

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

CASE No. EXP/405/ICANN/22

PROF. ALAIN PELLET, INDEPENDENT OBJECTOR

(FRANCE)

vs/

SILVER GLEN, LLC

(USA)

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

Generic Top-Level Domain Name Dispute
Administered by the International Centre for Expertise of the
International Chamber of Commerce

Disputed Generic Top-Level Domain Name
.HEALTHCARE

Ground for the Objection
Community Objection

Prof. Alain Pellet (Independent Objector)
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Objector

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Applicant

Expert Determination

Expert Panel

Ms Teresa Cheng, SC
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THE PARTIES

1. The Applicant is Silver Glen, LLC (“Applicant”), whose contact person is Mr. Daniel Schindler, and whose address is 10500 NE 8th Street, Suite 350, Bellevue, WA 98004, USA.

2. The Applicant is represented by Mr. John M. Genga and Mr. Don C. Moody, The IP & Technology Legal Group, P.C., dba New gTLD Disputes, whose address is 15260 Ventura Blvd., Suite 1810, Sherman Oaks, CA 91403, USA, and whose email addresses are john@newgtlddisputes.com and don@newgtlddisputes.com.

3. The Objector is Prof. Alain Pellet, Independent Objector (“Objector”), whose address is 16 Avenue Alphonse de Neuville, 92380 Garches, France.

4. The Objector is represented by Ms. Héloïse Bajer-Pellet, whose address is 15, Rue de la Banque, 75002 Paris, France and whose email address is avocat@bajer.fr; by Mr. Daniel Müller, whose address is 20, Avenue du Général de Gaulle, 78290 Croissy sur Seine, France and whose email address is mail@muellerdaniel.eu; by Mr. Phon van den Biesen, whose address is De Groene Bocht, Keizersgracht 253, 1016 EB Amsterdam, The Netherlands and whose email address is

phonvandenbiesen@vdbkadvocaten.eu; and by Mr. Sam Wordsworth, whose address is 24 Lincoln's Inn Fields, London, WC2A 3EG, United Kingdom and whose email address is SWordsworth@essexcourt.net.

PROCEDURE

5. This matter refers to the generic Top-Level Domain (“gTLD”) string .healthcare applied for by the Applicant, and the Objector has filed a Community Objection against this application. The dispute resolution service provider (“DRSP”) is the International Centre for Expertise (“Centre”) of the International Chamber of Commerce (“ICC”).

6. The applicable rules shall be the Rules for Expertise of the ICC (the “Rules”), supplemented by the ICC Practice Note on the Administration of Cases (“ICC Practice Note”) under the Attachment to Module 3 of the gTLD Applicant Guidebook, New gTLD Dispute Resolution Procedure (“Procedure”) of the gTLD Applicant Guidebook (“Guidebook”).

7. Pursuant to Article 5(a) of the Procedure, the language of all submissions and proceedings is English.

8. Pursuant to Article 6(a) of the Procedure, all communications by

the parties, the Expert Panel and the Centre were submitted by way of email.

9. The Applicant submitted a gTLD application (the “Application”) to ICANN (Application ID: 1-1492-32589) for the string .healthcare on 13 June 2012.

10. Donuts Inc. (“Donuts”) is the ultimate owner of the Applicant. In the Declaration of Jonathan Nevett, the founder and Executive Vice President of Donuts, he stated that Donuts was formed to acquire and operate new gTLD domains and has, through its subsidiaries, applied for 307 new gTLDs.

11. The purpose of the Application as stated in §18A of the Application is:

“.....

This TLD is attractive and useful to end-users as it better facilitates search, self-expression, information sharing and the provision of legitimate goods and services. Along with the other TLDs in the Donuts family, this TLD will provide Internet users with opportunities for online identities and expression that do not currently exist. In doing so, the TLD will introduce significant consumer choice and competition to the Internet namespace – the very purpose of ICANN’s new TLD program.

This TLD is a generic term and its second level names will be attractive to a variety of Internet users. Making this TLD

available to a broad audience of registrants is consistent with the competition goals of the New TLD expansion program, and consistent with ICANN's objective of maximizing Internet participation. Donuts believes in an open Internet and, accordingly, we will encourage inclusiveness in the registration policies for this TLD. In order to avoid harm to legitimate registrants, Donuts will not artificially deny access, on the basis of identity alone (without legal cause), to a TLD that represents a generic form of activity and expression.

