THE INTERNATIONAL CENTRE FOR EXPERTISE OF THE

INTERNATIONAL CHAMBER OF COMMERCE

CASE No. EXP/507/ICANN/124

AMERICAN INSURANCE ASSOCIATION

(USA)

vs/

AUBURN PARK, LLC

(USA)

(Consolidated with case No. EXP/432/ICANN/49

THE FINANCIAL SERVICES ROUNDTABLE (USA) vs/
AUBURN PARK, LLC (USA))

This document is an original 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.

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List of Abbreviations

Add.Sub.	Additional Submission
Appendix III	Appendix III to the Rules, Schedule of expertise costs for proceedings under the Procedure
Applicant	Auburn Park LLC
Application	Appl. I.D. 1-1512-20834 <.insurance>
Attachment	Attachment to Module 3 of the gTLD Applicant Guidebook
Beijing GAC Advice	GAC Communiqué - Beijing
Centre	International Centre for Expertise
Donuts	Parent company of Applicant, Donuts Inc.
DPML	Donuts Protected Marks List
Durban GAC Advice	GAC Communiqué - Durban
Expert Determination	Expert Determination
GAC	ICANN's Government Advisory Committee
GAC Early Warning	Early warning issued by the GAC at the request of the Australian Government on 20 November 2012
gTLD	generic Top Level Domain
Guidebook	gTLD Applicant Guidebook
ICANN	Internet Corporation for Assigned Names and Numbers
ICANN Final Report	Final Report - ICANN Generic Names Supporting Organization - August 8, 2007
Note	ICC Practice Note on the Administration of Cases under the New gTLD Dispute Resolution Procedure
Objection	Community Objection filed by the Objector
Objector	American Insurance Association
P&C Insurance Providers	Community of companies that are licensed and authorised to sell property-casualty insurance products
PIC	Donuts Public Interest Commitment
Procedure	Module 3 of gTLD Applicant Guidebook
Proceedings	Exp. 507/ICANN/124 (c. Exp. 432/ICANN/49)
Requirements	Requirements to be met for an Objection to prevail as detailed in paragraph 36
Rules	Rules for Expertise of the ICC

1. INTRODUCTION

1. This expert determination ["**Expert Determination**"] is issued pursuant to the proceedings being held before the International Centre for Expertise ["**Centre**"] of the International Chamber of Commerce Centre designated as EXP/507/ICANN/124 ["**Proceedings**"][1].

2. The Proceedings deal with the Community Objection ["**Objection**"] filed by the American Insurance Association ["**Objector**"] to the application registered by Auburn Park, LLC ["**Applicant**"] before the Internet Corporation for Assigned Names and Numbers ["**ICANN**"] for the new generic top level domain ["**gTLD**"] <.insurance> (Appl. I.D. 1-1512-20834) ["**Application**"].

3. Objector – American Insurance Association – is an insurance trade organisation, the purpose of which is to represent and advocate on behalf of its approximately 300 insurers members. Objector's address is:

   Ms. Angel Gleason
   Associate Counsel
   American Insurance Association
   2101 L Street, NW, Suite 400
   Washington D.C. 20037, USA
   Ph: (+ 1) 202.828.7181
   agleason@aiadc.org

4. Objector is represented by:

   David E. Weslow, Esq.
   Wiley Rein LLP
   1776 K Street, NW
   Washington D.C. 20006, USA
   Ph: (+1) 202.719.7000
   dweslow@wileyrein.com

5. Applicant – Auburn Park, LLC – is a company formed to acquire and operate generic top level domains under ICANN's new gTLD program[2]. Applicant's address:

   Mr. Daniel Schindler
   Auburn Park, LLC
   155 108th Avenue NE, Suite 510
   Bellevue, WA 98004, USA
   Ph: (+ 1) 424.254.8537
   pionerwillow@donuts.co

   The parent company of Applicant is Donuts Inc. ["**Donuts**"].

[1] This case is consolidated with EXP/432/ICANN/49. However, each of the objections is being issued a separate Expert Determination.
[2] Declaration of J. Nevett, Annex B to Response, at 3.

6. Applicant is represented by:

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2. PROCEDURAL BACKGROUND

8. On 13 June 2012 Applicant filed with ICANN an application requesting the gTLD <.insurance.

GAC Early Warning[3]

9. At the request of the Australian Government, on 20 November 2012, ICANN's Government Advisory Committee ["**GAC**"] issued an early warning ["**GAC Early Warning**"] stating that "the string (.insurance) is linked to a regulated market sector, and Auburn Park, LLC does not appear to have proposed sufficient mechanisms to minimise potential consumer harm" and suggesting that "Applicant should detail appropriate mechanisms to mitigate potential misuse and minimize potential consumer harm"[4].

[3] Both the GAC Early Warning and the Beijing GAC Advice will be analysed in detail *infra*.
[4] The GAC Early Warning detailed as reason/rationale for the warning the following: "*The proposed string (.insurance) is linked to a restricted or regulated market sector. This market sector is characterized by the ability to complete entire transactions online, without the need for any face-to-face interaction. In this context, Auburn Park, LLC does not appear to have proposed sufficient protections to address the potential for misuse. Without additional protections, this proposed TLD could result in misuse and consumer harm. Early warnings provide a mechanism to initiate a discussion between a government and an applicant on particular issues or questions. It is intended that a constructive dialogue through this process will assist applicants to better understand the concerns of governments, and help governments to better understand the planned operation of proposed gTLDs*".

10. Applicant replied to the GAC Early Warning by letter, concluding that "[W]e believe we have more than sufficient protections in place to address the needs of rights holders and insulate end-users against poor experiences, and we intend to proceed with our applications"[5].

Community Objection

11. On 13 March 2013 Objector filed an Objection before ICANN, which gave rise to the present proceedings.

Beijing GAC Advice

12. On 11 April 2013 the GAC issued the GAC Communiqué – Beijing ["**Beijing GAC Advice**"], where it stated that "to reinforce existing processes for raising and addressing concerns the GAC is providing safeguard advice to apply to broad categories of strings (see Annex I)".

