant³¹.
55. IO accepts that the charity sector is not an organized community with an entity dedicated to the community and its activities, but argues that the meaning of community in the Guidebook is not limited to organized communities and covers less structured communities, like those based on a common place of origin or a common language or a common activity or common set of goals or interests or values³² and refers to the 2007 ICANN Final Report which confirms that “community should be interpreted broadly and will include, for example, an economic sector, a cultural community, or a linguistic community”³³.
56. IO underlines that his position is confirmed by the Advice contained in the GAC’s Beijing Communiqué dated 11 April 2013³⁴ which considered the charity community as a market sector delineated by clear and/or regulated entry requirements on account of the level of implied trust from consumers and risk of consumer harm associated with its activities³⁵. The GAC included “.Charity” in its list of sensitive strings necessitating safeguard measures.

²⁸ Objection, para. 18.

²⁹ Ibid.

³⁰ Objection, para. 20 ; IO Additional Written Statement, para. 16.

³¹ Objection, para. 19.

³² Objection, para. 21.

³³ Objection, para. 17.

³⁴ <http://www.icann.org/en/news/correspondence/gac-to-board-18apr13-en.pdf> -Annex 1 to IO Additional Written Statement.

³⁵ IO Additional Written Statement, para. 17.

4.3.1.2. *The Targeting Test*

57. IO argues that the “.Charity” string implicitly targets the charity community (comprising charities and charitable organizations)³⁶ and that therefore the Targeting test is met³⁷.
58. IO refers to Implementation Guideline P of the 2007 ICANN Final Report which indicates that “implicitly targeting means that the objector makes an assumption of targeting or that the objector believes there may be confusion by users over its intended use”. The focus of the test is not what the Applicant intends but is what the average internet user perceives and expects from the string³⁸. Similarly, the test is not about what the Application targets but is about what the string itself targets³⁹
59. IO notes that in the Application, Applicant explicitly targets “the millions of persons and organizations worldwide involved in philanthropy, humanitarian outreach, and the benevolent care of those in need”⁴⁰. According to IO, that explicit target includes charities and charitable organizations⁴¹. The charity community is therefore implicitly targeted by the string⁴².
60. IO refers also to one of the dictionary definitions of the word “charity” which indicates that it is generally associated in the public mind with giving for what is seen as a good cause and likewise with not for profit institutions that are directed to some form of charitable outcome⁴³. IO adds that simply because the word bears several meanings, this does not preclude the string from having a strong association with one of those meanings if the general public is likely to make that association⁴⁴.

³⁶ Objection, para. 11.

³⁷ Objection, paras 9 and 14.

³⁸ Objection, para. 13.

³⁹ IO Additional Written Statement, para. 18.

⁴⁰ Objection, para. 11.

⁴¹ Ibid.

⁴² Objection, para. 13.

⁴³ Ibid referencing the definition of « charity » as « an organization set up to provide help and raise money for those in need » - <http://oxforddictionaries.com/definition/english/charity>.

⁴⁴ IO Additional Written Statement, para. 18.

61. IO concludes that according to Applicant's own statements and the general use of the term "charity" by the public, there is a strong association between the charity sector and ".Charity"⁴⁵.

4.3.1.3. *The Substantial Opposition Test*

62. According to IO, the test whether there is "substantial opposition within the community" to the Application is largely casuistic⁴⁶.
63. IO refers to the non-exhaustive list of factors in the Guidebook which an Expert Panel may use to identify substantial opposition to the Application⁴⁷ noting that the factors are more useful in cases of well-organized and structured communities than in cases like the present of communities lacking organizational structures or clear representation⁴⁸.
64. IO argues that a mere numerical criterion – the number of voiced oppositions to the Application – was not the intent of the Guidebook, the word "substantial" meaning not simply a large number but also something of "considerable importance" or "considerable worth"⁴⁹. According to IO, therefore, the material content of comments and oppositions and the rights and interests of those expressing those comments and oppositions must be taken into account⁵⁰.
65. IO identifies opposition comments having been posted on the public comments website by the Charity Commission for England and Wales, the National Council for Voluntary Organizations and the Association of Charitable Foundations, the first being the regulator of charities in England and Wales and the last representing a membership of some 330 charitable trusts and foundations in England and Wales⁵¹. IO refers also to the Australian member of the GAC having issued an Early Warning regarding ".Charity"⁵². According to IO, the common underlying concern of such opposition comments and Early Warning is the potential harm to the system of trust on which

⁴⁵ Objection, para. 14.

⁴⁶ Objection, para. 22.

⁴⁷ Objection, para. 23.

⁴⁸ Objection, para. 24.

⁴⁹ Objection, para. 25.

⁵⁰ Objection, para. 25.

⁵¹ Objection, para. 27.

⁵² Ibid.

charities and charitable are largely dependent that would be caused in the absence of sufficient protection mechanisms such as strict eligibility criteria for users of the string⁵³.

