

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

CASE No. EXP/417/ICANN/34

PROF. ALAIN PELLET, INDEPENDENT OBJECTOR

(FRANCE)

vs/

GOOSE FEST, LLC

(USA)

(Consolidated with CASE No. EXP/416/ICANN/33

PROF. ALAIN PELLET, INDEPENDENT OBJECTOR (FRANCE) vs/ DOTHEALTH,  
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.

**EXPERTISE PROCEEDINGS UNDER THE  
NEW gTLD DISPUTE RESOLUTION PROCEDURE**

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

**Consolidated Cases EXP/416/ICANN/33 (c. EXP/417/ICANN/34)**

**Expert Determination for Case EXP/417/ICANN/34**

**PROF. ALAIN PELLET, INDEPENDENT OBJECTOR**

(Objector)

vs.

**GOOSE FEST, LLC**

(Applicant)

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**Expert Determination**

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*Members of the Panel:*

Dr. Stanimir A. Alexandrov (Chair)

Dr. Maxi C. Scherer (Co-Expert)

Prof. Frédéric Bachand (Co-Expert)

***Independent Objector:***

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**Definitions of Abbreviations and Terms Used:**

<b>Abbreviation</b>	<b>Term</b>
ADR	Amicable Dispute Resolution
AGB	ICANN gTLD Applicant Guidebook, June 4, 2012 version
ALAC	ICANN At-Large Advisory Committee
Applicant	Goose Fest, LLC
Centre	International Centre for Expertise of the International Chamber of Commerce
Donuts	Donuts, Inc.
DRSP	Dispute Resolution Service Provider
GAC	Government Advisory Committee
gTLD	Generic Top-Level Domain
ICANN	Internet Corporation for Assigned Names and Numbers
ICC	International Chamber of Commerce
ICCPR	International Covenant on Civil and Political Rights
IO	Independent Objector
LPI Objection	Limited Public Interest Objection
Panel	Dr. Stanimir A. Alexandrov, Dr. Maxi C. Scherer, Prof. Frédéric Bachand
Procedure	Attachment to Module 3 of the AGB
Rules	ICC Expertise Rules
TLD	Top-Level Domain
UN	United Nations
WHO	World Health Organization

## Expert Determination

### **I. Introduction**

1. The dispute before the Panel involves a Limited Public Interest Objection (generally, an “LPI Objection” and, specifically, the “Objection”) filed in connection with the new generic top-level domain (“gTLD”) application process administered by the Internet Corporation for Assigned Names and Numbers (“ICANN”). The Objection was filed by the ICANN Independent Objector (“IO”), Professor Alain Pellet. It is directed at Goose Fest, LLC (“Goose Fest” or the “Applicant”), who filed an application to operate a new .health gTLD registry (the “Application”).

2. Professor Pellet has served as the IO for ICANN’s new gTLD application process since 14 May 2012.<sup>1</sup> The contact information provided by Professor Pellet for the purpose of these proceedings is 16, Avenue Alphonse de Neuville, 92380 Garches, France. His email address is: [contact@independent-objector-newgtlds.org](mailto:contact@independent-objector-newgtlds.org). Professor Pellet is represented in these proceedings by: Ms. Héloïse Bajer-Pellet ([bajer.avocat@gmail.com](mailto:bajer.avocat@gmail.com)),<sup>2</sup> 15, Rue de la Banque, 75002 Paris, France; Mr. Daniel Müller ([mail@muellerdaniel.eu](mailto:mail@muellerdaniel.eu)), 20, Avenue du Général de Gaulle, 78290 Croissy sur Seine, France; Mr. Phon van den Biesen ([phonvandenbiesen@vdbkadvocaten.eu](mailto:phonvandenbiesen@vdbkadvocaten.eu)), Van den Biesen Kloostra Advocaten, De Groene Bocht, Keizersgracht 253, 1016 EB Amsterdam, The Netherlands; and Mr. Sam Wordsworth ([SWordsworth@essexcourt.net](mailto:SWordsworth@essexcourt.net)), Essex Court, 24 Lincoln’s Inn Fields, London WC2A 3EG, United Kingdom.

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<sup>1</sup> See ICANN, *The Independent Objector*, <http://newgtlds.icann.org/en/program-status/odr/independent> (last visited 24 Sept. 2013).

<sup>2</sup> Ms. Bajer-Pellet also provided an email address of [avocat@bajer.fr](mailto:avocat@bajer.fr).

3. Under the ICANN Applicant Guidebook (“AGB”), the IO has broad standing to object to proposed new gTLDs. The IO is tasked with “[a]cting solely in the best interests of global Internet users” and “can lodge objections in cases where no other objection has been filed.”<sup>3</sup> These objections are limited to LPI Objections and Community Objections,<sup>4</sup> and the “IO cannot object to an application unless there is at least one comment in opposition to the application made in the public sphere.”<sup>5</sup> The IO has standing in this matter because there have been public comments made in opposition to the .health gTLD applications.<sup>6</sup> Finally, the AGB requires that the IO “be and remain independent and unaffiliated with any of the gTLD applicants.”<sup>7</sup>

4. Goose Fest, LLC is a company incorporated and organized under the laws of Delaware, USA, with its principal place of business at 155 108th Avenue NE, Suite 510, Bellevue, Washington 98004, USA. Its email address is: [goosefest@donuts.co](mailto:goosefest@donuts.co). Goose Fest is represented in these proceedings by: Mr. John M. Genga ([jgenga@gengalaw.com](mailto:jgenga@gengalaw.com)) and Mr. Don C. Moody ([don@newgtlddisputes.com](mailto:don@newgtlddisputes.com)), The IP & Technology Legal Group, P.C., dba New gTLD Disputes, 15260 Ventura Boulevard., Suite 1810, Sherman Oaks, CA 91403 USA.

5. The present case, EXP/417/ICANN/34, is consolidated with another case involving an LPI Objection asserted by the IO against an application for the .health gTLD string, EXP/416/ICANN/33. The applicant in that matter, DotHealth, LLC (“DotHealth”), is a company

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<sup>3</sup> AGB, Section 3.2.5.

<sup>4</sup> *Id.*

<sup>5</sup> *Id.*

<sup>6</sup> See ICANN, Public Comments, <https://gtldcomment.icann.org/comments-feedback/applicationcomment/viewcomments> (last visited 9 Sept. 2013).

<sup>7</sup> AGB, Section 3.2.5.

incorporated and organized under the laws of Delaware, USA, with its principal place of business at 354 Walthery Avenue, Ridgewood, NJ 07450 USA. The Panel is rendering a separate determination in the consolidated case EXP/416/ICANN/33.

## **II. Procedural History**

6. On 13 June 2012, Goose Fest submitted its Application to operate a new .health gTLD registry. ICANN reviewed Goose Fest's Application during the Initial Evaluation stage provided for under Section 2 of the AGB and determined that it met all requirements applicable at that stage of the evaluation process.<sup>8</sup>

7. The International Centre for Expertise ("Centre") of the International Chamber of Commerce ("ICC") received the IO's LPI Objection to Goose Fest's Application on 12 March 2013. This was conveyed to the IO in a letter dated 15 March 2013 in which the Centre also announced to the IO that the present proceedings would be handled by a Case Management Team.<sup>9</sup>

8. In a letter dated 2 April 2013, the Centre informed the IO that, further to an administrative review of the Objection conducted pursuant to Article 9 of the New gTLD Dispute Resolution Procedure ("Procedure") attached to Module 3 of the AGB, it had found that the Objection complied with Articles 5-8 of the Procedure.<sup>10</sup> As a result, the Objection was registered for processing in accord with Article 9(b) of the Procedure. The Centre also informed the IO that it would publish the required information regarding the proceedings, and invite Goose Fest to file a Response under Article 11(b) of the Procedure. The Centre reminded the IO that

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<sup>8</sup> See ICANN, New gTLD Program: Initial Evaluation Report: Goose Fest, 14 June 2013, *available at* <http://newgtlds.icann.org/sites/default/files/ier/gla5o8diWbr6espQa6ieq2u7/ie-1-1489-82287-en.pdf>.

<sup>9</sup> See the Centre's letter to Prof. Alain Pellet, Independent Objector (15 March 2013).