13. In Annex I to the Beijing GAC Advice the GAC advised the ICANN Board that:

> "Strings that are linked to regulated or professional sectors should operate in a way that is consistent with applicable laws. These strings are likely to invoke a level of implied trust from consumers, and carry higher levels of risk associated with consumer harm… [I]n the current round the GAC has identified the following non-exhaustive list of strings that the above safeguards should apply to: …….
> - Financial: ……insurance".

14. The GAC further advised the ICANN Board in Annex I that:

> "1. In addition, some of the above strings may require further targeted safeguards, to address specific risks, and to bring registry policies in line with arrangements in place off line. In particular, a limited subset of the above strings are associated with market sectors which have clear and/or regulated entry requirements (such as: financial, gambling….) in multiple jurisdictions, and the additional safeguards below should apply to some of the strings in those sectors:
> […]
> 6. At the time of registration, the registry operator must verify and validate the registrants' authorizations, charters, licenses and/or other related credentials for participation in that sector.
> 7. In case of doubt with regard to the authenticity of licenses or credentials, Registry Operators should consult with relevant national supervisory authorities, or their equivalents.
> 8 The registry operator must conduct periodic post-registration checks to ensure registrant's validity and compliance with the above requirements in order to ensure they continue to conform to appropriate regulations and licensing requirements and generally conduct their activities in the interests of the consumers they serve"[6].

[5] Donuts' response to the GAC Early Warning, p. 6.
[6] Beijing GAC Advice p. 10.

15. In a response to the Beijing GAC Advice, Donuts (Applicant's parent company) agreed to some of the safeguards suggested by the GAC, but rejected the implementation of the three measures detailed in the prior paragraph[7].

Consolidation of cases

16. By letter of 22 April 2013 the Centre informed the parties that the case had been consolidated with EXP/ 432/ICANN/49[8].

Applicant's response

17. Applicant filed its Response on 9 June 2013.

Durban GAC Advice

18. On 18 July 2013, the GAC issued a new advice with occasion of its meeting in Durban ["**Durban GAC Advice**"] stating in relation to the Beijing GAC Advice on safeguards to Category 1 new gTLDs, that the GAC would continue the dialogue with the NGPC (New Generics Program Committee) on this issue.[9] The issue remains therefore undecided so far.

19. Donuts stated in its response to the Durban GAC Advice that it believed the protections it established were sufficient, and that it had no plans to amend the applications for the affected gTLDs.

Appointment of Expert

20. The Expert was appointed on 1 July 2013 by the Chairman of the Standing Committee of the International Centre for Expertise of the ICC.

Approval of the Application

21. On 26 July 2013 ICANN declared that the Application had passed the Initial Evaluation.

Main procedural steps of the Proceeding

22. The file was transferred to the Expert on 5 August 2013 following payment in full of the estimated Costs by the parties and the confirmation of the constitution of the Panel by the Centre.

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[7] In its 10 May 2013 Comment on GAC Advice on New gTLDs.

[8] The Applicant was requested to file a response for each objection. The Panel was given the discretion to issue one or two Expert Determinations. The Mission Statement provided that there would be two Expert Determinations.

[9] On 10 September 2013 the NGPC stated that the Category 1 Safeguard advice from the Beijing GAC Advice remained open and would continue the dialogue with the GAC at a further date. The evaluation and objection processes remained on track.

23. By letter of 12 August 2013 the Expert inquired whether the parties required further submissions[10] and on 26 August 2013 the Expert authorised additional submissions, establishing 10 October 2013 as the date to deliver the Expert Determination. It is noted that the request on a hearing was denied[11].

24. On 4 September 2013 the Expert delivered to the parties a Mission Statement, reflecting the basic aspects of the Proceeding.

25. Objector delivered the additional submissions on 10 September 2013.

26. By letter of 25 September 2013 the Expert informed the parties that the Centre, upon request from Expert, had authorised the extension of the deadline to deliver the Expert Determination 15 October 2013[12].

27. Applicant filed its additional submissions on 25 September 2013.

28. I note that the language of the Proceeding has been English[13], this being the language of all documentation submitted, and that all communications have been delivered by email[14].

Delivery date

29. This Expert Determination was submitted for scrutiny to the Centre pursuant to article 21(a) and (b) of the Procedure.

3. REQUIREMENTS APPLICABLE TO THE OBJECTION

30. A community objection permits an application to be rejected if a significant part of the community to which the string is explicitly or implicitly targeted presents substantial opposition. The determination is to be made by an expert panel[15].

A. Applicable rules

31. In its review of a community objection, the panel will apply primarily:

- Module 3 (Objection Procedures) [the "**Procedure**"] and its attachment [the "**Attachment**"] of the gTLD Applicant Guidebook ["**Guidebook**"] (other parts of

[10] Objector required further submissions.
[11] On the basis that the expert had not found any evidence of extraordinary circumstances that would justify a hearing, pursuant to article 19 (b) of the Attachment.
[12] Pursuant to article 21 (a) of the Attachment.
[13] As required by article 5 (a) of the Procedure.
[14] As required by article 6 (a) of the Procedure.
[15] Recommendation 20 – ICANN Final Report: "An application will be rejected if an expert panel determines that there is substantial opposition to it from a significant portion of the community to which the string may be explicitly or implicitly targeted"

the Guidebook will also be helpful as reference, including specifically Module 4 (String Contention Procedures)[16]).
- Rules for Expertise of the ICC ["**Rules**"].
- Appendix III to the Rules, Schedule of expertise costs for proceedings under the Procedure ["**Appendix III**"].
- ICC Practice Note on the Administration of Cases under the new gTLD Dispute Resolution Procedure ["**Note**"].

32. Finally, the Procedure refers to the 8 August 2007 Final Report by the ICANN Generic Names Supporting Organization ["**ICANN Final Report**"][17], which includes the rationales of the different objections[18]. Thus, the panel can draw additional guidance from the ICANN Final Report.