66. IO admits that the opposition to the Application has largely emanated from the UK and Australia but argues that the concerns that have been voiced are substantively substantial, are “without doubt ... of much more general application”⁵⁴ and include the views of one or more governments (referencing section 1.1.2.4 of the Guidebook)⁵⁵.

4.3.1.4. *The Detriment Test*

67. IO emphasizes that the Detriment test requires a finding of “a likelihood of detriment”⁵⁶ and not of actual detriment – which would be anathema, the string not yet having been put into use⁵⁷ – the idea of requiring a finding of actual detriment having been abandoned during the *travaux* of ICANN⁵⁸.
68. According to IO, the likelihood of detriment must be created by the Application and therefore must take into account the Applicant and the security protection for user and community interests that Applicant has proposed or intends to adopt⁵⁹.
69. IO underlines that the likelihood of detriment must be to the rights or legitimate interests of the community or to users more widely, referring to Implementation Guideline P⁶⁰. He refers to the guidance in the Guidebook and summarizes that detriment may include harm to the reputation of the community, interference with the community’s core activities, economic or other concrete damage to the community or significant portions of the community⁶¹.
70. IO points out that the Expert Panel may take into account a variety of factors, including the dependence of the community on the DNS for its core activities, the intended use of the gTLD as stated in the Application, the importance of the rights and interests

⁵³ Objection, paras 27 to 31 ; IO Additional Written Statement, para. 20.

⁵⁴ Objection, para. 33.

⁵⁵ Objection para. 32.

⁵⁶ Objection, para. 34.

⁵⁷ IO Additional Written Statement, para. 22.

⁵⁸ IO Additional Written Statement, para. 22.

⁵⁹ Objection para. 36.

⁶⁰ Objection, para. 34.

⁶¹ Objection, para. 35.

exposed for the community targeted and for the public more generally⁶² and whether the Applicant intends acting in accordance with those rights and interests⁶³.

71. IO argues, in line with the GAC's Beijing Communiqué of 11 April 2013⁶⁴, that the charity sector relies on public trust without which its gift and other funding would be threatened. Public regulation exists in many jurisdictions precisely to protect and nurture that trust⁶⁵. Administration of the ".Charity" string outside such or similar protections and safeguards could, according to IO, citing the Charity Commission of England and Wales, lead to "scope for confusion, misunderstanding and, perhaps, deliberate abuse, resulting in turn in significant damage to charities if public support dropped as a result"⁶⁶.
72. IO asserts that the Application does not address the specific needs of the charity community and points to three factors that demonstrate a likelihood of detriment to that community: (i) Applicant has not framed the Application as a community based gTLD, thereby avoiding certain consequences for the evaluation of the Application and the terms (such as user registration requirements) under which the gTLD would be operated⁶⁷; (ii) no registrant eligibility criteria are proposed for the string, Applicant preferring to address abuse if it occurs, such that the needs and requirements of the charity community would not be addressed in a preventive manner⁶⁸ and it being up to Applicant (and not IO) to enumerate its Application with sufficient specificity to meet the required tests⁶⁹; and (iii) the security mechanisms proposed in the Application to react to abuse are unspecific, often left to the discretion of the Applicant and its parent company and largely identical to the mechanisms proposed by Applicant's sister companies for strings with different features such as ".Creditcard"⁷⁰.
73. IO concludes that Applicant, like its ultimate parent, continues to affirm a pro-open registry philosophy for new gTLDs that fails to address the specific characteristics of the ".Charity" string, including the need to protect public trust in charities and

⁶² Objection para. 35.

⁶³ Objection, para. 36.

⁶⁴ IO Additional Written Statement, para. 24 and Annex 1 thereto.

⁶⁵ Objection, paras. 37 & 38.

⁶⁶ Objection, para. 39.

⁶⁷ Objection, para. 42.

⁶⁸ Objection, para. 43.

⁶⁹ IO Additional Written Statement, para. 25.

⁷⁰ Objection, para. 45.

charitable organisations being the community implicitly targeted by the string, and that is evidenced by the challenge to the safeguard measures advised by the GAC made by Applicant's ultimate parent⁷¹.

4.3.2. Applicant's Position

74. Relying on section 3.5.4 of the Guidebook, Applicant states that an objector making a Community objection must satisfy four tests to succeed, namely, the Community test, the Targeting test, the Substantial Opposition test and the Detriment test⁷². It points out that failure on any one test compels denial of the objection⁷³.

75. Applicant's position is that none of the tests is met by IO⁷⁴.

4.3.2.1. The Community Test

76. Applicant notes that the standing requirement and the substantive tests for a Community objection both impose on an independent objector a showing that a "clearly delineated community" exists⁷⁵. In order to satisfy the general rule that all parts of different tests must have an operative meaning, Applicant argues that ICANN must have intended the substantive "Community test" to be "a more stringent test ... than for standing"⁷⁶.