<sup>10</sup> See the Centre's letter to Prof. Alain Pellet, Independent Objector (2 April 2013).

the Parties could seek a settlement or amicable dispute resolution under the ICC Amicable Dispute Resolution (“ADR”) Rules.<sup>11</sup>

9. The Centre first raised the issue of consolidation in its letter to the parties dated 2 April 2013.<sup>12</sup> On 12 April 2013, it informed the IO and Goose Fest that it was contemplating consolidating four cases relating to the applied-for .health gTLD string: No. EXP/416/ICANN/33; No. EXP/417/ICANN/34; No. EXP/418/ICANN/35; and No. EXP/409/ICANN/26. Each of the Parties in Case No. EXP/417/ICANN/34 was invited to provide the Centre with comments regarding the potential consolidation on or before 15 April 2013.<sup>13</sup>

10. On 19 April 2013, the Centre wrote to the IO and to Goose Fest to inform the Parties that it had decided not to proceed with the consolidation while noting that the Parties themselves may propose consolidation of the objections across the four cases involving the .health gTLD.<sup>14</sup> The Centre further requested that Goose Fest pay its initial filing fee of €5,000 to proceed in the matter and avoid a default judgment against it.<sup>15</sup>

11. On 30 April 2013, the Centre wrote to the Parties to inform them that, on 25 April 2013, the representative of an applicant in another .health gTLD case (EXP/418/ICANN/35), Dot Health Ltd., requested consolidation of the .health gTLD cases in accordance with Article 12 of

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<sup>11</sup> *See id.*

<sup>12</sup> *See id.*

<sup>13</sup> *See* the Centre’s letter to Prof. Alain Pellet, Independent Objector & Daniel Schindler, Goose Fest, LLC (12 April 2013).

<sup>14</sup> *See* the Centre’s letter to Prof. Alain Pellet, Independent Objector & Daniel Schindler, Goose Fest, LLC (19 April 2013).

<sup>15</sup> *See id.*



the Procedure. Each of the Parties in Case No. EXP/417/ICANN/34 was invited to provide the Centre with comments regarding the potential consolidation on or before 3 May 2013.<sup>16</sup>

12. Goose Fest filed a letter expressing its opinion on consolidation with the Centre on 2 May 2013.<sup>17</sup>

13. On 3 May 2013, the Centre informed the Parties that the following cases were consolidated pursuant to Article 12 of the Procedure: EXP/416/ICANN/33; EXP/417/ICANN/34; and EXP/418/ICANN/35. As a consequence of the consolidation, the Centre explained that the above-referenced cases were joined in one administrative procedure, but that the “Applicants shall file a separate Response to each specific Objection.”<sup>18</sup> Beyond this, the Centre explained that “if one of the parties in the consolidated proceeding defaults, this will affect the defaulting party only and will have no incidence on the other parties to the consolidated proceeding,” while reminding the Parties that a single panel would be appointed for the consolidated proceeding to “examine each Objection on its own merits and . . . decide whether, based on the specificities of each case, to issue one or separate Expert Determinations in [the] consolidated cases.”<sup>19</sup>

14. On 2 June 2013, Goose Fest delivered its response to the Objection to the IO, to the other .health gTLD applicants, and to the Centre (the “Response”).

15. On 3 July 2013, the Centre acknowledged receipt of the Applicant’s Response and informed the Parties that, pursuant to Article 13 of the Procedure and Article 9(5)(d) of the

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<sup>16</sup> See the Centre’s letter to Prof. Alain Pellet, Independent Objector & Daniel Schindler, Goose Fest, LLC (30 April 2013).

<sup>17</sup> See the Centre’s letter to Prof. Alain Pellet, Independent Objector, et al. (3 May 2013).

<sup>18</sup> *Id.*

<sup>19</sup> *Id.*

ICC Expertise Rules (“Rules”), the Centre had, on 28 June 2013, appointed the Panel as experts in this matter in accordance with Article 3(3) of Appendix I of the Rules. The Centre requested that any comments by the Parties be received on or before 8 July 2013. The comments were invited due to the Qualified Declaration of Acceptance and Availability, Statement of Impartiality and Independence of Dr. Scherer. The Centre received no comments.

16. The contact information for the three members of the Panel are as follows:

Dr. Stanimir A. Alexandrov  
Sidley Austin LLP  
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USA  
salexandrov@sidley.com

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Prof. Frédéric Bachand  
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3644 Peel  
Montreal (Qc) H3A 1W9  
Canada  
frederic.bachand@mcgill.ca

17. On 18 July 2013, the Centre wrote the Parties and the Panel to convey that ICANN had informed the Centre that the application in case EXP/418/ICANN/35 (Dot Health Ltd. (Gibraltar)) had been withdrawn and the case was terminated.

18. On 2 August 2013, the Centre acknowledged receipt of the advance payment of costs from each party and confirmed the full constitution of the Panel. On the same date, the Centre transmitted the case files for the consolidated cases to the Panel.

19. In a letter dated 2 August 2013, the IO requested the Panel’s authorization to file additional written statements in both consolidated cases.<sup>20</sup>

20. On 5 August 2013, the Panel invited Goose Fest to comment on the IO’s request to file an additional written statement.<sup>21</sup>

21. In its response dated 6 August 2013, Goose Fest objected to the IO’s request and suggested that any further submission by the IO should be limited to “address only the issue of his independence, which Goose Fest questioned in its Response to the Objection.”<sup>22</sup>

22. On 7 August 2013, the Panel wrote to the Parties in both consolidated cases to inform them that they would be allowed to submit additional written statements of no more than ten (10) pages. The Panel set 14 August 2013 as the deadline for the IO to file an additional written statement; Goose Fest was allowed to file a responsive additional written statement within one week of receipt of the IO’s additional written statement.

23. On 14 August 2013, the IO filed its additional written statement, including annexes in support (“IO’s Additional Written Statement”).

24. On 22 August 2013, Goose Fest filed its additional written statement, including annexes in support (“Goose Fest’s Additional Written Statement”).

25. On 23 August 2013, the Panel informed the Parties that the IO’s Objection would not be dismissed under the “Quick Look” review provided for in Section 3.2.2.3 of the AGB.

26. On 12 September 2013, the Panel requested that the Centre grant the Panel an extension until 10 October 2013 for rendering the Expert Determination. The Centre granted this

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<sup>20</sup> See Letter from Prof. Alain Pellet, Independent Objector, to Stanimir Alexandrov, et al. (2 August 2013).

<sup>21</sup> See Letter from Stanimir A. Alexandrov to Andrew Ryan Weissberg, DotHealth LLC, et al. (5 August 2013).

<sup>22</sup> See Email from John M. Genga to Stanimir A. Alexandrov, et al. (6 August 2013). The Panel will address Goose Fest’s insinuations regarding the IO’s independence *infra* at ¶¶ 88-90.

request on 13 September 2013. A draft of this Expert Determination was submitted for scrutiny to the Centre within the extended time limit in accordance with Article 21(a) and (b) of the Procedure.

27. Following the submission of the draft Expert Determination, on 4 December 2013 Goose Fest submitted to the Panel a request to review recent developments in ICANN's gTLD process for consideration in its decision. The IO objected to this request. The Panel declined to admit Goose Fest's proposed evidence into the record.

28. All communications by the Parties, the Panel, and the Centre were submitted electronically, in accordance with Article 6(a) of the Procedure.

29. Neither party requested that a hearing be held. In the absence of "extraordinary circumstances" within the meaning of Article 19(b) of the Procedure, the Panel decided not to hold a hearing in this matter.

### **III. Applicable Procedural and Substantive Rules**

30. It is common ground between the Parties that, pursuant to Articles 4(a) and 4(b)(iii) of the Procedure and Module 3 of the AGB, Section 3.3, the present proceedings are governed by the AGB, the Procedure, the Rules and the ICC Practice Note on the Administration of Cases (the "ICC Practice Note").

31. As is clearly set out in Article 20(c) of the Procedure, "the Objector bears the burden of proving that its Objection should be sustained in accordance with the applicable standards."<sup>23</sup>

32. The language of all submissions and proceedings in this matter is English.<sup>24</sup> No other language was used in any submissions, supporting evidence, or proceedings.

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<sup>23</sup> See also AGB, Section 3.5.