.HEALTHCARE is a TLD attractive to registrants with affinity or professional interest in promotion or treatment of human health, and the methods of delivery and payment for health care services. This includes, but is not limited to, those engaged in the treatment and prevention of disease and illness, the provision of primary and secondary care, the dissemination of health care information, and the advancement of public health. The term HEALTHCARE is also highly topical in the global discussion of healthcare policy and administration, and is a useful forum for debate and the exchange of ideas. We would operate this TLD in the best interests of all registrants, and in a stable and secure manner.

.....”

12. The Objector submitted its objection to the applied-for string .healthcare on 12 March 2013 (“the Objection”) to the Centre.

13. On 8 April 2013, the Centre registered the Objection for processing pursuant to Article 9(b) of the Procedure.

14. On 27 May 2013, the Centre acknowledged receipt of the Applicant’s response to the Objection dated 15 May 2013.

15. On 12 June 2013, the Chair of the Standing Committee of the Centre appointed Ms. Teresa Cheng, SC as sole member of the Expert Panel ("the Panel") in this matter.

16. On 30 July 2013, the Centre informed the Panel and the parties that the estimated costs had been paid in full by each party and the Centre confirmed the full constitution of the Expert Panel.

17. Accordingly, the Centre proceeded with the transfer of the file to the Panel on the same day.

18. On 2 August 2013, the Objector requested to file an additional statement.

19. On 8 August 2013, the Applicant responded to the Objector's request of 2 August 2013.

20. In an email dated 12 August 2013, the Panel allowed the Objector's request. The Objector was allowed to file an additional written statement on or before 19 August 2013, and the Applicant was allowed to file a response to the Objector's additional written statement on or before 26 August 2013.

21. The Objector submitted an additional statement on 19 August

2013.

22. The Applicant submitted a response to the Objector's additional statement on 26 August 2013.

23. No hearing has taken place, nor was it requested by the parties.

24. Article 21(a) of the Procedure provides that the Centre and the Panel shall make reasonable efforts to ensure that the Expert Determination is rendered within forty-five (45) days of the constitution of the Panel. The Centre considers that the Panel is constituted when the Expert is appointed, the parties have paid their respective advances on costs in full and the file is transmitted to the Expert. In this case, the Panel was constituted on 30 July 2013. The Centre and the Panel were accordingly to make reasonable efforts to ensure that the Expert Determination was rendered no later than 13 September 2013 (as calculated in accordance with Articles 6(e) and 6(f) of the Procedure). On 13 September 2013, pursuant to Article 21(b) of the Procedure, the Panel submitted a first draft of the Expert Determination to the Centre for scrutiny as to form before it was signed.

25. On 4 December 2013, the Applicant submitted further statement and information "*regarding matters raised in the Objection and further*

submissions made by the Objector" to the Panel.

26. On 6 December 2013 (Hong Kong time), the Objector responded to the Applicant's submissions of 4 December 2013.

27. On 12 December 2013, the Centre acknowledged receipt of the Applicant's submission of 4 December 2013 and Objector's response of 5 December 2013 (Paris time), and referred the decision of whether to reopen the matter and accept further submissions by the parties to the Panel.

28. On 20 December 2013, the Panel informed the parties that "*[the Panel does] not agree to re-open the proceedings for any further statement of the Applicant to be admitted*". The Panel's email of 20 December 2013 provides:

"I refer to Mr Moody's email dated 4 December 2013 made on behalf of the Applicant and Mr Pellet's email dated 6 [sic] December 2013 in response. I have considered the submissions made therein. Mr Pellet objects to the admission of the new statement, set out in the email of 4 December attaching further information, on the grounds that the Applicant has contended that GAC advice is irrelevant to the objection proceedings and that procedurally such statement is not permitted under the Procedure.

Procedurally the statement has not been authorized and will need permission for it to be admitted under Article 17(a) of the Procedure. If this new statement and evidence is admitted, pursuant to Article 4 of the Procedure, the

Objector must be given the opportunity to respond. The statement was made as a result of the new circumstances that have arisen in October and November 2013 and is therefore not something that could be raised earlier. If such evidence and statement is relevant and material to my determination by reason of the submissions of the parties, I consider that I have the power to permit such statements to be admitted under the Procedure. Whether the power is to be exercised is of course a matter of discretion taking all relevant circumstances into account.