33. I now detail below certain relevant aspects of each of these rules.

B. Requirements and standards

34. Pursuant to the Procedure, an Objection must satisfy the following requirements to be successful:

35. First: Objector must prove that it has standing to object[19] (a).

36. Second: Having proven standing, objector must that the following four tests regarding the merits are complied with[20] (b):

- The community invoked by the objector is a clearly delineated community;
- The community opposition to the application is substantial;
- There is a strong association between the community invoked and the applied-for string; and
- The application creates a likelihood of material detriment to the rights of legitimate interests of a significant portion of the community to which the string may be explicitly or implicitly targeted.

The standing and the four tests described below will be referred to as the "**Requirements**".

37. To assist the panel in its task, the Procedure identifies for each of the Requirements a non-exhaustive list of factors which the panel may consider. The panel is authorised to balance the relevant factors (though not all factors must be established) and to take other factors into consideration[21].

[16] On the reference value of Module 4, see paragraph 51 for further analysis.
[17] Procedure at p. 3-5.
[18] Recommendation 20.
[19] Procedure at 3-8.
[20] Procedure at 3-22.
[21] Procedure at 3-22/3-25.

38. In making its determination, the panel may refer to and base its findings upon the statements and documents submitted by the parties and/or any rules or principles that it determines applicable[22].

39. The panel must bear in mind that it is the Objector who bears the burden of proofing that the requirements and standards applicable to the Objection are met[23].

a. Standing to object

40. The first step is to qualify for standing to file a community objection. In order to have standing, Objector must prove that it is an established institution and that it has an ongoing relationship with a clearly delineated community.

41. To evaluate whether Objector is an institution, the panel may consider, among others, the following factors[24]:

- Level of global recognition of the institution;
- Length of time the institution has been in existence; and
- Public historical evidence of its existence, such as the presence of a formal charter or national or international registration, or validation by a government, inter-governmental organisation, or treaty; the institution must not have been established solely in conjunction with the gTLD application process.

42. To evaluate whether there is an on-going relationship with a clearly delineated community, the panel may consider, among others, the following factors[25]:

- The presence of mechanisms for participation in activities, membership and leadership;
- Institutional purpose related to the benefit of the associated community;
- Performance of regular activities that benefit the associated community and
- The level of formal boundaries around the community.

b. Requirements on the merits

43. If the Objector is found to have standing, then it must pass the following four tests on the merits.

(i) <u>First test: Objector must prove that the community is clearly delineated</u>

44. To evaluate whether the community is clearly delineated[26], the Procedure allows the panel to consider, among others, the following factors:

[22] Attachment, article 20 (b).
[23] Attachment, article 20 (c).
[24] Procedure at 3-8.
[25] Procedure at 3-8.
[26] Procedure 3-23.

- The level of public recognition of the group as a community at a local and/or global level;
- The level of formal boundaries around the community and what persons or entities are considered to form the community;
- The length of time the community has been in existence;
- The global distribution of the community (this may not apply if the community is territorial); and
- The number of people or entities that make up the community.

(ii) Second test: Objector must prove that the community opposition is substantial

45. This second Requirement will only be analysed if the first test is passed, i.e. if a clearly delineated community is found.

46. In considering whether the second test[27] is met, the Procedure provides that the panel may consider, among others, the following factors[28]:

- The number of expressions of opposition relative to the composition of the community;
- The representative nature of entities expressing opposition;
- The level of recognised stature or weight among sources of opposition;
- The distribution or diversity among sources of expressions of opposition, including:
  - Regional
  - Subsectors of community
  - Leadership of community
  - Membership of community
- The historical defence of the community in other contexts; and
- The costs incurred by objector in expressing opposition, including other channels the objector may have used to convey opposition.

(iii) Third test: Objector must prove the existence of a strong association

47. If substantial opposition to the application is evidenced, the objector must then prove that there is a strong association between the community invoked and the applied-for string[29].

48. To evaluate the existence of a strong association between the string and the community, the panel may consider, among others, the following factors[30]:

- Statements contained in the application;
- Other public statements by the applicant; and
- Associations by the public.

[27] Procedure 3-23.
[28] Procedure at 3-8.
[29] Procedure 3-24.
[30] Procedure 3-23.

(iv) Fourth test: Objector must prove likelihood of detriment to rights

49. Finally, if a strong association between community and string has been established, the objector must prove that the application creates the 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[31].

50. To evaluate the existence of material detriment to the members of the community, the Procedure advises the panel to use, among others, the following factors[32]:

- Nature and extent of damage to the reputation of the community represented by the objector that would result from the applicant's operation of the applied-for gTLD string;
- Evidence that the applicant is not acting or does not intend to act in accordance with the interests of the community or of users more widely, including evidence that the applicant has not proposed or does not intend to institute effective security protection for user interests;
- Interference with the core activities of the community that would result from the applicant's operation of the applied-for gTLD string;
- Dependence of the community represented by the objector on the DNS for its core activities;
- Nature and extent of concrete or economic damage to the community represented by the objector that would result from the applicant's operation of the applied-for gTLD string; and
- Level of certainty that alleged detrimental outcomes would occur.

* * *

51. Module 4 of the Guidebook (String contention procedure) also provides criteria to review and score a community-based application. It shares some common concepts with the community objection procedure (such as community establishment and nexus between the string and the community), though its standards are stricter, and thus can only be taken as a general reference[33].

52. ICANN provides the following guidelines in relation to Recommendation 20 of its Final Report:

> "Guidelines
> a) Substantial – in determining substantial the panel will assess the following: signification portion, community, explicitly targeting, implicitly targeting, established institution, formal existence, detriment.