**A. Quick Look Procedure**

33. Under AGB Section 3.2.2.3, “[a]nyone may file a Limited Public Interest Objection.”<sup>25</sup> Due to the open standing provided under the AGB, LPI Objections are subject to a “Quick Look” procedure “designed to identify and eliminate frivolous and/or abusive objections.”<sup>26</sup> Thus, “[a]n objection found to be manifestly unfounded and/or an abuse of the right to object may be dismissed at any time.”<sup>27</sup>

34. While the Quick Look procedure requires an assessment of “the merits of the objection[s],” the Panel’s role at the Quick Look review stage is limited to considering whether the objections are “manifestly unfounded” or constitute “an abuse of the right to object.”<sup>28</sup> Goose Fest first contends that the Objection is “manifestly unfounded.”<sup>29</sup>

35. An objection is “manifestly unfounded” if it does “not fall within one of the categories” defined as grounds for an LPI Objection in AGB Section 3.5.3. Under AGB Section 3.5.3, the grounds for a limited public interest objection are limited to objections that an applied-for gTLD string may be contrary to generally accepted legal norms relating to morality and public order on the basis of: (i) incitement to or promotion of violent lawless action; (ii) incitement to or promotion of discrimination based upon race, color, gender, ethnicity, religion or national origin, or other similar types of discrimination that violate generally accepted legal norms recognized under principles of international law; (iii) incitement to or promotion of child

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<sup>24</sup> Art. 5(a) of the Procedure.

<sup>25</sup> AGB, Section 3.2.2.3.

<sup>26</sup> *Id.*.

<sup>27</sup> *Id.*

<sup>28</sup> *Id.*

<sup>29</sup> Goose Fest Resp. at 7-8.

pornography or other sexual abuse of children; or (iv) a determination that an applied-for gTLD string would be contrary to specific principles of international law as reflected in relevant international instruments of law.

36. Goose Fest further contends that, by “filing multiple objections against [it] and related parties,” the IO’s Objection amounted to an “abuse of process.”<sup>30</sup> Pursuant to Section 3.2.2.3 of the AGB, “multiple objections filed by the same or related parties against a single applicant may constitute harassment of the applicant, rather than a legitimate defense of legal norms that are recognized under general principles of international law,” and “[a]n objection that attacks the applicant, rather than the applied-for string” may amount to an “abuse of the right to object.”<sup>31</sup>

37. In response to the Applicant’s request that the Panel dismiss the Objection under the Quick Look procedure,<sup>32</sup> the Panel ruled on the matter in its letter to the Parties dated 23 August 2013.<sup>33</sup> The Panel did not find that the IO’s Objection was manifestly unfounded because the IO expressly invoked “specific principles of international law as reflected in relevant international instruments of law,” which is a ground for an objection contemplated under the AGB, Section 3.5.3.<sup>34</sup>

38. The Panel further reviewed the Objection to consider whether it constituted an “abuse of the right to object.”<sup>35</sup> The Panel concluded that the it did not. On 23 August 2013, the

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<sup>30</sup> *Id.* at 8.

<sup>31</sup> AGB, Section 3.2.2.3

<sup>32</sup> Goose Fest Response at 7-8.

<sup>33</sup> *See* Letter from Stanimir A. Alexandrov to Prof. Alain Pellet, Independent Objector, et al. (23 August 2013).

<sup>34</sup> *See id.*

<sup>35</sup> AGB, Section 3.2.2.3.

Panel, informed the Parties of the Panel’s decision not to dismiss the Objection through the Quick Look procedure.<sup>36</sup>

**B. The Applicable Standards**

39. The standards by which the merits of the IO’s LPI Objection are to be assessed are set out in Section 3.5.3 of the AGB. To succeed, the IO must establish that “the applied-for gTLD string is contrary to general principles of international law for morality and public order.”<sup>37</sup> The AGB further states that “[t]he panel will conduct its analysis on the basis of the applied-for gTLD string itself,” and that “[t]he panel may, if needed, use as additional context the intended purpose of the TLD as stated in the application.”<sup>38</sup>

40. ICANN provides in the AGB examples of instruments containing such “general principles of international law for morality and public order” and upon which a panel may rely while assessing the merits of an LPI Objection.<sup>39</sup> The instruments listed in Section 3.5.3 of the AGB are: the Universal Declaration of Human Rights (UDHR); the International Covenant on Civil and Political Rights (ICCPR); the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW); the International Convention on the Elimination of All Forms of Racial Discrimination; the Declaration on the Elimination of Violence against Women; the International Covenant on Economic, Social, and Cultural Rights; the Convention against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment; the International Convention on the Protection of the Rights of all Migrant Workers and Members of

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<sup>36</sup> See Letter from Stanimir A. Alexandrov to Prof. Alain Pellet, Independent Objector, et al. (23 August 2013).

<sup>37</sup> AGB, Section 3.5.3.

<sup>38</sup> *Id.*

<sup>39</sup> *Id.*

their Families; the Slavery Convention; the Convention on the Prevention and Punishment of the Crime of Genocide; and the Convention on the Rights of the Child.<sup>40</sup>

41. The AGB further states at Section 3.5.3 the grounds upon which an applied-for gTLD string may be considered contrary to generally accepted legal norms relating to morality and public order that are recognized under principles of public international law. The first three grounds are: incitement to or promotion of violent lawless action; incitement to or promotion of discrimination based upon race, color, gender, ethnicity, religion or national origin, or other similar types of discrimination that violate generally accepted legal norms recognized under principles of international law; and incitement to or promotion of child pornography or other sexual abuse of children. The AGB adds that an LPI Objection may also be sustained upon a determination that the “applied-for gTLD string would be contrary to specific principles of international law as reflected in relevant international instruments of law.”<sup>41</sup>

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<sup>40</sup> Universal Declaration of Human Rights, G.A. Res. 217A, U.N. GAOR, 3d Sess., 1st plen. mtg., U.N. Doc. A/810 (Dec. 12, 1948); International Covenant on Civil and Political Rights, G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, *entered into force* Mar. 23, 1976; Convention on the Elimination of All Forms of Discrimination against Women, G.A. res. 34/180, 34 U.N. GAOR Supp. (No. 46) at 193, U.N. Doc. A/34/46, *entered into force* Sept. 3, 1981; International Convention on the Elimination of All Forms of Racial Discrimination, 660 U.N.T.S. 195, *entered into force* Jan. 4, 1969; Declaration on the Elimination of Violence Against Women, G.A. res. 48/104, 48 U.N. GAOR Supp. (No. 49) at 217, U.N. Doc. A/48/49 (1993); International Covenant on Economic, Social and Cultural Rights, G.A. res. 2200A (XXI), 21 UN G.A.O.R. Supp. (No. 16) at 49, U.N. Doc. A/6316 (1966); 993 UNTS 3; 6 ILM 368 (1967); Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. res. 39/46, annex, 39 U.N. GAOR Supp. (No. 51) at 197, U.N. Doc. A/39/51 (1984), *entered into force* June 26, 1987; International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, G.A. res. 45/158, annex, 45 U.N. GAOR Supp. (No. 49A) at 262, U.N. Doc. A/45/49 (1990), *entered into force* July 1, 2003; Slavery, Servitude, Forced Labour and Similar Institutions and Practices Convention of 1926 (Slavery Convention of 1926), 60 L.N.T.S. 253, *entered into force* March 9, 1927; Convention on the Prevention and Punishment of the Crime of Genocide, 78 U.N.T.S. 277, *entered into force* Jan. 12, 1951; Convention on the Rights of the Child, G.A. res. 44/25, annex, 44 U.N. GAOR Supp. (No. 49) at 167, U.N. Doc. A/44/49 (1989), *entered into force* Sept. 2, 1990.

<sup>41</sup> AGB, Section 3.5.3.



42. The IO objected to Goose Fest’s Application to operate a new .health gTLD registry on that latter ground, namely that the proposed gTLD string is “contrary to specific principles of international law as reflected in relevant international instruments of law.”<sup>42</sup>

#### **IV. Summary of the Parties’ Positions**

##### **A. The IO’s LPI Objection**

43. The IO’s LPI Objection to the Goose Fest Application is based on the IO’s “determination that an applied-for gTLD string would be contrary to specific principles of international law as reflected in relevant international instruments of law.”<sup>43</sup> The IO notes in his Objection that “the objections raised are based on the applied-for gTLD string itself in context with the appreciation of the stated intended purpose as it may be derived from the description of its position the Applicant has provided.”<sup>44</sup>

44. The IO filed LPI objections to four .health gTLD applications, including the Goose Fest Application, predicated on the IO’s view that “health is not just another commodity” and that, “under international law, ‘health’ is recognized as a fundamental human right with a corresponding obligation to respect, protect and fulfil this human right, which is primarily entrusted to States and to intergovernmental organizations such as the United Nations.”<sup>45</sup>

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<sup>42</sup> Objection at ¶ 6 (citing AGB, Section 3.5.3).