77. Applicant looks to ICANN's purpose for the Community objections and cites a public comment from eNOM of 21 July 2009 transcribed into ICANN's Summary Report and Analysis of Public Comment, 2 October 2009 (<http://archive.icann.org/en/topics/new-gtlds/agve-analysis-public-comments-04oct09-en.pdf>) at p.19 where eNOM stated the objective of Community objections being "to prevent the misappropriation of a string that uniquely or nearly uniquely identifies a well-established and closely connected group of people or organizations"⁷⁷. Applicant argues that the intent behind the Community test set out in the Guidebook is therefore that the string must itself describe

⁷¹ IO Additional Written Statement, para. 27.

⁷² Response, p. 7.

⁷³ Ibid.

⁷⁴ Ibid.

⁷⁵ Ibid.

⁷⁶ Ibid.

⁷⁷ Ibid.

or “clearly delineate” a “community”⁷⁸. Referring to section 4.2.3 of the Guidebook, Applicant submits that “a community must have more ‘cohesion than a mere communality of interest’”⁷⁹.

78. Relying on section 3.5.4 of the Guidebook, Applicant identifies five factors that an objector must prove to show that the Community test is met: (i) public recognition of the group as a community at a local and/or global level; (ii) formal boundaries around the community, such as who specifically forms the community; (iii) how long the community has existed; (iv) the community’s global distribution; and (v) how many people or entities comprise the community⁸⁰.
79. Applicant argues that IO has failed to provide evidence of any of these factors.
80. Applicant states that IO’s definition of the charity community as “millions of persons and organizations worldwide involved in philanthropy, humanitarian outreach, and the benevolent care of those in need” which includes “charities and charitable organizations” has no boundaries and potentially includes “planet Earth”⁸¹.
81. Although IO has extracted a subset of “charities and charitable institutions”, Applicant argues that IO has failed to delineate such subset as a community as Applicant says IO has admitted when he states in his Objection (para. 21) that the “charitable community ... [is] not institutionalized and straddles the border between different stakeholders of the community of charitable organizations”⁸². Applicant submits that the community standard was crafted by ICANN to avoid legitimate uses of generic terms, such as charity, being blocked by the objection process⁸³.
82. Applicant points out that the word “charity” has many meanings and represents a subject – IO having failed to show that the public recognizes “charity” as a “community”⁸⁴.
83. Even if the “community” in question were “charitable institutions”, Applicant argues that IO still fails to discharge the burden of proof imposed by the Community test not

⁷⁸ Applicant Additional Written Response, p. 3.

⁷⁹ Response, p. 7.

⁸⁰ Applicant Additional Written Response, p. 3.

⁸¹ Response, p. 8.

⁸² Ibid.

⁸³ Ibid.

⁸⁴ Response, p. 9.

having defined “charitable institution” – itself a generic and widely-applicable term⁸⁵. At best, “charitable institutions” constitutes a “loosely delineated” community: not the required “clearly delineated” one.

84. In response to IO’s reliance on the GAC comments, Applicant states that the GAC Beijing Advice does not in fact view “.Charity” as a string delineating a community but merely considers that string is one of many “sensitive strings” for which possible additional safeguards may be necessary⁸⁶.
85. In addition to IO having failed to discharge the burden of proving that “charity” constitutes a clearly delineated community, Applicant claims that the Objection would, if successful, stifle free expression and discourse and thus undermine the purpose of ICANN’s new gTLD program as well as Applicant’s open-internet philosophy⁸⁷.

4.3.3. The Substantial Opposition Test

86. Applicant refers to section 3.5.4 of the Guidelines and argues that IO must prove substantial opposition to the Application from the community on whose behalf IO purports to speak. Applicant extracts from that Article six factors to be taken into account: (i) the number of expressions of opposition; (ii) the representative nature of those expression opposition; (iii) the stature or weight of the opposition; (iv) the distribution or diversity of opposition within the community; (v) the defence of the community in other contexts by those expressing opposition; and (vi) costs incurred in expressing opposition⁸⁸.
87. Applicant points out that IO relies upon only three of the seven public comments made to ICANN in respect of the Application as well as the Early Warning by the Australian member of GAC⁸⁹. Those three public comments all come from the same jurisdiction – the UK. Two use the same language and thus express the same concern⁹⁰. The other is limited to general concern about consumer confusion and abuse if the string is administered improperly which suggests a need to examine Applicant’s safeguard

⁸⁵ Applicant’s Additional Written Statement, p.3.

⁸⁶ Applicant’s Additional Written Statement, pp. 4 & 7-9.

⁸⁷ Response, p. 9.

⁸⁸ Response, p. 9.

⁸⁹ Ibid.