[31] Procedure 3-24.
[32] Procedure 3-23.
[33] Thus, Module 4 states that "*It should be noted that a qualified community application eliminates all directly contending standard applications, regardless of how well qualified the latter may be. This is a fundamental reason for very stringent requirements for qualification of a community-based application, as embodied in the criteria below. Accordingly, a finding by the panel that an application does not meet the scoring threshold to prevail in a community priority evaluation is not necessarily an indication the community itself is in some way inadequate or invalid.*" – Mod. 4 at p. 4-9.

b) Significant portion – in determining significant portion the panel will assess the balance between the level of objection submitted by one or more established institutions and the level of support provided in the application from one or more established institutions. The panel will assess significance proportionate to the explicit or implicit targeting.
c) Community – community should be interpreted broadly and will include, for example, an economic sector, a cultural community or a linguistic community. It may be a closely related community which believes it is impacted.
d) Explicitly targeting – explicitly targeting means there is a description of the intended use of the TLD in the application.
e) Implicitly targeting – 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.
f) Established institution – an institution that has been in formal existence for at least 5 years. In exceptional cases, standing may be granted to an institution that has been in existence for fewer than 5 years.
Exceptional circumstances include but are not limited to a re-organization, merger or an inherently younger community.
The following ICANN organizations are defined as established institutions: GAC, ALAC, GNSO, ccNSO, ASO.
g) Formal existence – formal existence may be demonstrated by appropriate public registration, public historical evidence, validation by a government, intergovernmental organization, international treaty organization or similar.
h) Detriment – 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".

4. SUMMARY OF THE OBJECTION

53. Objector claims that the granting of the string "<.insurance" to the Applicant will result in material harm to the insurance industry generally, the community of companies that are licensed and authorised to sell property-casualty insurance products ["**P&C Insurance Providers**"], and the consumers[34] and considers that the Application should be rejected.

54. Objector claims that it has standing to object (A), and meets the four tests on the merits required by the Procedure (B).

A. Standing to object

55. Objector must prove that it is an established institution (a) and that is has an on-going relationship (b) with a clearly delineated community (c).

a. An established institution

56. The Objector states that it was born out of the merger in 1964 of the old American Insurance Association with the National Board and the Association of Casualty and

[34] Objection p. 5.

Surety Companies[35]. It has a membership of approximately 300 P&C Insurance Providers that represent around 20% of total P&C insurance market in the United States[36].

b. On-going relationship with the community

57. Objector claims it is recognised as a leading voice on behalf of the P&C Insurance Providers[37]. In that role it has provided on-going defence of the community of P&C Insurance Providers through litigation, lobbying and other forms of advocacy. It has, additionally, defended the community in a variety of contexts, including filing amicus briefs in support of the property-casualty industries in hundreds of cases over the years. Objector's president is an acknowledged advocate for the property-casualty insurance industry[38].

c. The community is clearly delineated

58. From the above it follows that the Objector is an institution with an on-going relationship with the community of P&C Insurance Providers. The insurance industry is one of the most highly regulated industries in the world. This regulatory structure has resulted in a clearly delineated community of P&C Insurance Providers, that is, companies that are licensed and authorized to sell property-casualty insurance products[39].

B. <u>Requirements on the merits</u>

59. The Requirements consist of four tests, the first of which (the existence of a clearly delineated community) has already been addressed in the previous section. The Objector's position with respect to the remaining three tests is as follows.

a. There is substantial opposition to the Application

60. The Objector claims that there is substantial opposition to the Application from the P&C Insurance Providers community. The opposition is represented essentially by the Objector, whose members represent approximately 20% of the total property-casualty insurance market in the United States. The Objector is widely recognised as a leading voice of the P&C Insurance Providers community as a consequence of many years providing ongoing defence for the community through litigation, lobbying and other forms of advocacy. Importantly, its members are among the leaders in both the personal and commercial property-casualty insurance markets (at least two members are within the top ten writers of private passenger coverage and five among the top ten commercial carriers)[40].

[35] Objection p. 5.
[36] Objection p. 11.
[37] Objection p. 7.
[38] Objection p. 7.
[39] Objection p. 9.
[40] Objection p. 11.

61. Additionally, the Objector presents two letters supporting the Objection[41].

b. There is a strong association between the string and the community

62. The Objector claims that there is a strong association between the P&C Insurance Providers community and the string[42]. Automobile and homeowners insurance products are ubiquitous. This is evident on the basis that all U.S. states (except New Hampshire) require automobile insurance, and most lenders require homeowners to carry insurance on their homes. Moreover, the members of the P&C Insurance Providers community spend substantial amounts in advertising their products. As a result, Objector states, consumers understand they can obtain insurance from many members of the community of P&C Insurance Providers[43].

63. Objector considers[44] that another element that evidences association between the <.insurance and the community P&C Insurance Providers is evident from the face of the Application, which states that:

> ".insurance will be "… particularly attractive to registrants providing insurance products and services (one of the world's largest and most attractive industries)".
>
> "Registrants may include insurance companies, brokerages, adjusters, service providers, reinsurance organizations, agents and others who can use the TLD to more intuitively reach end-users".

64. Many of these groups are members of the community of P&C Insurance Providers.

c. The application is likely to cause material detriment

65. Objector claims that the operation of the Application will be detrimental to the insurance community. The Objector highlights that the Application lacks any registration criteria (i.e. no restrictions on who can own second-level domains), and thus there is a strong likelihood that there will be serious abuse within the gTLDs and that consumers will be misled[45].

66. Objector also claims that persons with no connection to the insurance industry could potentially hold out as brokers or carriers, using legitimate- appearing sites for phishing or other malicious data collecting purposes relying on the trust consumers impart to insurers in providing personal information[46]. This is further exacerbated by the fact that proxy registrations will be permitted. The Objector alleges that proxy registration have historically encouraged fraud and spam[47].

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[41] From Insurance Bureau of Canada and Canadian Life and Health Insurance Association.
[42] The Objector highlights that the panel is to consider that association between the community and the string, and makes the distinction that Guidebook requires the community to be associated to the string, and not the other way around. - Additional Submission ["**Add. Sub.**"] p. 4.
[43] Objection p. 13.
[44] Objection p. 13.
[45] Objection p.14.
[46] Objection p.14.
[47] Objection p.15.

67. Objector contends that the Beijing GAC Advice provides additional evidence of the material detriment that Donuts[48] proposed operation of the <.insurance will cause[49]. The injury to insurance consumers, argues the Objector, will arise when a consumer encounters a <.insurance domain name (and associated website), at which point it will be too late to avoid the damage by subsequently conducting research to identify the domain registrant information held on file by Donuts[50].

68. Objector contends that, taking into account the above, Applicant's approach would be particularly disruptive given the increasing use of technology by members of the community of P&C Insurance providers to sell and service policies. The Objector points out that direct writers-companies that sell their own products and rely heavily on Internet sales channels, accounted for 51.1% of all property-casualty net premiums written in 2011[51].