<sup>43</sup> *Id.*

<sup>44</sup> *Id.* at ¶ 7 (citing to AGB Section 3.5.3, stating “[t]he panel will conduct its analysis on the basis of the applied-for gTLD string itself. The panel may, if needed, use as additional context the intended purpose of the TLD as stated in the application.”).

<sup>45</sup> *Id.* at ¶ 9. At the same time, the IO does note that “this responsibility is no exclusively reserved for these public entities.” *Id.*

45. In support of his Objection to the Goose Fest Application, the IO devotes considerable effort to explicating the ways in which the concept of “health” has been recognized as a right under public international law.

46. In particular, the IO cites Article 25 of the Universal Declaration of Human Rights, which provides that “[e]veryone has the right to a standard of living adequate for the health and well being of himself and of his family . . .”<sup>46</sup> to highlight that health is a fundamental human right.<sup>47</sup>

47. The IO also cites the International Covenant on Economic, Social and Cultural Rights, which states “the right of everyone to the enjoyment of the highest attainable standard of physical and mental health,”<sup>48</sup> to buttress his conclusion that “numerous instruments of international law confirm[ ] the human rights-status of ‘health.’”<sup>49</sup>

48. The IO supplements the above with further citations to statements by the United Nations Committee on Economic, Social and Cultural Rights, the World Health Organization, and regional Human Rights Courts to support the IO’s position that access to health—and, by extension, health-related information—is a fundamental human right.<sup>50</sup>

49. Having noted the degree to which “health” is recognized in international law as a right, the IO then declares that any entity seeking to operate a .health gTLD registry must:

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<sup>46</sup> Universal Declaration of Human Rights, G.A. Res. 217A, U.N. GAOR, 3d Sess., 1st plen. mtg., U.N. Doc. A/810 (Dec. 12, 1948).

<sup>47</sup> Objection at ¶ 10.

<sup>48</sup> G.A. res. 2200A (XXI), 21 UN G.A.O.R. Supp. (No. 16) at 49, U.N. Doc. A/6316 (1966); 993 UNTS 3; 6 ILM 368 (1967).

<sup>49</sup> Objection. at ¶ 11.

<sup>50</sup> *Id.* at ¶¶ 9-20.

Demonstrate awareness of its duty to see to it that this TLD is organized, set up and managed in such a way that the right to health . . . is fully respected and, consequently, should demonstrate that this duty will be effectively and continuously implemented. In addition, the Applicant should demonstrate how, given the public interest at stake, the policies and decision-making of the Applicant will be properly connected to the public authorities, national as well as international, that are under a legal obligation to respect, protect and fulfil the right to health.<sup>51</sup>

50. The IO explains in the Objection the “crucial role that governments are to play” in this area and that “the promotion and protection of international health is inherent to the due respect for generally accepted legal norms of public order that are recognized under fundamental principles of international law.”<sup>52</sup> Consequently, the IO avers, Goose Fest—or any entity applying to operate a .health gTLD registry for that matter—must demonstrate how its operation of the registry will be “properly connected to the public authorities, national as well as international, that are under a legal obligation to respect, protect and fulfil the right to health.”<sup>53</sup> The IO notes that Goose Fest’s Application is devoid of any information on such matters, and that it is “entirely identical” to numerous applications filed by its parent entity Donuts Inc. (“Donuts”) for various new gTLDs.<sup>54</sup>

51. Another central element to the IO’s argument is that “access to health-related information is an essential element of the right to health,”<sup>55</sup> and “the right to health may be compromised in case any entity would launch a .health TLD without having given due consideration to the fundamental rights and related obligations that are at stake and without

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<sup>51</sup> *Id.* at ¶ 25.

<sup>52</sup> *Id.* at ¶ 15.

<sup>53</sup> *Id.* at ¶ 25.

<sup>54</sup> *Id.* at ¶¶ 27-30 (suggesting a “lack of awareness of the specifics of a .health gTLD”).

<sup>55</sup> *Id.* at ¶ 17.

having considered how to include mechanisms that at all times would rather strengthen than hinder these obligations and fundamental rights.”<sup>56</sup>

52. In stating this view, the IO refers to the position taken by the Committee on Economic, Social and Cultural Rights that “States [have a duty] to ensure that privatization of the health sector does not constitute a threat to the availability, accessibility, acceptability and quality of health facilities, goods and services.”<sup>57</sup>

53. The IO refers to concerns found in public comments and GAC early warnings by France and Mali to the .health gTLD applications regarding “the reliability and trustworthiness of a .Health TLD that is run by a private enterprise.”<sup>58</sup> As a result, “[the IO] is of the view that any Applicant applying for a .Health TLD should demonstrate awareness of its duty to see to it that this TLD is organized, set up and managed in such a way that the right to health with all of the implications discussed above . . . is fully respected and, consequently, should demonstrate that this duty will be effectively and continuously implemented.”<sup>59</sup> The IO adds that “the Applicant should demonstrate how, given the public interest at stake, the policies and decision-making of the Applicant will be properly connected to the public authorities . . . that are under a legal obligation to respect, protect and fulfil [sic] the right to health.”<sup>60</sup>

54. The IO further asserts that in its Application, Goose Fest failed to demonstrate any “awareness of the fact that ‘health’ . . . represents a fundamental right.”<sup>61</sup> The IO adds that,

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<sup>56</sup> *Id.* at ¶ 21.

<sup>57</sup> *Id.* at ¶ 20.

<sup>58</sup> *Id.* at ¶ 22.

<sup>59</sup> *Id.* at ¶ 25.

<sup>60</sup> *Id.*

<sup>61</sup> *Id.* at ¶ 29.

in his communication with Goose Fest, the Applicant “responded summarily . . . [and] highlighted some of the aspects already contained in its application and stated that it saw no reason whatsoever to deal with any issues raised by the IO[,] adding that it is opposed to any form of measures other than those proposed in its Application.”<sup>62</sup>

55. The IO further takes issue with Goose Fest’s claim to have “consulted with and evaluated the ideas of international law enforcement, consumer privacy advocacy organizations, intellectual property interests and other Internet industry groups to create a set of protections that far exceed those in existing TLDs,”<sup>63</sup> and points to the absence of any discussion on these topics in Goose Fest’s Application.<sup>64</sup>

56. Furthermore, the IO relies on a letter from the World Health Organization (“WHO”) to ICANN, dated 11 April 2011, expressing the views of some WHO representatives that ICANN should postpone decisions on .health applications to allow for consultation with the global health community. The IO indicates that, at a minimum, the Panel should consider postponing Goose Fest’s Application.<sup>65</sup>

57. With respect to remedies, the IO first requests that the Panel uphold his Objection against the .health gTLD string. Second, and alternatively, the IO asks that the Panel conditionally uphold his Objection until the Applicant adopts the necessary safeguards to ensure the proper use of the .health gTLD.

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<sup>62</sup> *Id.* at ¶ 32.

<sup>63</sup> *Id.* at ¶ 31.

<sup>64</sup> *Id.*

<sup>65</sup> *Id.* at ¶ 42.