However, the position of the Applicant is that such GAC advice is irrelevant to the objection proceedings before me as rightly pointed out by the Objector. I note also that the point made in the new statement, if admitted, does not deviate from this primary position. It reiterates the submission contending that if awarded the subject string, the Applicant would have to implement the GAC-recommended safeguards to the extent ICANN has so adopted the GAC Advice. In the premises, I agree with the Objector's submissions and I do not agree to re-open the proceedings for any further statement of the Applicant to be admitted and that therefore dispenses with the need for the Objector to respond accordingly.

....."

SUMMARY OF PARTIES' POSITIONS

29. The Objector files the Objection on the ground of Community Objection.

30. In paragraph 6 of the Objection, the Objector states, "*Healthcare targets the healthcare sector, which constitutes a clearly delineated community in the sense of the Guidebook. The opposition against the*

Application is substantial and the Application creates a likelihood of material detriment to the rights and legitimate interests of the members of the healthcare community, the healthcare system in general and the public interest goal of public health.”

31. The Objector submits that the Application targets the healthcare community. The applicable test, by reference to the Implementation Guideline P of the 2007 ICANN Final Report on the Introduction of New Generic Top-Level Domains, is not limited to the assumptions and the intended use proposed for any given application but is primarily concerned with the expectations of the average internet users and their perception of and associations with the string.

32. The term “*healthcare*” has a specific, clear and unequivocal meaning and there is a “*clearly delineated community*” within the meaning of section 3.5.4 of the Guidebook. “*Community*” is to be interpreted broadly and this string targets the healthcare sector and its professionals.

33. The objections that have been raised can be seen in comments on ICANN’s public comment website posted on behalf of the American Hospital Association and the Association of American Medical Colleges. They represent, the Objector said, a significant number of stakeholders of

the community in the North America region. They voice concerns that the protection of the public and the users of a .healthcare TLD is an absolute imperative and that this domain name needs to be operated in the interest of public health and safety. They are concerned with the lack of safety measures, the eligibility requirements or validation procedures to prevent abuse of the .healthcare TLD. This will cause harm to the reputation of the healthcare community and the damage to the healthcare systems and public health in general. The Association of Corporate Counsel voiced similar concerns. The opposition is substantial.

34. The material detriment, the Objector submits, results from the harm to the reputation of the community, the interference with the community's core activities, and economic or other concrete damage to the community or significant portions of the community.

35. The Applicant responded contending that an objector must act on behalf of a "*clearly delineated community*" and the Objector does not. The Objector, the Applicant says, is biased in favour of healthcare interests and opposes those who would provide a forum for such topics on the internet and has filed multiple objections to the applications by the Applicant's parent company and related companies.

36. The Applicant submits that the Objector has failed to discharge the

burden of proof in relation to each of the four tests for a Community Objection to be sustained.

37. Further the Applicant contends that, as seen in Application Q18A, the stated purpose of this TLD expressly does not “*target*” the string towards any particular community. There is no need for an operator to apply as a community. Preventive measures have been proposed and there is no evidence to conclude any detriment to the “*community*” (even if it satisfies the Community test under section 3.5.4 of the Guidebook) referred to by the Objector. As to any registration eligibility criteria, Application Q18A shows the registration of second level domains is to be without constraints of access, expression and innovation. This, the Applicant says is supported by ICANN as evidenced in the Preamble of the Guidebook.

38. The Objector filed an additional statement refuting the allegation of bias. He contends that as an independent objector he is not acting on behalf of any community and that is clearly stated in section 3.2.5 of the Guidebook.

39. The Objector submits that the issue is whether the Applicant can use and operate the .healthcare string in the way it describes in its Application.

40. The Objector submits that the Targeting test under section 3.5.4 of the Guidebook is met not by reference to whether the string describes the community, but by establishing a “*strong association*” as set out in section 3.5.4 of the Guidebook between the applied-for string and the community. As to the evidence needed to support the Detriment test provided for under section 3.5.4 of the Guidebook, it is not proof of harm but likelihood of detriment that has to be established. The Applicant’s unwillingness to propose preventive measures and to control the actual content of websites in the .healthcare gTLD and to ensure controlled registration eligibility requirements shows that the detriment is likely to arise.