⁹⁰ Ibid.

measures but not to block the Application⁹¹. Not one comment relates to Applicant itself⁹².

88. Applicant summarizes the seven public comments about the Application as emanating almost entirely from the UK and being limited to two concerns: (i) that “.Charity” should be run by a not-for-profit organization with which IO disagrees; and (ii) that “.Charity” should be a community-based TLD, a requirement not imposed by ICANN⁹³.
89. Applicant concludes that IO has failed to adduce anything more than scant evidence of opposition which cannot be characterized as substantial opposition from a significant portion of the global “charity community”. What that evidence of opposition might do is to enable IO to have standing to object, but falls short of satisfying the Substantial opposition test⁹⁴.

4.3.4. *The Targeting Test*

90. Applicant relies on section 3.5.4 of the Guidebook and argues that IO must prove a “strong association” between the applied-for string and the community he invokes by relying on statements in the Application, public statements by the Applicant and public associations between the string and the community⁹⁵.
91. Applicant criticizes IO for having failed to take any account of what the Applicant targets⁹⁶ and points out that in its Application it is targeting a wide variety of users – “millions of persons and organizations worldwide involved in philanthropy, humanitarian outreach, and the benevolent care of those in need (relying on the Declaration of Mr. Jonathan Nevelt, the founder and Executive Vice President of Applicant’s parent company): not a discrete set which would run contrary to its parent’s internet philosophy⁹⁷.
92. Applicant argues that IO has failed to present evidence that the public strongly associates the word “charity” with any delineated community – all that IO has done,

⁹¹ Ibid.

⁹² Response, p. 10.

⁹³ Response, p. 9.

⁹⁴ Applicant Additional Written Statement, p. 5.

⁹⁵ Response, p. 10.

⁹⁶ Applicant Additional Written Statement, p. 4.

⁹⁷ Response, pp. 10 – 11.

according to Applicant, is to ignore the generic nature of the string⁹⁸ and to identify users who may have an interest in the subject of charity. That, for Applicant, is not targeting within the meaning of the Guidebook⁹⁹.

4.3.5. Detriment Test

93. According to Applicant who relies on section 3.5.4 of the Guidebook, the detriment test requires an independent objector to prove “likelihood” of “material detriment” which in turn calls for proof of (i) the nature and extent of potential damage to the “community” or its reputation from Applicant’s operation of the string; (ii) evidence that Applicant does not intend to act consistently with the interests of that “community”; (iii) interference with the core activities of that “community” by Applicant’s operation of the string; (iv) the extent to which the “community” depends on the DNS for core activities; and (v) the level of certainty that detrimental outcomes will occur¹⁰⁰.
94. Applicant disagrees with IO regarding the need of an objector to provide evidentiary support for its arguments. Whilst IO argues that the Guidebook does not require such support (given the prospective nature of the Detriment test – likelihood of detriment –), Applicant relies upon Implementation Guideline P, Final Report on the Introduction of New Generic Top-Level Domains, 8 August 2007 where it is stated that “the objector must provide sufficient evidence to allow the panel to determine that there would be a likelihood of detriment to the rights or legitimate interests of the community or to users more widely” adding that IO has relied itself upon those Guidelines (albeit on the different issue of standing)¹⁰¹.
95. Applicant argues that IO has failed on all points – having raised just one point: namely that if persons other than recognized charitable organizations can use a “.Charity” TLD, abuse and harm may potentially occur¹⁰².
96. Applicant argues that because it has not applied for a community based gTLD is not proof of harm since the ICANN rules and process permit applications such as the Application¹⁰³.

⁹⁸ Applicant Additional Written Statement, p. 4.

⁹⁹ Response, page 11.

¹⁰⁰ Response, p. 11.

¹⁰¹ Applicant Additional Written Statement, p. 6.

¹⁰² Response, p. 12.

97. Applicant asserts that it shares IO's desire that the ".Charity" string be used for the creation of a trusted place of information about charitable activities – hence the Application's compliance with the 14 ICANN protections, the additional 8 safeguards Applicant agrees to put in place¹⁰⁴ and the four further measures Applicant says it will implement due to the sensitivity of the string following the GAC Beijing Advice¹⁰⁵. Applicant argues that IO has simply ignored such undertakings¹⁰⁶
98. Applicant criticizes IO's suggestion of a need for registration eligibility criteria because IO has failed to specify what such criteria would be¹⁰⁷. Applicant argues further that the Guidebook does not require the onerous registration restrictions as opposed to safeguards suggested by IO¹⁰⁸ and points out that IO's reliance on the GAC Beijing Advice in this regard is misplaced since the ICANN Board is not obliged to accept such Advice (and indeed has not done so to-date)¹⁰⁹.
99. Applicant adds that IO has failed to make an assessment of the certainty of harm occurring¹¹⁰.
100. Finally Applicant argues that the effect of upholding the Application would "eviscerate free speech and competition" and "subvert ICANN's goals"¹¹¹ and that IO's arguments on the Detriment test boil down to a disagreement with Applicant's "open registry" approach¹¹².