## B. Goose Fest's Response

58. Goose Fest begins by explaining that “ICANN has articulated a presumption in favor of awarding new gTLDs to qualified applicants” and adds that the IO bears the burden of proving that the Objection should be sustained in accordance with the applicable standards.<sup>66</sup> Goose Fest argues that, by “alleging that health is an important issue and that a <.HEALTH> TLD could face abuse,” the IO fails to meet his burden because the IO instead must “prove that the string name itself would be contrary to generally accepted legal norms relating to morality and public order to the same degree as a string name that would incite violent lawless action, discrimination or child pornography.”<sup>67</sup>

59. Goose Fest makes an affirmative case for its operation of a .health gTLD registry by noting that:

Applicant would make the <.HEALTH> domain open to all for legitimate use of that common word's many connotations. The registry would not only operate neutrally, without favoring one constituency, but also with more than two dozen protections not required of existing gTLDs, making abuse much less likely than it is today. Far from inciting lawless action, the new TLD will provide access to policymakers, critics, commentators, and others with any level of interest or participation in the endless variety of health-related matters – including fitness, nutrition, veterinary and alternative medicine, and mental, emotional, relationship and financial health. All would have nondiscriminatory access to the gTLD, with unprecedented safeguards.<sup>68</sup>

Goose Fest further argues that the Objection “threatens the enhanced competition, choice, expression and security of new gTLDs.”<sup>69</sup>

60. Beyond this, Goose Fest points to Donuts' extensive preparation and commitment to the new gTLD process, as well as its “team consist[ing] of industry veterans with long

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<sup>66</sup> Goose Fest Response at 5.

<sup>67</sup> *Id.*

<sup>68</sup> *Id.* at 6.

<sup>69</sup> *Id.*

histories of contributing to ICANN’s policymaking process, successfully launching gTLDs, building industry-leading companies, and bringing innovation, value and choice to the domain name marketplace.”<sup>70</sup> Goose Fest notes that its affiliated companies have “passed the Initial Evaluation process for at least 95 [new gTLD] applications” and that “ICANN has thus found . . . that Donuts is ethically, technically and financial fit to operate safely the many registries for which it has applied.”<sup>71</sup>

61. As mentioned earlier, Goose Fest asks the Panel to reject the Objection under the Quick Look procedure on the ground that it is “manifestly unfounded” and constitutes “an abuse of the right to object.”<sup>72</sup> Goose Fest labels the Objection as “manifestly unfounded” because it does not “fall within one of the categories that have been defined as the grounds for such an objection” as a result of the Objection focusing on the Applicant, rather than arguing that the applied-for string runs “contrary to any specific principle of international law.”<sup>73</sup> Additionally, Goose Fest suggests that, “by filing multiple objections against the Applicant and related parties,” the IO has engaged in “harassment” of Goose Fest, which provides further justification for Quick Look dismissal.<sup>74</sup>

62. Goose Fest then returns to its substantive argument against the IO’s Objection. Goose Fest begins by reiterating that “the burden of proof . . . rests solely on the objector” and that the Objection does not fall within the categories provided for in the AGB at Section 3.5.3.<sup>75</sup>

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<sup>70</sup> *Id.* at 7.

<sup>71</sup> *Id.* at 12.

<sup>72</sup> *Id.* at 7.

<sup>73</sup> *Id.* at 8.

<sup>74</sup> *Id.*

<sup>75</sup> *Id.*

Goose Fest avers that, beyond this, the IO “fails to show specifically that, from a statement in the Application, the Applicant intends to operate the TLD in contravention of ‘morality and public order.’”<sup>76</sup>

63. Goose Fest frames this argument in the context of ICANN’s expressed support for freedom of expression.<sup>77</sup> Goose Fest argues that the fourth ground upon which an LPI objection may be granted under Section 3.5.3 of the AGB (i.e., that a string is “contrary to generally accepted legal norms relating to morality and public order” in that it is “contrary to specific principles of international law as reflected in relevant international instruments of law”) is thus not a “catch-all provision for whatever the Objector may broadly consider as vaguely reflected in international law codifications that [the Objector] unilaterally deems relevant.”<sup>78</sup>

64. Invoking the *ejusdem generis* canon of interpretation, Goose Fest argues that this fourth ground must be construed in the context of the preceding grounds, and that its scope must thus be limited to situations similar to those captured by those first three grounds.<sup>79</sup> Goose Fest asserts that its position is supported by statements made by ICANN while drafting the AGB that indicate that this fourth ground was stated “in general terms in order to give a panel the discretion to consider gTLD strings that do not fit within one of the three specific categories, *but only to the extent contrary to generally accepted legal norms relating to morality and public order to the same degree as the first three grounds.*”<sup>80</sup>

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<sup>76</sup> *Id.* at 8-9.

<sup>77</sup> *Id.* at 9, 10.

<sup>78</sup> *Id.* (internal quotations omitted).

<sup>79</sup> *Id.*

<sup>80</sup> *Id.* (citing ICANN, New gTLD Draft Applicant Guidebook – Version 2, Analysis of Public Comment, <http://archive.icann.org/en/topics/new-gtlds/agv2-analysis-public-comments-31may09-en.pdf>) (internal quotations omitted, emphasis added).



65. Goose Fest then explains its view that “no matter how one defines ‘morality’ or ‘public order,’ one cannot argue that the string itself—the simple word ‘health’—indicates or incites any form of unlawful or wrongful behavior,” and that its Application provides no further context suggestive of unlawful or wrongful behavior.<sup>81</sup> Instead, Goose Fest argues, the IO has merely focused on how Goose Fest intends to operate the applied-for string and “offer[ed] no evidence that tends in any way to prove that the string itself, or Applicant’s stated intent in operating it, will violate . . . inarguable legal norms.”<sup>82</sup> Goose Fest claims that the IO is essentially asking the Panel to infer from a series of irrelevant factors that Goose Fest not only lacks any awareness of the issues related to the operation of a .health gTLD registry, but also that its Application is tainted by malicious intent and conduct.<sup>83</sup>

66. Goose Fest urges the Panel to find that the IO does not meet the “Objector’s burden of showing why Applicant should not be awarded the domain for which it has applied.”<sup>84</sup> Instead, Goose Fest posits, the Objector “idealizes . . . how the Limited Public Interest objection should operate” but this idealization “bears no resemblance whatsoever to what ICANN has stated it must do.”<sup>85</sup> Goose Fest then accuses the IO of “trying to replace the actual rules that were approved [by ICANN] and relied upon with his own ideas and preferences” that have no relation to the New gTLD process.<sup>86</sup> As a result, Goose Fest requests that the Panel “avoid

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<sup>81</sup> *Id.* at 10.

<sup>82</sup> *Id.*

<sup>83</sup> *Id.* at 10-11.

<sup>84</sup> *Id.* at 12.

<sup>85</sup> *Id.*

<sup>86</sup> *Id.*

choking growth and legitimate activity” by sustaining the Objection,<sup>87</sup> and instead deny the Objection so that Goose Fest may foster greater choice and competition on the Internet.<sup>88</sup>

67. In its Response, Goose Fest also makes allegations relating to the impartiality or biases of the IO. These are discussed *infra* at Paragraphs 87-89.

### **C. Additional Written Statements by the Parties**

68. *The IO’s Additional Written Statement.* Under the limited additional statement procedure elaborated by the Panel in its 7 August 2013 letter, the IO used his Additional Written Statement, filed 14 August 2013, to further several points relating to his Objection.

69. First, the IO addresses Goose Fest’s allegations relating to his impartiality;<sup>89</sup> these allegations are discussed *infra* at Paragraphs 87-89.

70. Second, the IO asserts that his LPI Objection in the present dispute is neither “manifestly unfounded” nor “abusive,” as alleged in Goose Fest’s Response, and thus should not be dismissed under a Quick Look review by the Panel.<sup>90</sup>

71. Third, the IO explains that his LPI Objection does not exceed the mandate ICANN gave him for the filing of LPI and Community Objections. The IO notes that “the subject-matter of this LPI Objection is not the term “health” but rather the intended use of the applied for string and, in particular, the confiscation of “health” for purely commercial purposes which is contrary to the general principles of international law.”<sup>91</sup> In this argumentation, the IO

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<sup>87</sup> *Id.*

<sup>88</sup> *Id.* at 12-13 (noting that any .health gTLD would already compete with numerous health-related second-level domains (“SLDs”) already in the market).

<sup>89</sup> IO’s Additional Written Statement at ¶¶ 3-10.

<sup>90</sup> *Id.* at ¶¶ 11-12.