41. In response to the Objector’s additional statement, the Applicant reiterates the need for the Objector to discharge the burden of proof. The ICANN Generic Names Supporting Organization (“GNSO”) Final Guideline is referred to. It provides that “*the objector must prove 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 the users more widely.*” This was adopted in the Guidebook by the ICANN Board as seen in section 3.5 of the Guidebook expressly stating the burden of proof rests on the Objector.

42. The Applicant contends that the “*strong association*” element does

not look simply at the generic association between the string and the “community” in the eyes of the public. There is a need to consider what the Applicant targets by reference to “[s]tatements contained in the application” and “[o]ther public statements by the applicant” as set out in section 3.5.4 of the Guidebook. The intent of the Guidebook by reference to the discussion of the stakeholders is that the Community Objection ground is a vehicle “to prevent the misappropriation of a string that uniquely or nearly uniquely identifies a well-established and closely connected group of people or organizations” as referred to in the Summary Report and Analysis of Public Comment - Applicant Guidebook Excerpts and Explanatory Memoranda (See <http://archive.icann.org/en/topics/new-gtlds/agve-analysis-public-comments-04oct09-en.pdf> at page 19). The Objector has failed to satisfy the Community and Targeting tests.

43. The Applicant reiterates that it has undertaken to implement eight protective mechanisms in addition to the fourteen steps that ICANN requires for new gTLDs and four further measures due to the sensitivity of this particular string. These have been set out under "Our Protection" at pages 8 and 9 of §18A of the Application. Further, the Applicant is contractually bound by the Public Interest Commitments (PICs) made by Donuts, on behalf of, inter alia, the Applicant. The Panel notes that

according to the ICANN PIC Specifications, the commitments made in the PICs may include commitments not made in an application but to which an applicant intends to commit. These commitments will become part of an applicant's new gTLD registry agreement.

FINDINGS

44. Community Objection is defined in Article 2(e)(iv) of the Procedure as follows:

“Community Objection” refers to the objection that there is substantial opposition to the application from a significant portion of the community to which the string may be explicitly or implicitly targeted.”

45. Section 3.2.1 of the Guidebook states:

“3.2.1 Grounds for Objection

A formal objection may be filed on any one of the following four grounds:

.....

***Community Objection** – There is substantial opposition to the gTLD application from a significant portion of the community to which the gTLD string may be explicitly or implicitly targeted.*

.....”

46. In the Guidebook, section 3.5 sets out the applicable standards for the consideration and determination of the objection, and in so far as a Community Objection is concerned, section 3.5.4 provides for four tests:

“The four tests described here will enable a DRSP panel to determine whether there is substantial opposition from a significant portion of the community to which the string may be targeted. For an objection to be successful, the objector must prove that:

- *The community invoked by the objector is a clearly delineated community; and*
- *Community opposition to the application is substantial; and*
- *There is a strong association between the community invoked and the applied-for gTLD string; and*
- *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. Each of these tests is described in further detail below.”*

47. The Objector has to demonstrate that the community expressing opposition can be regarded as a “*clearly delineated community*” as provided for in section 3.5.4 of the Guidebook, and that a panel could balance a number of factors to determine this, including but not limited to:

- “ • *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.”*

48. Further there has to be proof of “*substantial opposition*” and the Panel is to balance a number of factors including but not limited to those listed in section 3.5.4 set out below in concluding whether that is established:

- “ • *Number of expressions of opposition relative to the composition of the community;*
- *The representative nature of entities expressing opposition;*
 - *Level of recognized stature or weight among sources of opposition;*
 - *Distribution or diversity among sources of expressions of opposition, including:*
 - *Regional*

- *Subsectors of community*
- *Leadership of community*
- *Membership of community*
- *Historical defense of the community in other contexts; and*
- *Costs incurred by objector in expressing opposition, including other channels the objector may have used to convey opposition.”*

49. The Targeting Test has to be satisfied by establishing a “*strong association between the applied-for gTLD and the community.*” The factors that could be balanced include, but are not limited to, those listed in section 3.5.4:

- “ • *Statements contained in application;*
- *Other public statements by the applicant;*
 - *Associations by the public.”*

50. Finally, the Objector has to establish 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 targeted. An allegation of detriment that consists only of the applicant being delegated the string instead of the objector will not be sufficient for a finding of material detriment.*” A number of factors can be

taken into account and they include:

- “ • *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. In accordance with section 3.5.4 of the Guidebook, each of the four above-mentioned tests has to be satisfied for the Objection to be sustained.