69. In addition to the above, Objector contends that the Application does not include sufficient protections for variations of the trademarks and trade names of members of the P&C Insurance Providers community. This could lead to significant consumer confusion, consumer fraud and misleading advertisements of insurance products and services[52].

70. Objector submits that the likelihood of material detriment posed to the members of the insurance community by the .insurance gTLD application is made further certain by examination of the background of the Donuts group. In this respect, Objector suggests that it appears likely that the Donuts group should not survive the background screening standards set forth in sections 1.1 and 2.1 of the Guidebook.[53]

5. SUMMARY OF APPLICANT'S RESPONSE

71. Responding to the Objection, Applicant claims that Objector has failed to prove standing (A), and has not proven any of the four tests on the merits (B).

A. Lack of standing

72. The Applicant alleges that the Objector contests the application for the generic term <.insurance and not for a term strongly associated with the clearly delineated community. Furthermore, the Applicant quotes section 3.2.24 of the Guidebook stating that the "community named by the objector must be … strongly associated with the applied-for gTLD string"[54].

[48] Refers to Donuts, ultimate parent of Applicant's group.
[49] Add. Sub. p. 8.
[50] Add. Sub. p. 9.
[51] Objection p. 15.
[52] Objection p. 15.
[53] Objection p. 16.
[54] Response p. 7.

B. Requirements on the merits

73. On the merits Applicant submits that Objector has not been able to meet any of the four tests for several reasons, namely:

a. No clearly delineated community

74. Applicant contends that the Objector has not identified a clearly delineated community for the following reasons[55]:

75. (i) The word insurance has several meanings, it is impossible to show that this generic term describes a clearly delineated community.

76. (ii) There is a low or no level of formal boundaries around the term <.insurance> and a large degree of uncertainty as to what person or entities would be considered to form such a community. Even if insurance refers only to "regulated insurance", which it does not, the Objector occupies but a fraction of the universe by that term. Objector represents only P&C Insurance Providers, and by its own admission, its members represent only 20% of the P&C U.S. market.

77. (iii) There are many types of insurance (e.g. health, life, automobile, liability, home, professional liability, long-term disability, etc. to name a few). Such variations make even the narrow product aspect of insurance impossible to delineate.

78. (iv) Applicant argues that an infinitely greater universe of users beyond P&C insurance with conceivable interest in the various meanings and implications of "insurance" exists. Objector attempts to identify a narrow community more susceptible of "delineation" than the vast population associated with the generic "insurance" designation. In doing so, Objector attempts to change the standard: there must be a clear delineated community invoked by the term "insurance".

b. No substantial opposition

79. Applicant alleges that Objector has not presented evidence of substantial opposition. Of the thousands (if not more) insurance companies globally, the Objector represents only 20% of P&C providers in the U.S., excluding insurers that provide other types of insurance, other P&C insurers outside the U.S. and others otherwise associated with the term insurance but who do not write policies[56].

80. Applicant points out that no evidence of the substantial opposition within the Objector's community has been provided: no letters from any of its members have been provided. Moreover, even assuming that all members of the Objector have implicitly expressed opposition, this represents 20% of the invoked community. Such a percentage cannot be considered as substantial opposition from the P&C Insurance Providers community[57].

[55] All detailed in Response p. 7/9.
[56] Response p. 9.
[57] Response p. 9.

81. Applicant alleges that the Objector not only fails to demonstrate substantial opposition within the restricted U.S. based community it invokes, it also fails to offer evidence of the opposition on the global scale of the Internet, where the Applicant will make the string domain available. With the exception of one letter from the Insurance Bureau of Canada, no P&C community outside of North America has written a letter in support of the Objection. Regarding the second letter from Canada, Applicant notes that it is sent by Canadian Life & Health Insurance Association, which is not a member of the Objector nor even part of the P&C community[58].

c. Lack of strong association

82. Applicant claims that Objector has not proven the existence of a strong association between the community and the string, for the following reasons:

83. First, the text of the Application reveals that Applicant intends to offer this gTLD to a wide variety of internet users, and not just those providing insurance products and services[59]. In support for this statement, Applicant quotes from the Application as follows:

> "[r]egistrants may include insurance companies, brokerages, adjusters, service providers, reinsurance organizations, agents and others who can use the TLD to more intuitively reach end-users. The TLD also could provide a forum for ratings agencies, journalists, industry analysts, insurance customers, policy makers, and others who take a professional or personal interest in this important financial instrument"[60].

84. Applicant's second argument states that Objector does not demonstrate any public association between the string and the P&C insurance community Objector represents. There is no evidence that the public strongly associates the word insurance with the Objector's narrow group of American P&C insurers, as opposed to insurance in all its varieties and meanings generally[61]. A research of the use of the term "insurance" in the namespace reveals use of the term in over 116,000 domain names in .com and five other existing gTLDs. This wide use demonstrates the antithesis of a strong association between the generic term and the Objector's specialised community[62].

85. Even more, the invoked community exists solely in the U.S. while the <.insurance string has a global reach. The English term "insurance" goes well beyond Objector's own limited geographic region[63].

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[58] Response p. 10.
[59] Response p. 11.
[60] Response p. 11.
[61] Add. Sub. p. 4.
[62] Add. Sub. p. 4.
[63] Add. Sub. p. 4 – Applicant provides examples of the use "insurance" at second domain level by various entities offering insurance products in Brazil, Niger, Abu Dhabi, South Africa, among others.

d. No material detriment

86. Applicant considers that Objector has failed to demonstrate the likelihood of material detriment to the community for the following reasons.