<sup>91</sup> *Id.* at ¶ 14.

encourages the Panel, in making its decision, to “use as additional context the intended purpose of the TLD as stated in the application.”<sup>92</sup> He reiterates that his position is “of course, not that the *term* ‘health’ would be offensive and, therefore, objectionable *per se* but that the Application does not guarantee its use in full respect for these general principles.”<sup>93</sup>

72. The IO’s Additional Written Statement thus suggests that “the term ‘health’” is not *ipso facto* contrary to generally accepted principles of international law, but that the “intended use of the applied for string . . . in particular, the confiscation of ‘health’ for purely commercial purposes” was instead contrary to international law.<sup>94</sup>

73. The IO argues that Goose Fest misconstrues Section 3.5.3 of the AGB in its argument that the fourth ground upon which an LPI objection may be based must be construed in light of the first three grounds.<sup>95</sup> Instead, the IO invites the Panel to interpret the AGB liberally, since adopting the Applicant’s *ejusdem generis*-based approach would inappropriately limit the sources from which a Panel may draw while considering an LPI objection.<sup>96</sup>

74. The IO also argues that Goose Fest is incorrect to suggest that the Objection infringes upon Goose Fest’s, and the public’s, freedom of expression.<sup>97</sup> The IO points to Section 3.5.3 of the AGB, which states that freedom of expression “carries with it special duties and responsibilities,” which, according to the IO, should lead to the rejection of the Application.<sup>98</sup>

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<sup>92</sup> *Id.* at ¶ 15.

<sup>93</sup> *Id.*

<sup>94</sup> *Id.* at ¶ 14.

<sup>95</sup> *Id.* at ¶ 18.

<sup>96</sup> *Id.*

<sup>97</sup> *Id.* at ¶ 19.

<sup>98</sup> *Id.*

75. The IO concludes that the involvement of public authorities in the management of the .health gTLD registry (which the IO argues is required, as detailed above)<sup>99</sup> cannot occur, firstly because of Goose Fest’s “inflexible position” to the effect that “the applied-for string will be open to all consumers,”<sup>100</sup> and, secondly, because Goose Fest does not intend to ensure that safeguards will be in place when a .health gTLD registry starts operating.<sup>101</sup> Beyond this, the IO suggests that a recent resolution adopted by the Sixty-sixth World Health Assembly on “eHealth Standardization and Interoperability” confirms his concerns.<sup>102</sup>

76. ***Goose Fest’s Additional Written Statement.*** Goose Fest reiterates its view that the IO’s Objection must be rejected on the basis of its failure to provide evidence sufficient “to meet [the] Objector’s significant burden to prove that the applied-for string <HEALTH> itself - or its proposed use as stated by [the] Applicant in its New gTLD application . . . are ‘contrary to general principles of international law for morality and public order as required for [LPI objections].”<sup>103</sup>

77. Goose Fest also reiterates its view that “the string is nothing more than [a] generic term . . . which can be used in a variety of legitimate ways, none of which being ‘contrary to . . . morality and public order.’”<sup>104</sup> By way of example, Goose Fest makes reference to the potential use of the term “health” in the context of financial services, relationship counseling, nutritionist

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<sup>99</sup> See discussion *supra* at ¶¶ 49-56.

<sup>100</sup> *Id.* at ¶ 20.

<sup>101</sup> *Id.*

<sup>102</sup> *Id.* at ¶ 21.

<sup>103</sup> Goose Fest’s Additional Written Statement at 1.

<sup>104</sup> *Id.* at 2.

services, psychology services, online learning sites, health insurance offerings, computer and motor vehicle diagnostic tools, and veterinary services.<sup>105</sup>

78. While explaining why—in its view—the IO has offered insufficient evidence to support his Objection, Goose Fest maintains that its Application is innocuous and in no way indicative of any immorality or illegality.<sup>106</sup>

79. Goose Fest claims that the IO has taken an overly-broad view of the grounds upon which an LPI objection may be granted by seeking to bar the registration of a gTLD on the sole basis that the term comprising the applied-for string is mentioned in international legal instruments.<sup>107</sup> Goose Fest characterizes the Objection as relating to the “open” operation of the proposed registry, and as entailing that Goose Fest would need to develop some “connection” with relevant “authorities” to satisfy the IO’s concerns.<sup>108</sup> Goose Fest explains that this is not required under the AGB and does not constitute a valid basis upon which an LPI objection may be granted.

80. Goose Fest also explains that its Application does not suggest that it would “operate [a .health registry] contrary to general principles of international law for morality and public order,” and that as a result of its explicit recognition of .health as a sensitive string and its commitment to twelve protective measures beyond the fourteen required by ICANN, “a <.HEALTH> gTLD run by Applicant will be safer than most any gTLD the Internet has ever known, and a leader among all new gTLDs in that respect.”<sup>109</sup>

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<sup>105</sup> *Id.*

<sup>106</sup> *Id.* at 3.

<sup>107</sup> *Id.* at 4.

<sup>108</sup> *Id.*

<sup>109</sup> *Id.* at 2.

81. Goose Fest also contends that the IO misconceives the importance of the GAC Beijing Communiqué, which identified over one hundred strings that should be subject to additional safeguards.<sup>110</sup> Although Goose Fest supports much of the GAC’s advice, it maintains that it is ICANN—and not this Panel—who shall determine what policy response should be given to the GAC’s position, and that the Beijing Communiqué should have no bearing on the present proceedings.<sup>111</sup> Alternatively, Goose Fest explains, the GAC Beijing Communiqué should not be considered as probative as the IO hopes, as it did not suggest that .health was among the particularly sensitive strings falling within the purview of a “strong presumption” operating against applicants seeking to register such strings.<sup>112</sup> In any event, Goose Fest noted, ICANN will likely adopt any of the relevant safeguards proposed by the GAC through the regular course of the new gTLD process.<sup>113</sup>

82. Goose Fest also addresses a comment the IO made in his Additional Written Statement while taking issue with Goose Fest’s interpretation of the provisions of the AGB relating to the grounds upon which an LPI objection may be granted.<sup>114</sup> The comment appears to discount the relevance of public comments made in relation to the AGB, which—according to the IO—cannot replace the AGB. Goose Fest responds that the IO’s comment is misplaced, because although public comments are not substitutes for the text of the AGB, they provide

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<sup>110</sup> *Id.* at 4.

<sup>111</sup> *Id.* at 5.

<sup>112</sup> *Id.*

<sup>113</sup> *Id.*

<sup>114</sup> *Id.* at 6.

interpretive guidance that will “help clarify hard-to-define terms such as ‘morality’ and ‘public order.’”<sup>115</sup>

83. Finally, Goose Fest explains that the alternative remedy sought by the IO poses a problem, because granting it would be tantamount to providing the IO with veto power over the gTLD application.<sup>116</sup> In Goose Fest’s view, sustaining the IO’s Objection on a conditional basis, where the IO has explained only in vague generalities the conditions necessary for assuring adequate protection for the .health gTLD and has not recognized the affirmative protections Goose Fest proposed in its Application, is not an order that should be entertained by the Panel.<sup>117</sup>

## **V. Findings of the Panel**

84. ICANN has explicitly stated that the objector bears the burden of proof in any dispute under Module 3 of the AGB.<sup>118</sup> Thus, there is a presumption favoring Goose Fest’s Application, and it is the IO who must demonstrate that “the applied-for gTLD string would be contrary to general principles of international law for morality and public order.”<sup>119</sup> The Panel must thus assess the Objection by considering whether the IO has satisfied his burden of showing that Goose Fest’s Application to operate a .health gTLD registry would breach the standards set out in Section 3.5.3 of the AGB.

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<sup>115</sup> *Id.*

<sup>116</sup> *Id.*

<sup>117</sup> *Id.* at 6-7.

<sup>118</sup> See Procedure, Art. 20(c). See also ICANN, New gTLD Draft Applicant Guidebook Version 3 Public Comments Summary and Analysis, at 67, <http://archive.icann.org/en/topics/new-gtlds/summary-analysis-agv3-15feb10-en.pdf> (“There is a presumption generally in favor of granting new gTLDs to applicants who can satisfy the requirements for obtaining a gTLD—and, hence, a corresponding burden upon a party that objects to the gTLD to show why that gTLD should not be granted to the applicant.”).

<sup>119</sup> AGB, Section 3.5.3.