Allegation of Bias and Standing

52. Section 3.2.2.4 of the Guidebook provides, inter alia,

"...To qualify for standing for a community objection, the objector must prove both of the following:

It is an established institution - Factors that may be considered in making this determination include, but are not limited to:

- *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 organization, or treaty. The institution must not have been established solely in conjunction with the gTLD application process.*

It has an ongoing relationship with a clearly delineated community – Factors that may be considered in making this determination include, but are not limited to:

- *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."*

53. Whether a "*clearly delineated community*" is established is to be determined in accordance with section 3.5.4 of the Guidebook.

54. In any event, the plea of bias has no relevance to the qualification for standing for a community objection under section 3.2.2.4 and 3.2.5 of the Guidebook,

55. As to the standing of an Independent Objector, section 3.2.5 of the Guidebook provides:

"A formal objection to a gTLD application may also be filed by the Independent Objector (IO). The IO 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.

In light of this public interest goal, the Independent Objector is limited to filing objections on the grounds of Limited Public Interest and Community."

56. The Applicant argues that the Objector is biased and lacks standing.

57. The Panel does not accept that there is bias by reason of the objections that have been made by the Objector against the health-related applications made by the Applicant or its subsidiaries or related companies. Each ground for objection will have to be viewed on its own merit.

58. The direct or indirect association of the Objector with the healthcare community, past or present, does not, without further substantiation, justify a plea of bias either. There is no evidence before the Panel that suggests that the Objector is biased or that there is a justifiable doubt as to that and this plea is dismissed.

59. As to standing, the Objector does not act on behalf of a “community.” However, section 3.2.5 of the Guidebook clearly contemplates that an independent objector can raise such objection in the best interest of the public who uses the global internet. The Objector has raised the Objection in the interest of the internet users in general as noted in the submissions and arguments which are summarized above. The Panel therefore finds that the Objector has standing.

Community Test

60. The first issue is whether there is a “*clearly delineated community*” that the applied-for string targets. The Applicant contends that the string has to describe a clearly delineated community before the Community and Targeting tests can be satisfied. The Objector disagrees and says that the purpose of this ground of objection is that the string targeting a community is operated in a way so as not to cause material

detriment to the rights of the community or a significant portion of the community and as such the way in which the Applicant uses or operates this gTLD is to be considered.

61. The Panel finds that there is nothing from the Guidebook that supports the Applicant's contention that the string has to describe a community. If the string, whilst using a generic term, targets a specific community that meets the standards set out in the Community test, the Objection, in so far as the Community test is concerned, can be established. The string does not have to describe a community for this ground to be established. The fact that it represents a generic subject does not preclude opposition from being raised on this ground by a community.

62. Nonetheless, the Objector still has to satisfy the Panel that there is a "*clearly delineated community*" which this string targets. It is clear from section 3.5.4 that the burden of proof rests on the Objector to establish each of the four tests.

63. The parties' submissions refer the Panel to definitions of healthcare. Such definitions are broad and cover aspects of organized provision of medical care, maintenance and restoration of health through medical services, and prevention, treatment and management of illness.

64. The Panel finds that in the light of the Guidebook and the 2007 ICANN Final Report, the term “*community*” should be interpreted broadly when considering whether the Community test can be established. As submitted by the Objector, the “*community*” has to be determined by reference to some common characteristics, values or goals in order to constitute a “*clearly delineated community.*” The Implementation Guideline P highlighted one important criterion as to whether the group of individuals or entities can be clearly delineated from others and whether members of the “*community [are] delineated from internet users in general.*” This is by reference to the common characteristics and particularities of that group.