¹⁰³ Response, p. 12.

¹⁰⁴ Response, p. 12.

¹⁰⁵ Applicant Additional Written Statment, p. 5.

¹⁰⁶ Applicant Additional Written Statement, p. 5.

¹⁰⁷ Response, p. 12.

¹⁰⁸ Applicant Additional Written Statement, p. 7.

¹⁰⁹ Applicant Additional Written Statement, p. 7.

¹¹⁰ Response, p. 12.

¹¹¹ Response, p. 13.

¹¹² Applicant Additional Written Statement, p. 6.

5. EXPERT PANEL'S DETERMINATION

5.1. IO's Independence and Impartiality

101. Section 3.2.5 of the Guidebook requires that independent objectors *"be and remain independent and unaffiliated with any of the gTLD applicants"*. It states further that an independent objector *"does not act on behalf of any particular persons or entities, but acts solely in the best interests of the public who use the global internet"*.
102. The mere statement by Applicant that IO may have devoted "the bulk" of his objections to applications (including the Application) filed by Applicant's parent is not in the view of the Expert Panel a basis in and of itself to question IO's independence and impartiality under section 3.2.5 of the Guidebook. The question whether those objections have or lack merit (the latter being according to Applicant an indication of bias) is, in any event, beyond the remit of this Expert Determination. The Expert Panel has no evidence before it that gives reason to challenge IO's confirmation that he is acting exclusively in the best interests of the public who use the global internet.
103. The Expert Panel would point out that the present Application has been consolidated with two other applications (EXP/399/ICANN/16 and EXP/400/ICANN/17) in which IO has objected to applications made by other applicants than the Applicant. The existence of these other objections by IO is an indicator that IO is not acting out of any particular bias or targeting of Applicant.
104. The Expert Panel rejects, therefore, Applicant's challenge to IO's Independence and Impartiality.

5.2. IO's Standing

105. The "mandate and scope" for independent objectors are set out in section 3.2.5 of the Guidebook and comprise three elements: (i) *"The IO is granted standing to file objections on th[e] enumerated grounds, notwithstanding the regular standing requirements for such objections ..."*; (ii) *"The IO may file objections against "highly objectionable" gTLD applications to which no objection has been filed"*; and (iii) *"the IO shall not object to an application unless at least one comment in opposition to the application is made in the public sphere"*.

106. Only one of these elements, the first cited above, is described in terms of “standing”. This is how IO reads the Guidebook, making no reference to the second element that the Application is “highly objectionable” and treating the third, at least one publicly stated opposition to the Application, as a condition to an objection by an independent objector being admissible. Applicant on the other hands treats all three elements as going to “standing” but only develops argument on the first, accepting that the third element has been met and merely citing the second.
107. Given the phraseology chosen by the authors of the Guidebook, the Expert Panel prefers IO’s view and considers that there is only one criterion for the standing of an IO to make a Community Objection: namely that he or she is an independent objector within the meaning of the Guidebook, as is the case here, to whom the regular standing requirements for the particular objection do not apply.
108. The third element is not, strictly speaking, therefore, a requirement of standing, but operates as a condition of admissibility for any objection by an independent objector. It is not disputed that the condition is fulfilled in this case.
109. The drafting of the second element is different from the first (phrased in terms of standing) and the third (phrased in terms of a negative condition) and uses permissive language: “*may file objections ...*”. The Guidebook drafters’ decision not to craft this element as a standing requirement or negative condition distinguishes it from the first and third. That choice of different language should be given meaning.
110. That meaning can be drawn from the purpose behind the introduction of independent objectors in the new gTLD dispute resolution procedure as stated by ICANN in its Explanatory Memorandum on the Description of Independent Objector for New gTLD Dispute Resolution Process dated 18 February 2009¹¹³. The role of independent objectors is stated to be the answer to the question “what will be done if there is an application for a highly objectionable name but there are no objections within the process?”. The Explanatory Memorandum uses various formulations for what is meant by “highly objectionable” including “clearly objectionable”, “controversial applications”, “highly controversial strings”, “valid objections” and “strings considered objectionable across many jurisdictions”. Whilst the formulation varies, therefore, the purpose is clear: to have a means of dealing with applications which raise issues that should be determined within the dispute resolution procedure but which, for whatever

¹¹³ <http://www.newgtlds.icann.org/en/about/historical-documentation/matrix-agb-v2.pdf>

reason, have not attracted an objection by a person satisfying the regular standing criteria.