- The Application provides effective security protections that are sufficient to safeguard the best interests of all users.
- There is no evidence that Applicant's string poses a likelihood of damage to the purported "community" or its "reputation". While it claims that it will invite an increasing cybersquatting and phishing threat, it tenders no evidence that it would create any greater or different harm to the industry than exists today.
- The Donuts Protected Marks List ["**DPML**"] provided in the Donuts Public Interest Commitment ["**PIC**"] establishes an adequate trademark protection safeguard, allowing concerned members to register in advance to get notification of cybersquatting and other internet schemes[64].
- There is no relevant evidence regarding interference with the community's core activities.
- No evidence is shown demonstrating any level of certainty regarding the detriment its constituents may suffer[65].
- The Beijing GAC Advice adds nothing to the Objection. Current policy as established in the Guidebook does not require the onerous registration constraints for which the Objector advocates. If the GAC ultimately requires such measures, and ICANN's Board accepts the advice, Applicant would abide by the decision. It is a policy decision, however, to be made by the ICANN Board and not by Objector or this Panel.[66]

87. Finally, the Applicant rejects the suggestion that it should not survive the background screening standards set forth by the Guidebook, and refutes any allegations as to impropriety[67].

6. FINDINGS OF THE EXPERT

88. In order to be successful, the Objector must prove that it has standing to object (A) and that the four Requirements are met: the community it invokes is clearly delineated (B), there is substantial opposition from the community to the Application (C), there is a strong association between the community and the string (D), and the Application creates the 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 (E).

[64] Response p. 11.
[65] Response p. 13.
[66] Add. Sub. p. 6.
[67] Objection p. 13.

89. The Objector claims it has met all the above Requirements, while the Applicant avers that the Objector has failed to prove any of the above Requirements.

90. I turn now to review the Requirements.

A. Objector's standing to object

91. To have standing, Objector must prove that it is an established institution (a) with an on-going relationship with a clearly delineated community (b).

a. Objector as an established institution

92. The Objector has submitted evidence that it is an organization comprising approximately 300 members of the community, (representing around 20% of the P&C Insurance Providers market in the U.S. by premium[68]), engaged in the promotion and protection of its members and the P&C insurance industry generally.[69] Its proactive activities and public recognition are referred to in paragraph 102.

93. As for its historical existence, the Objector has been in existence since 1964.

94. On the basis of the above, I am satisfied that the Objector has shown it is an established institution for the purposes of this Proceeding.

b. Ongoing relationship with a clearly delineated community

95. Having shown that it is an institution, the Objector must then prove that it has an ongoing relationship with a clearly delineated community invoked by the Objector.

96. The first question to be addressed is the definition of the community the Objector is invoking. The Objector has not expressly identified such community. Although most of the references regarding delineation are made to the U.S. insurance regulations[70], the Objection also recognises the existing of a global P&C Insurance Providers community[71].

97. In my opinion, the community being invoked by the Objector is the U.S. P&C Insurance Providers. I reach this conclusion based on the fact that the Objector, when referring to the opposition to the Application "by the community", it mentions that its members represent 20% of the "community"[72]; since the Objector gathers 20% of the U.S. P&C Insurance Providers[73], the Objector must be equating "community" to "U.S. P&C

[68] Objection p. 11.
[69] I note that one of the factors I am suggested by the Procedure to consider is the global level of recognition of the institution (Procedure 3-8). Since I have found (see paragraph 97) that the invoked community is the U.S. P&C Insurance Community (i.e. a territorial community), I have taken into consideration the level recognition of the institution within the community invoked (Procedure 3-23 addresses an analogous situation in relation to global distribution and a territorial community).
[70] Objection p. 9.
[71] Objection p. 10.
[72] Add. Sub. p. 7.
[73] Objection p. 11.

Insurance Providers". Additionally, the lack of substantial international P&C insurance support lends weight to the idea that the community represented is the U.S. community.

98. On the basis of the above, albeit with some hesitation, I will assume that the community invoked by the Objector is the P&C Insurance Providers comprised by entities licenced to sell P&C insurance products in the U.S. I will nevertheless make some further remarks on the issue of the community invoked as and when the analysis in other sections of this determination develops.

99. The U.S. P&C Insurance Providers community (thus defined) counts with 2,660 entities in 2011, representing 42% of the total net insurance premiums in all the U.S. [74].

100. Is the U.S. Property & Casualty Providers insurance community clearly delineated?

101. In this regard, I note that Module 4, criterion 1, dealing with the determination of Community Establishment defines delineation as relating

> "to the membership of a community, where a clear and straight-forward membership definition scores high, while an unclear, dispersed or unbound definition scores low"[75].

102. The Objector has stated that the U.S. P&C Insurance Providers are subject to a strong set of regulations covering registration and solvency requirements, among other aspects of the insurance legal protection regime. The high regulatory barriers constitute a clear formal boundary around the alleged community[76]. The ongoing relationship between the Objector and the community invoked is also clear. The Objector has been in existence since 1964 and its members are all entities belonging to the community. Its objective is to advocate on behalf of the interests of the industry, and in that role has developed activities (filing *amicus curie* etc.) with such objective in mind. Its proactive role is recognised by the public[77].

103. On the basis of the above, albeit with some hesitation, I am ready to consider that the U.S. P&C Insurance Providers community invoked is clearly delineated for the purposes of standing.

104. I must now turn to the Applicant's counter-arguments on the matter of clear delineation: (i) since the word insurance has several meanings, it is impossible for Objector to show that this generic term describes a clearly delineated community, but rather a large universe of users with conceivable interest in the various meanings and implications of "insurance" and (ii) even if insurance referred only to "regulated insurance", the Objector occupies but a fraction of the universe covered by that term; finally (iii) the Objector contests the application for the generic term <.insurance and not for a term strongly associated with the clearly delineated community.

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[74] Objection p. 11/13.
[75] Module 4 at 4-11.
[76] Objection p. 8.
[77] "The savvy chief of the leading property-casualty insurance trade group is skilled at building coalitions on Capital Hill", "Pusey is a strong advocate for the property-casualty insurance industry". Objection p. 7.

105. I am persuaded by the Objector and unconvinced by the arguments put forward by the Applicant.

106. (i) The issue at hand is whether the invoked community is a clearly delineated community itself. In this regard, Objector is invoking the U.S. P&C Insurance Providers community. Although I agree with Applicant that this definition of community is narrower than a broader definition of, say, an insurance community, as such, I see no requirement in the Guidebook that a string should solely identify one community. The strong association required to exist between a clearly delineated community and the string, does not imply that the string term has no meaning other than identification of the community[78].