65. The group of medical and paramedical professionals identified by the Objector illustrates that there are individuals and bodies in this community. But this is not adequate to establish, on balance, that such community is a “*clearly delineated community.*”

66. The Objector argues that the community is clearly delineated as it comprises members who are specifically educated persons and comprises medical and paramedical professionals. It is further contended that the community is delineated by reference to the public interest mission the healthcare community is entrusted with, or its general mission, i.e. to provide medical services to the public. The community is also one that is

regulated by competent public authorities. The Objector concludes in paragraph 19 of the Objection, “[t]hese characteristics permit [one] to distinguish members of the healthcare community from other actors and parts of the health system, as well as from the public that use the global internet. Its individual and institutional members can be readily identified, in particular through the necessary public approvals or licencing requirements with which they must comply.”

67. The Panel accepts the test postulated by the Objector in determining whether a group is a “*clearly delineated community*” within the meaning of the Guidebook. This has then to be considered in the context of the specific string of .healthcare here.

68. Given the broad and widely encompassing definition of healthcare, the group of individuals and bodies related to or targeted by the string can encompass numerous stakeholders, professionals and non-professionals. Further, the stakeholders could include multilateral organizations, government agencies and non-governmental organizations concerned with provision of healthcare services and information. It may also include, in the Panel’s view, those not generally recognised as professionals even though they may have interest or knowledge in healthcare. This latter group may have different practices in different states/localities such that

there is no certainty universally as to whether such persons should be included in such community. Bodies concerned with healthcare would, as submitted by the Applicant, also include for-profit entities which do not necessarily share the common goal, mission or interest as the international or governmental bodies. The types of persons or bodies involved in the provision of healthcare services and information are therefore diverse, wide-ranging and plentiful. They may have divergent interests and goals.

69. The Applicant's submission that arguably the entire world population has a fundamental interest in, and is impacted by .healthcare is not without merit. It is not inconceivable that a member of the general public may be said to be associated or even strongly associated with the applied-for gTLD if he is concerned with healthcare issues for his own well-being. The delineation between the "community" and the internet users in general becomes blurred and indistinct.

70. The public recognition of the group as a community is, on balance, not distinct enough either. As noted above, the provision of healthcare services from diverse stakeholders with different interest or goal tends to suggest there is not a distinct body from the eyes of the public. It is conceivable also that there are disagreements as to who the members of this community are given the wide-encompassing definition of

healthcare.

71. The global distribution of the “community” is widespread and may also be premised on very different bases or standards. The identity or qualifications of members within such a “community” is uncertain and on balance diverse in the light of the circumstances. The limit is not closed; and the boundaries are not clear. There is uncertainty as to what would define the “*community*.”

72. The Government Advisory Council's ("GAC") Beijing Communiqué dated 11 April 2013 confirms that .healthcare is a sensitive string requiring particular safeguard measures. This however is not inconsistent with the provisional conclusions reached above. Whilst most stakeholders concerned with healthcare have to be subjected to regulated-entry requirements in multiple jurisdictions, it nonetheless does not mean that the community is clearly delineated for the purposes of establishing the Community test under this objection procedure.

73. The Panel finds that for the above reasons, it is not possible “*to distinguish members of the healthcare community from other actors and parts of the health system, as well as from the public that use the global internet.*” as suggested by the Objector in paragraph 66 above.

74. The Community Objection ground is not related to the interests of the internet users generally but to those of a specific “*community*” which should be “*clearly delineated.*” The Panel is thus of the view that the Objector has failed to establish the requirements of the Community test given that a “*clearly delineated community*” has not been identified, as is required under section 3.5.4 of the Guidebook.

75. As a result, given that the four tests of section 3.5.4 of the Guidebook are cumulative, the Objection is dismissed.

76. There is thus no need to consider the other three tests. In passing the Panel notes however that it accepts that substantial opposition is not to be judged by reference to quantity but the quality, substance and impact of the opposition made. The Panel also accepts that there is no need to adduce evidence of harm to the extent contended by the Applicant. Inferences may be drawn by the Panel to decide, based on the Application, the evidence and submissions of the parties, as to whether there is a “*likelihood*” of material detriment.

DECISION

77. In light of the above reasons and in accordance with Article 21(d) of the Procedure, I hereby issue the following Expert Determination:

1. Prof. Alain Pellet's Objection is dismissed.
2. The Applicant, Silver Glenn, LLC, prevails.
3. The Applicant, Silver Glenn, LLC, shall be refunded its advance payment on costs by the Centre.

Date: 9 January 2014



Teresa Cheng, SC
Expert