111. That purpose raises the more important question for the Expert Panel as to whether satisfaction of the “highly objectionable” criterion is an issue for determination *in limine*, on the merits or at all. The Explanatory Memorandum is helpful. It states: “*It is anticipated that in each instance the Independent Objector would make an independent assessment as to whether an objection is warranted ... It is anticipated that the Independent Objector will have the discretion and judgment to only act in clear cases where the grounds for objection seem strong*”. The Expert Panel concludes, therefore, that this second element of the mandate refers to the discretion given to the independent objector over when to act and an indicator of how that discretion should be exercised. It is not therefore a criterion of standing or admissibility of an objection.

112. The Expert Panel determines, therefore, that IO has standing to make this Objection.

5.3. The Community Objection

113. In order for his Objection to succeed, IO bears the burden of proving that four tests are met: (a) a Community test, namely that the community invoked by the objector is a clearly delineated community; (b) a Substantial opposition test, namely that community opposition to the application is substantial; (c) a Targeting test, namely that there is a strong association between the community invoked and the applied-for gTLD string; and (d) a Detriment test, namely that the application creates a likelihood of material detriment to the rights or legitimate interests of a significant of the community to which the string may be explicitly or implicitly targeted¹¹⁴.

5.3.1. The Community Test

114. Pursuant to section 3.5.4 of the Guidebook, IO has the burden of proving to the Expert Panel that “*the community invoked by the objector is a clearly delineated community*”.

115. The “community” in question is the one invoked by the objector – it is not the community targeted by the string, the applicant or the application.

¹¹⁴ Objection, para. 8.

116. The objector in this case is IO. The community invoked by IO is “the charity sector” comprising all “charitable institutions”.
117. The question for determination, therefore, is whether IO has proven to the Expert Panel that the “charity sector” comprising all “charitable institutions” constitutes a “clearly delineated community”.
118. The Guidebook does not provide a definition of “clearly delineated community” but lists five factors that an Expert Panel may balance when making its determination. That list is neither exhaustive, conclusive nor imperative. None of the cited factors goes to the heart of what is a “community” but each assists in identifying a “community” when it exists: public recognition of the community, level of formal boundaries, length of existence, global distribution and number of members.
119. IO and Applicant agree that for a community to exist there must be a degree of “communality” among the members whether of “interest” or “characteristics” – although the Parties disagree as to the necessary degree. For IO “commonality of certain characteristics” is sufficient whereas for Applicant cohesion rather than just a commonality of interests is required. It seems that the difference is in fact one of degree rather than substance. The Expert Panel accepts the view in the 2007 ICANN Final Report that “community should be interpreted broadly and will include, for example, an economic sector, a cultural community, or a linguistic community”. Whether the group or sector is sufficient delineated to pass the Community test is casuistic and the distinction drawn by Applicant between commonality of interest and cohesion is not particularly helpful.
120. IO states that the common characteristics of the members of the “charity sector” include their charitable aims, often status as not-for-profit institutions, often exemption from regulatory requirements applicable to for-profit entities and funding through donations or public money. Given the obviousness of each of these characteristics in the Expert Panel’s view none requires the support of specific evidence to be found as facts.
121. The existence in many jurisdictions, such as the UK, of regulators of the charity sector is an indication that that sector is capable of delineation and is considered publicly to be different from others.
122. The public comments made with respect to the Application indicate that publicly the charity sector is considered to exist separately from other sectors of activity.

123. IO accepts that the “charity sector” has no clear geographical boundaries – indeed it is global – and is not structured in any way. These are factors which may be taken into account as indices of the absence of a community but are not conclusive.
124. Balancing these various factors and considerations, the Expert Panel finds that the charity sector, comprising all charitable institutions, constitutes a clearly delineated community within the meaning of section 3.5.4 of the Guidebook. The “Community test” has been satisfied by IO.

5.3.2. The Targeting Test

125. Pursuant to section 3.5.4 of the Guidebook, IO has the burden of proving “a strong association between the applied-for gTLD string and the community” invoked by the objector.
126. The “strong association” sometimes referred to as “targeting” that must be shown by IO to exist therefore is between the applied-for gTLD and the community invoked by IO: namely, between “.Charity” and the “charity sector”.
127. The Guidebook does not define “a strong association” or “targeting” but identifies three sources of evidence that an independent objector may use to show that it exists: statements in the application, other public statements by the applicant and associations by the public. Those three factors are neither exhaustive, imperative nor conclusive.
128. Targeting may be explicit or implicit as explained in Implementation Guideline P of GNSO’s Principles, Recommendations and Implementation Guidelines. Whilst that Implementation Guideline P addresses specifically the Substantial opposition test, its reference to the possibility of implicit targeting must logically apply equally to the Targeting test satisfaction of which is a pre-condition to considering whether the Substantial opposition test is met.
129. Explicit targeting is where there is a description of the intended use of the applied-for gTLD in the application; implicit targeting is when the objector makes an assumption of targeting or that the objector believes there may be confusion by users over the use of the applied-for gTLD.
130. IO presents its objection as one of implicit targeting, accepting that the term “charity” has numerous meanings like other generic terms. IO must satisfy the Expert Panel that its assumption of targeting or belief that confusion among users may occur is legitimate.