107. This notwithstanding, I agree that a narrow definition of the invoked community entails a series of difficulties; which may become an issue when deciding whether a strong association exists between string and community, because it makes evidence of such association more difficult. This is, however, a question to be discussed in section D. Test 3 *infra*[79].

108. (ii) Applicant also states that even if insurance refers only to "regulated insurance", an assumption which Applicant rejects, the Objector occupies but a fraction of the universe covered by that term. In fact, Objector only represents P&C Insurance Providers, and of those, only 20% of the market. This argument must fail since the Procedure requires no relationship between the representational size of the Objector and the community invoked. In other words, there is no requirement that the Objector should represent any minimum part of the community invoked.

109. (iii) Applicant alleges that the Objector contests the application for the generic term <.insurance and not for a term strongly associated with the clearly delineated community, a requirement established in section 3.2.2.4 of the Procedure (the "community named by the objector must be … strongly associated with the applied-for gTLD string")[80].

110. I understand Applicant's argument but am unconvinced that it has any bearing on the issue of Objector's standing: section 3.2.2.4 of the Procedure states that "to qualify for standing for a community objection, the objector must prove both of the following: it is an established institution … It has an ongoing relationship with a clearly delineated

[78] Module 4 provides the criteria to evaluate the existence of a community in the case of a Community Priority Evaluation. Criterion 2 thereof provides guidance on the valuation of the nexus between the proposed string and the community. The criteria to apply are nexus (matching of string and name of community) and uniqueness (string term has no other significant meaning beyond identifying the community). The nexus criteria could score up to three points, while the uniqueness criteria could score a maximum of one (Guidebook at 4-13). Additionally, when dealing with the definition of relevance in criterion 4, the Guidebook clearly states that there may be more than one community associated to a string (Guidebook, at 4-18).

[79] See paragraphs 123 et seq.

[80] Response p. 7.

community…"[81]. Having proved these requirements, the Objector must be pronounced as having standing.

* * *

111. The conclusion reached *supra* is thus not altered: standing requires the Objector to prove that it is an established community with an ongoing relationship with a clearly delineated community. I find that Objector has satisfied all these elements, and declare that the Objector has standing to file the Objection.

* * *

112. Having established standing, the next task is to review whether the four tests on the merits have been satisfied.

B. Test 1: Clearly delineated community

113. The first test requires proving that a clearly delineated community exists, a concept which has already been considered for the purposes of standing. The analysis made in section 6.A is valid for these purposes: although I had initial uncertainty as to whether the community being invoked is the global P&C Insurance Providers community or a sub-community comprised by the U.S. Insurance Providers, in my opinion the community invoked is the latter and it meets the requirements of being clearly delineated.

C. Test 2: Substantial opposition by the community

114. Having considered that the community invoked by the Objector is clearly delineated, the next test is to determine whether there is substantial opposition from the community.

115. To evaluate whether the opposition is substantial, the Procedure invites the Expert to consider several factors, including, among others, the number of expressions of opposition relative to the composition of the community, the representative nature of entities expressing opposition, the level of recognised stature or weight among sources of opposition and the distribution or diversity among sources of expressions of opposition.

116. I note that the number of opponents in this case is limited to one, the Objector. The letters from Insurance Bureau of Canada and Canadian Life and Health Insurance Association, while providing some level of global recognition, are irrelevant for this specific analysis, since they are not members of the community invoked (the U.S. P&C Insurance Providers).

[81] The reference to the strong association between the community and the string made in section 3.2.2.4 of the Procedure must be understood as a general background statement preceding the actual requirements for evaluation of standing. A string may explicitly or implicitly target a community (see test 4, Procedure at p 3-23), and such review is to be made under such test on the merits and not at the standing phase. In any event, the question is probably moot since failure to prove the strong association will, regardless of where it is made, result in the failure of the Objection.

117. Having said that, the Objector is an association representing over 300 entities, with a market share of 20%. I accept the representative nature of the Objector, and that its opposition should be considered as the opposition of the members. Thus, the fact that no members have issued specific letters of opposition is irrelevant.

118. The issue is whether 20% of the community invoked can be counted as substantial opposition. By itself, I would probably conclude that such limited representation cannot be counted as substantial. However, it is not an insignificant proportion, and its weight may be supplemented by other factors.

119. In this context, I note that several of the members of the Objector are among the top ten companies in the U.S. in two sectors, including commercial carriers. I believe that a group including major companies of the community is a sign of leadership and representation of the larger group.

120. The historical existence of the P&C Insurance Providers community evidenced by the Objector is another factor to be taken into consideration. Moreover, I find the quotes cited by Objector on the lobbing capabilities of the Objector's president relevant[82]. These considerations taken together indicate a perception of the Objector as one of the leaders of the P&C industry in general. This lends weight to the opposition it represents, and leads me to accept, albeit with some hesitation, that there is substantial opposition from the community to the Application[83].

121. Applicant has submitted that because the use of the string is intended to be world-wide, that opposition should be measured on the same scale, and that Objector has failed to provide evidence of such global opposition to the Application. I do not concur: Objector must evidence substantial opposition from the invoked community. In this case, such community is not the global P&C Insurance Providers – as Applicant suggests – but only the U.S. P&C Insurance Providers. And consequently, the opposition must be substantial from within this specific community.

122. In conclusion, the Objector has evidenced substantial opposition from the U.S. P&C Insurance Providers community.

D. Test 3: Strong association between community and string

123. Having established substantial opposition to the Application, the next test to consider is whether there is a strong association between the community invoked and the string[84].

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[82] See footnote 37.

[83] This conclusion is based on the decision that the invoked community is not the global P&C insurance market, but only the U.S. P&C Insurance Providers; however, if *arguendo* I were to assume that the invoked community was the global P&C insurance providers market, Test 2, substantial opposition, would not have been met.

[84] Objector has suggested that the Guidebook requires an association between the community and the string and not the other way around. I find no such distinction. The Procedure uses the terms freely, and refers to association between community and string or between string and community similarly (see Procedure at p. 3-24). The purpose of a community objection is to stop the use of a string which because of its publicly perceived association to the community, could harm the community.