85. By way of introduction, the Panel acknowledges the existence of legitimate public interest concerns inherent in any application for any new gTLD related to the subject of health. The Panel also recognizes the importance of these concerns in the new gTLD application process.<sup>120</sup>

86. In particular, the Panel notes that the GAC has designated certain terms relating to health and fitness as “sensitive,” and thus deserving of additional safeguards beyond those ICANN intends to apply to all new gTLDs.<sup>121</sup> The Panel also notes that the World Health Assembly has underscored the importance of global coordination with regard to electronic health information and services, while emphasizing that “health-related global top-level domain names in all languages, including ‘.health,’ should be operated in a way that protects public health.”<sup>122</sup> Further, the Panel is mindful that the United Nations Committee on Economic, Social and Cultural Rights has expressed the view that the obligations to protect the right to health “include, inter alia, the duties of States . . . to ensure that privatization of the health sector does not constitute a threat to the availability, accessibility, acceptability and quality of health facilities, goods and services.”<sup>123</sup>

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<sup>120</sup> See, e.g., ICANN GAC, GAC Communiqué – Beijing, People’s Republic of China, 11 Apr. 2013, Annex I (attached as Annex 1 to the IO’s Additional Written Statement) (identifying health and fitness related strings as sensitive strings, which are “likely to invoke a level of implied trust from consumers” and are deserving of additional safeguards); 66th World Health Assembly Agenda item 17.5 Resolution on *eHealth Standardization and Interoperability* (27 May 2013) (attached as Annex 3 to the IO’s Additional Written Statement) (urging collaboration between national health authorities and other health officials, ICANN GAC members, and others to “coordinate . . . positions toward the delegation, governance and operation of health-related global top-level domain names in all languages, including ‘.health,’ in the interest of public health.”).

<sup>121</sup> ICANN GAC, GAC Communiqué – Beijing, People’s Republic of China, 11 Apr. 2013, Annex I (attached as Annex 1 to the IO’s Additional Written Statement).

<sup>122</sup> 66th World Health Assembly Agenda item 17.5 Resolution on *eHealth Standardization and Interoperability* (27 May 2013) (attached as Annex 3 to the IO’s Additional Written Statement).

<sup>123</sup> United Nations Committee on Economic, Social and Cultural Rights, General Comment No. 14, *The Right to the Highest Attainable Standard of Health* (Art. 12 of the Covenant on Economic, Social and Cultural Rights), ¶ 35. (cited in Objection, ¶ 20).



87. The Panel further notes that various stakeholders have discussed the need for safeguarding health-related gTLDs subsequent to Goose Fest’s submission of its Application. For instance, a number of public comments were submitted with regard to Goose Fest’s Application for the .health gTLD. In addition to these comments, the governments of France and Mali submitted Governmental Advisory Committee (“GAC”) Early Warnings with regard to Goose Fest’s Application for the .health gTLD.<sup>124</sup>

88. Before turning to the merits of the IO’s Objection, the Panel will address Goose Fest’s suggestion that the IO is somehow biased in favor of certain “health-related interests” so that these allegations do not remain unaddressed in the record.<sup>125</sup>

89. While claiming to “not suggest that [the IO] has engaged in any improper conduct,” Goose Fest nonetheless suggests that the Panel “consider his bias when weighing the Objection.”<sup>126</sup> In support of this request, Jonathon Nevett, Executive Vice President of Donuts, provided the Panel with documents which were said to suggest the existence of a professional connection between the IO’s legal assistant and a consultant to the WHO.<sup>127</sup> This consultant is alleged to have advocated on behalf of medical organizations in proceedings before the ICANN At-Large Advisory Committee (“ALAC”).<sup>128</sup> Goose Fest also points to IO’s *curriculum vitae* in asserting that he has done some work for the WHO in the past.<sup>129</sup>

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<sup>124</sup> As ICANN explains, an Early Warning is a notice from a member or members of the ICANN GAC that an application is seen as potentially sensitive or problematic by one or more governments; it is not a formal objection. See ICANN, GAC Early Warning and Advice, <http://newgtlds.icann.org/en/applicants/gac-early-warning> (last visited 9 Sept. 2013).

<sup>125</sup> Goose Fest Response at 6.

<sup>126</sup> *Id.*

<sup>127</sup> *Id.* See also *id.*, Annex B (Declaration of Jonathon Nevett, ¶ 18).

<sup>128</sup> *Id.*, Annex B (Declaration of Jonathon Nevett, ¶ 18).

<sup>129</sup> Goose Fest Response at 6.

90. The Panel has no hesitation in dismissing Goose Fest’s allegations as unfounded, if not plainly frivolous. As ICANN has explained, the IO “is a highly regarded professor and practitioner of law and has represented governments as Counsel and Advocate in the International Court of Justice in many significant and well-known cases [who] is widely published and holds several significant honors.”<sup>130</sup> The Panel shares ICANN’s view.

**A. The Merits of the IO’s LPI Objection**

**i. The .health string is not in itself contrary to general principles of international law for morality and public order**

91. To sustain the IO’s Objection, the Panel must determine that .health is an “applied-for gTLD string” that is “contrary to general principles of international law for morality and public order.”<sup>131</sup>

92. It is clear that under Section 3.5.3 of the AGB, an LPI Objection may be sustained if the *string itself*—in other words, the terms constituting the applied-for .gTLD—is “contrary to general principles of international law for morality and public order.” But it is just as clear to the Panel that the generic term “health” is not, in and of itself, contrary to such generally accepted legal norms. The IO has primarily conjectured that a .health gTLD registry, as operated by Goose Fest, would not be adequately safeguarded or protective enough of human rights to health, but that changes nothing to the fact that word “health” is by no means inherently objectionable.<sup>132</sup>

93. As explained in the AGB, LPI Objections are designed, to weed out gTLD applications where the gTLD string at issue is “contrary to general principles of international law

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<sup>130</sup> ICANN, *Independent Objector for the New gTLD Program Selected*, 14 May 2012, <http://www.icann.org/en/news/announcements/announcement-14may12-en.htm> (last visited 2 October 2013).

<sup>131</sup> See AGB, Section 3.5.3.

<sup>132</sup> See discussion *supra* ¶¶ 49-56, 71-72.

for morality and public order.” Thus, the relevant principles must at the very least be similar to the examples provided in the AGB, namely principles prohibiting: (i) the incitement to or promotion of violent lawless action; (ii) the incitement to or promotion of discrimination based upon race, color, gender, ethnicity, religion or national origin, or other similar types of discrimination that violate generally accepted legal norms recognized under principles of international law; (iii) the incitement or promotion of child pornography or other sexual abuse of children). For instance, publicly-available documents illustrate how ICANN clearly contemplates that the LPI Objection process would be proper to prevent the creation of a gTLD registry whose string contained “objectionable or racist” terms.<sup>133</sup> Thus, to be contrary to such general principles of international law for morality and public order, the string at issue must be as objectionable as words that would incite or promote senseless violence, discrimination, or child pornography, or any similar words or terms.

94. The proposition that the string itself must be severely objectionable to sustain an LPI Objection is supported by ICANN’s analysis of public comments to the AGB.<sup>134</sup> In its analysis, ICANN noted that the fourth ground for an LPI Objection should be construed in light of the first three grounds, because “panels considering morality and public order should have discretion to consider gTLD strings that do not fit within one of the three specific categories but are nonetheless contrary to generally accepted legal norms relating to morality and public order to the same degree as the first three grounds”. ICANN added that “[a]pplications for such strings

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<sup>133</sup> See ICANN, New Generic Top-Level Domains: Frequently Asked Questions, available at <http://newgtlds.icann.org/en/applicants/customer-service/faqs/faqs-en>. (“4.5 Will ICANN prevent the registration of objectionable or racist extensions? Consistent with the policy advice on new gTLDs, all applied-for strings could be subject to an objection-based process based on Limited Public Interest grounds. This process will be conducted by the qualified DRSP utilizing standards drawing on provisions in a number of international treaties.”).

<sup>134</sup> See ICANN, New gTLD Draft Applicant Guidebook – Version 2: Analysis of Public Comment 137-140 (2009), available at <http://archive.icann.org/en/topics/new-gtlds/agv2-analysis-public-comments-31may09-en.pdf> (cited in Goose Fest Response at 9).

may well be rare or non-existent.”<sup>135</sup> Therefore, ICANN intended that the fourth ground be limited to violations of legal norms relating to morality and public order that would be similar to those prohibiting anyone to incite or promote violent lawless action, discrimination, or child pornography or sexual abuse.<sup>136</sup>

95. The Panel has no hesitation in finding that the string “health” is not objectionable in and of itself. It is obvious to the Panel that the word “health” does not conflict with any generally accepted legal norms relating to morality and public order of the same nature as the first three grounds ICANN listed in AGB Section 3.5.3.