131. In the Application, Applicant states that the applied-for gTLD is aimed at “the millions of persons and organizations worldwide involved in philanthropy, humanitarian outreach and the benevolent care of those in need”. The Expert Panel finds that within that statement there is an implicit reference to the “charity sector”, the community invoked by IO, such that there can be a legitimate assumption on the part of IO of targeting.
132. IO relies also on one of the dictionary definitions of the word “charity” as a charitable institution. The Expert Panel finds that this definition of the word “charity” means that there would be public association of “.Charity” with the charity sector and therefore that IO has a legitimate belief that confusion over the use of the applied-for gTLD may occur.
133. The GAC Beijing Advice provides further evidence that the public would associate “.Charity” with charitable institutions – the charity sector – given the concern expressed over the sensitive nature of the applied-for gTLD string precisely because of the regulated nature of the charity sector and level of implied trust from consumers invoked by the string. Such concern implies the “strong association” required by the Targeting test.
134. Applicant’s responses that its target is much broader than charitable institutions and that the word “charity” is a generic term with many other meanings than charitable institutions do not detract from the strong association between “.Charity” and the charity sector or the implicit targeting of “.Charity” to that sector. All that those responses do is to point out that other associations and other targeting may exist. It is not however for IO to satisfy the Expert Panel that the strong association or targeting identified is exclusive.
135. The Expert Panel is therefore satisfied that IO has proven that the Targeting test is satisfied.

5.3.3. The Substantial Opposition Test

136. Substantial opposition is not defined in the Guidebook other than to indicate that the opposition is to be to the application (as opposed to the applicant). Instead, section 3.5.4 of the Guidebook provides a list of factors which the Expert Panel may balance to determine whether substantial opposition to the Application exists. That list is neither exhaustive, imperative nor conclusive.

137. IO and Applicant disagree over the meaning of “substantial”. IO argues that “substantial” may refer to the number of statements of opposition relative to the composition of the community and/or to the substantive importance or worth of the statements of opposition. Applicant considers that the factors listed in section 3.5.4 of the Guidebook focus on the number of statements of opposition.
138. A review of the factors listed in section 3.5.4 indicates that a mere numerical meaning for “substantial” would be wrong. Those factors include not only the relative number of statements of opposition but also the representative nature of those expressing opposition and the recognized weight or stature of the expressions of opposition.
139. IO relies upon public comments from the Charity Commission for England and Wales, the National Council for Voluntary Organizations, the Association of Charitable Foundations, the Australian member of the GAC (in the form of an Early Warning) and the Office of the Scottish Charitable Regulator (as part of a legal rights objection). The Charity Commission is the regulator of charities in England and Wales. The Association of Charitable Foundations represents some 330 charitable trusts and foundations in England and Wales. The National Council for Voluntary Organizations represents just under 10,000 voluntary organizations (not all charitable institutions) in the UK. The Office of the Scottish Charitable Regulator is the regulator of charities in Scotland. The Australian member of the GAC is a representative of the Australian government.
140. The Charity Commission for England and Wales, the Office of the Scottish Charitable Regulator, the Association of Charitable Foundations and the National Council for Voluntary Organizations state their opposition on the potential harm to the system of trust on which charities and charitable giving are dependent if the “.Charity” string were to be run by a for-profit organization – arguing that had the Application been made as a community-based application their concerns would be assuaged given the status requirements for a community-based Applicant. Similar concerns are expressed by the Australian member of the GAC.
141. IO refers to the other public opposition comments made to ICANN¹¹⁵. These include opposition from the Association of Corporate Counsel (“ACC”) which has over 30,000 members (in-house counsel) employed by over 10,000 organizations in more than 75 countries. The Association’s Not-for-profit Organizations Committee offers a collective voice to over 1,400 in-house counsel practising law in nonprofit institutions across the

¹¹⁵ <http://gtldcomment.icann.org/comments-feedback/applicationcomment/viewcomments>

globe. In addition to concerns over abuse (for which the ACC proposes two types of safeguards), the ACC points to the need for protection “*given the intimate and obvious connection between [.Charity] and our members’ organizations that operate in the philanthropy field*”.

142. The Expert Panel would point out that the relative number of statements of opposition is small. Those statements come from the same or similar common law jurisdictions. These are two factors that, in the Expert Panel’s view, militate against a finding that there is substantial opposition.
143. This small number of opposition statements comes from bodies that are representative of a larger number of members of the charity sector not only in jurisdictions where regulation of charitable activities is historically strong, developed and well-established but also in the case of ACC, worldwide. These are factors which militate in favour of a finding that there is substantial opposition.
144. The fact that the opposition raised by the different statements is substantively similar does not detract from the number of statements or from their representative nature or relative importance.
145. On balance, the Expert Panel is satisfied that IO has provided evidence of substantial opposition to the Application such that the Substantial opposition test is met.