124. To help determine the issue, the Expert may balance factors including: the statements contained in the Application (a) or the association by the public between community and the string (b).

a. Statements contained in the Application

125. Regarding the Application, both parties have drawn my attention to the answer provided by Applicant to question 18 (a), though inferring different conclusions: The Objector claims that the Application evidences association between the string <.insurance and the community of U.S. P&C Insurance Providers. The Applicant, however, submits that the Application reveals its intent to offer this gTLD to a wide variety of internet users, and not just those providing insurance products, and thus rejects the association with the invoked community.

126. The relevant paragraph in the Application states as follows:

> ".Insurance will be particularly attractive to registrants providing insurance products and services (one of the world's largest and most attractive industries), and the end-users who seek to protect against risk or otherwise are interested in or are required to have insurance coverage. Registrants may include insurance companies, brokerages, adjusters, service providers, reinsurance organizations, agents and others who can use the TLD to more intuitively reach end-users. The TLD also could provide a forum for ratings agencies, journalists, industry analysts, insurance customers, policy makers, and others who take a professional or personal interest in this important financial instrument".

127. In my opinion, the paragraph seems to target primarily entities directly involved in the insurance activity. However, the description in the Application refers to the insurance industry or community in general. It does not refer exclusively, or primarily, or even by specific reference, to the P&C insurance sector. Thus, an analysis of the paragraph does not lead to the conclusion that the Application is targeting specifically this type of insurance company. It is true that as part of the wider insurance community, to which the Application refers, the P&C insurers would be included. But I do not find that the application is targeting the P&C insurers any more distinctly than any other insurance sector.

128. Additionally, the Application is targeting a word-wide market, making it impossible to establish a nexus between its wording and the specific U.S. P&C Insurance Providers community invoked.

129. I thus cannot find that the wording of the Application evidences a strong association between the string and the U.S. P&C Insurance Providers community invoked by the Objector.

b. Association between community and the string

130. Another relevant factor that the Procedure establishes for consideration is the level of association by the public between the string and the community.

131. Concerning the association by the public, the Objector alleges that due to the extended use of the P&C insurance products, plus the high degree of advertising, there is strong association among consumers between the string and the community[85]. The Applicant is of the contrary opinion, and submits that the Objector offers no evidence that the public strongly associates the word insurance with the narrow group of U.S. P&C insurers[86], because the term insurance reaches far beyond this geographic region[87].

132. To determine the level of public perception, I must consider two issues: the extent of the term public (i) and what should be understood and how to value association by the public (ii).

133. (i) Public: the U.S. P&C Insurance Providers is a community restricted to the U.S. This raises the question as to whether the public perception should be measured on U.S. public perception, as the Objection seems to imply[88], despite the fact that it is the Applicant's intention to use the string world-wide. I tend to side with Applicant and consider that the public, in relation to which the test should be measured, is the world, or at least the English speaking countries of the world (since insurance is an English word).

134. (ii) Association by the public: association means that the string term brings to mind the community invoked. This can be a matter of degree; the association can be very strong (for example, the term "navajo" would be very strongly associated with the Navajo indian community since it uniquely identifies the community[89]) or it can be weak (for example the string .indian would have in my opinion a low association with the Navajo tribe: in this case, the string does not describe uniquely the community, nor does it even identify it). I agree with the Applicant that no evidence has been delivered to prove that the global consumer public generally links the term insurance to the U.S. P&C Insurance Providers community invoked for two reasons:

- I am not convinced that the consumer public in general strongly associates the term insurance to the concept of P&C insurance whether it be on a global or national scale. The term insurance clearly overreaches the concept of P&C insurance, because it includes all types of insurance. Thus, the public may associate the term insurance to the wider insurance community, but not necessarily to the narrower P&C insurance community. Objector has not provided sufficient evidence to the contrary[90].
- I am less persuaded that the consumer public strongly associates the term insurance to the U.S. P&C Insurance Providers community. The narrowness with which the community has been defined renders it very difficult to accept that a global public (even restricted to English speaking countries) strongly associates

[85] Objection p. 13
[86] Response p. 11
[87] Add. Sub. p. 4
[88] Objection p. 12/13
[89] Note, however, that uniqueness is not necessary to prove a strong association. See footnote 80.
[90] Even if the community invoked was the global P&C Insurance Providers, I would still have serious doubts as to the association by the public between the generic string insurance and the specific community of P&C insurance.

the term insurance with the geographically-bound community of U.S. P&C Insurance Providers.

135. In conclusion, I find that the Objector has not evidenced a strong association between the string insurance and the U.S. P&C Insurance Providers community invoked and therefore has failed to meet one of the four tests established in section 3.5.4 of the Procedure. This failure leads to the dismissal of the Objection.

7. CONCLUSION

136. I find that while the Objector has established its standing to file the Objection against the granting of the string <.insurance to the Applicant, Objector has not met the burden of establishing a strong association between the string <.insurance and the U.S. P&C Insurance Providers community (Test 3).

137. Since Objector has not met Test 3 successfully, considering whether Test 4 (Material Harm) has been met, becomes moot.

8. COSTS

138. The Applicant has requested payment of the costs reasonably incurred in opposing the Objection. However, pursuant to article 14 (e) of the Attachment to the Procedure, upon termination of the proceedings, the Dispute Resolution Service Provider shall refund to the prevailing party, as determined by the panel, its advance payment in costs. Thus, the panel has no mandate on costs other than the advance costs referred.

139. The Applicant has prevailed, and thus should have its advance costs refunded.

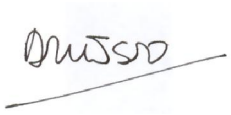
DECISION

For the reasons given above, and in relation to the Objection filed by American Insurance Association as Objector, against the application filed by Auburn Park, LLC, as Applicant, for the gTLD <.insurance, I find and declare that:

I. The Applicant has prevailed and the Objection is dismissed;

II. The Applicant is entitled to have its advance payment of costs refunded by the Centre.

Date: 14 January 2014

Signature: 

Mr. Juan Fernández-Armesto
Expert