5.3.4. *The Detriment Test*

146. Pursuant to section 3.5.4 of the Guidebook it is for IO to prove that the Application (or rather use of the applied-for gTLD as contemplated by the Application) creates a likelihood of material detriment to the rights or legitimate interests of a significant portion of the community to which the string may be explicitly or implicitly targeted.
147. The test requires evidence of a likelihood of material detriment and not evidence of actual detriment – which would be impossible given the prospective nature of the objection process.
148. Evidence of a likelihood of something happening – cause and effect occurring in the future – is inherently difficult. It is no doubt for this reason that the Guidebook focuses on a variety of factors (none of which is imperative or conclusive) that IO may prove to lead to the conclusion that material detriment is likely. These factors include the dependence of the community on the DNS for its core activities, the intended use of the gTLD as stated in the Application, the importance of the rights and interests exposed

for the community and the public, and whether the Applicant intends acting in accordance with those rights and interests.

149. The various public statements of opposition to the Application are all premised on the importance of the global internet as a means of recognition and fund-raising for the charity sector. It is therefore generally accepted that the DNS is important for a core activity of the community.
150. Those public statements of opposition all focus on the need clearly to distinguish charitable organizations from for-profit enterprises in particular in public giving and fund-raising activities. They point out the absence of any limitation in the Application of the “.Charity” string to not-for-profit or charitable organizations – the stated purpose of the Applicant in the Application being to the contrary. This concern is the origin of the suggestion in many of the public statements of opposition that the “.Charity” string should be treated only as a community-based gTLD.
151. The public statements of opposition identify the rights and interests of the community and the public that are exposed to harm if the Application were to proceed as the need of the charity sector for public funding to finance its activities; the trust and confidence of the public in the charity sector that donations will be used for the stated charitable ends. They point out that those rights and interests are protected outside the internet by public regulation of recourse to public giving for charitable purposes. They and IO emphasize the need for strict registration eligibility criteria limited to persons regulated as charitable bodies or their equivalent depending upon domestic law.
152. The Expert Panel is of the view that these public statements of opposition that are echoed by IO cannot be ignored as they point to an important characteristic of the targeted community (including its existence and its activities) that would be harmed if access to the “.Charity” string were not restricted to persons (whether incorporated entities, unincorporated associations or entities, foundations or trusts) which can establish that they are a charity or a not-for-profit enterprise with charitable purposes.
153. The Application expressly avoids such a limitation and therefore the protection that the Expert Panel considers should exist stating *“we believe attempts to limit abuse by limiting registrant eligibility is unnecessarily restrictive and harms users by denying access to many legitimate registrants. Restrictions on second level domain eligibility would prevent law-abiding individuals and organizations from participating in a space to which they are legitimately connected, and would inhibit the sort of positive innovation we intend to see in this TLD”*.

154. Applicant emphasizes the Application's compliance with the 14 ICANN protections, the additional 8 safeguards Applicant agrees to put in place and the 4 further measures that Applicant says it will implement following the GAC Beijing Advice. Those protections, safeguards and measures focus on avoiding and eradicating abuse. They do not therefore respond to the rights and interests of the charity sector community since abuse is not, *ex hypothesi*, defined in the Application in terms of those rights and interests. There is nothing in the Application, therefore, to indicate that Applicant will act in accordance with the rights and interests of the community.

155. Whilst the Expert Panel acknowledges the value of Applicant's (and its parent's) vocation for freedom of speech and competition throughout the internet, those general aims are not factors to be taken into account when assessing an objection (which focuses on the four tests that the objector must satisfy for its objection to succeed).

156. In view of the foregoing, the Expert Panel is satisfied that there is a likelihood of material detriment to the charity sector community were the Application to proceed such that the Detriment test is satisfied.

5.3.5. Conclusion

157. Having reviewed the Parties' submissions and supporting evidence and for the foregoing reasons, the Expert Panel upholds IO's Community Objection against the Application.

5.4. Costs of the Expert Determination

158. Article 14(e) of the Procedure provides which of the Parties shall bear the Costs.

159. The Objection has been upheld.

160. In accordance with Article 14(e) of the Procedure, the advance payment on Costs made by IO is therefore to be reimbursed.

5.5. Expert Panel's Determination

161. In light of the above and in accordance with Art. 21(d) of the Procedure, the Panel hereby renders the following Expert Determination:

- i. The Objection is upheld and therefore the Independent Objector is the prevailing party.
- ii. The Independent Objector is thus entitled to a refund of the advance payment of Costs by the Centre pursuant to Article 14(e) of the Procedure.

Done in Paris.

9 January 2014



Mr. Tim Portwood
Expert Panel