96. The Panel’s conclusion is consistent with the position adopted by the IO himself. Indeed, the IO suggested in both his initial Objection<sup>137</sup> and his Additional Written Statement<sup>138</sup> that the operation of a .health gTLD registry should be allowed, provided that such a registry was subject to proper oversight and administration. Specifically, the IO took the position that the operation of a .health gTLD registry would comply with principles of international law if it gave “due consideration to the fundamental rights and related obligations” attendant to the use of the .health string.<sup>139</sup> By highlighting that the operation of a .health gTLD—as opposed to the mere

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<sup>135</sup> *Id.* at 139.

<sup>136</sup> *See id.* This view is supported elsewhere in ICANN’s publicly-available materials relating to the new gTLD process. *See* ICANN, New gTLD Program Explanatory Memorandum: Morality and Public Order Objection Considerations in New gTLDs, Oct. 29, 2008, available at <http://archive.icann.org/en/topics/new-gtlds/morality-public-order-draft-29oct08-en.pdf> (“[S]ome have proposed that panelists be provided significant discretion to find that other categories might also reach to the level of violating generally accepted legal norms of morality and public order.”).

<sup>137</sup> *Id.* at ¶ 32 (suggesting a delay in the review of .health applications “in order to allow for consultations with the global health community *which may lead to a satisfactory structure of a .Health TLD.*”) (emphasis supplied). *See also id.* (requesting as alternative relief that the Panel postpone the creation of the .health registry until the Applicant provides “solutions” for the IO’s objections).

<sup>138</sup> IO’s Additional Written Statement at ¶¶ 6-7.

<sup>139</sup> *See* Objection at ¶ 31 (“[T]he present Application does not meet the standards that have to be applied for a . . . highly sensitive TLD.”).

existence of the gTLD—is at the heart of its LPI Objection, the IO conceded that the string itself—.health”— is not contrary to the principles of international law contemplated in Section 3.5.3 of the AGB.

**ii. The manner in which Goose Fest proposes to operate a .health gTLD registry does not conflict with general principles of international law for morality and public order.**

97. The IO concedes that, *in appropriate circumstances*, the operation of a .health gTLD registry would not be contrary to generally accepted legal norms of morality and public order that are recognized under principles of international law. But he contends that the manner in which Goose Fest intends to operate a .health registry falls short of requirements that allegedly derive from the right to health and, more specifically, the right to health-related information.<sup>140</sup> For example, the IO states that “the question is not, or at least not only – and usually not primarily – whether the word or the term would be objectionable, but whether the proposed string and its intended operation may be objectionable from the perspective of ‘general principles of international law for morality and public order.’”<sup>141</sup> Implicit in the IO’s argument is the proposition that these alleged flaws in Goose Fest’s Application constitute grounds upon which an LPI Objection may be sustained.

98. Goose Fest disputes this last point. In its Additional Written Statement, it contends that, rather than objecting on the basis of the .health string itself as permitted in the

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<sup>140</sup> See Objection at ¶ 25 (“[the IO] is of the view that any Applicant applying for a .Health TLD should demonstrate awareness of its duty to see to it that this TLD is organized, set up and managed in such a way that the right to health with all of the implications discussed above . . . is fully respected and, consequently, should demonstrate that this duty will be effectively and continuously implemented. In addition, the Applicant should demonstrate how, given the public interest at stake, the policies and decision-making of the Applicant will be properly connected to the public authorities . . . that are under a legal obligation to respect, protect and fulfil [sic] the right to health.”). See *also id.* at 13 (noting the need for “reliability and trustworthiness” in a .Health gTLD); *id.* at pg. 14 (supporting the WHO’s view of the need for “a satisfactory structure of a .Health TLD,” and requesting that the objection be sustained “as long as the Applicant has not provided solutions” to address its purported lack of recognition of rights in health).

<sup>141</sup> IO’s Additional Written Statement, ¶ 6.

AGB, the IO attempts to impose additional hurdles and safeguards in a way that is inconsistent with, and represents a circumvention of, the gTLD application process ICANN carefully designed.<sup>142</sup>

99. According to the AGB, the Panel’s task is to “conduct its analysis on the basis of the applied-for gTLD string itself,” but it also is stated that the Panel “*may, if needed*, use as additional context the intended purpose of the TLD as stated in the application.”<sup>143</sup> The AGB provides no details regarding the circumstances under which a panel should accept to take such “intended purpose” into consideration. Nor does it specify what importance ought to be given to the “intended purpose” while assessing the merits of an LPI objection, or whether this “intended purpose” may form the *sole* basis of LPI objection. That said, the Panel need not decide this issues since it is not necessary to dispose of the IO’s Objection.

100. Indeed, even taking additional context provided by the IO into consideration, his Objection still fails on the merits. Although the IO has argued that the right to health and the right to accurate health-related information are “specific principle[s] of international law as reflected in relevant international instruments of law,” he has failed to demonstrate convincingly that the operation of a .health gTLD registry by Goose Fest would be contrary to such alleged principles of international law unless certain safeguards were in place.

101. A full discussion of whether the rights to health and to health-related information are fundamental human rights and “specific principle[s] of international law” for the purpose of Section 3.5.3 of the AGB, as contended by the IO, is unnecessary. For the purpose of reviewing the IO’s LPI Objection, these assertions may be assumed to be correct. Even in that case,

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<sup>142</sup> See Goose Fest’s Additional Written Statement at 7.

<sup>143</sup> See AGB, Section 3.5.3(emphasis added).

however, the IO has not met his burden of demonstrating that the .health gTLD, as applied for by Goose Fest, is “contrary to specific principles of international law.”<sup>144</sup> The Panel finds that the term “health” is not, even when looking to the “additional context [of] the intended purpose of the TLD,” equivalent to the per se offensive terms suggested by the AGB as deserving of an LPI Objection.<sup>145</sup> The Panel finds that the term “health” is not, even when looking to the “additional context [of] the intended purpose of the TLD,” equivalent to the per se offensive terms suggested by the AGB as deserving of an LPI Objection.<sup>146</sup>

102. As mentioned above, the IO’s key contention is that the alleged right to health-related information requires that “any Applicant applying for a .Health TLD should demonstrate awareness of its duty to see to it that this TLD is organized, set up and managed in such a way that the right to health with all of the implications discussed above . . . is fully respected and, consequently, should demonstrate that this duty will be effectively and continuously implemented” and that “the Applicant should demonstrate how, given the public interest at stake, the policies and decision-making of the Applicant will be properly connected to the public authorities . . . that are under a legal obligation to respect, protect and fulfil the right to health.”<sup>147</sup> The Panel does not find the IO’s view convincing: even if an applicant failed to meet any or all of the IO’s suggested benchmarks for a .health registry operator, the Panel would still not be convinced that the gTLD string is contrary to specific principles of international law for the purpose of Section 3.5.3 of the AGB.

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<sup>144</sup> *See id.*

<sup>145</sup> *See* AGB, Section 3.5.3.

<sup>146</sup> *See id.*

<sup>147</sup> Objection at ¶ 25.

103. The IO predicates his Objection on language found in the International Covenant on Economic, Social and Cultural Rights and the Universal Declaration of Human Rights, with secondary citations to statements promulgated by the WHO and the UN Committee on Economic, Social and Cultural Rights and decisions by regional Human Rights Courts (e.g., the European Court of Human Rights). Even assuming that there is a generally accepted right to health, it is nonetheless unclear to the Panel how the sources invoked by the IO support the proposition that access to accurate health information is a “specific principle of international law as reflected in international instruments of law.” Furthermore—and crucially—none of these instruments provide any support for the IO’s argument that the operation of .health gTLD registry by a private entity would inhibit or impair the access to accurate health information unless it was done under the conditions envisaged by the IO. In other words, the IO fails to provide any convincing explanation as to why the Panel should infer from the broad statements regarding health found in these instruments that it would be contrary to specific principles of international law for a private entity like Goose Fest to operate a .health gTLD registry unless certain safeguards were in place.

104. The Panel considered additional sources beyond those cited to by the IO—as is explicitly recommended by ICANN<sup>148</sup>—in evaluating the LPI Objection. ICANN provides in the AGB a non-exhaustive list of international legal documents that may serve as the basis for an LPI Objection.<sup>149</sup> These provisions simply add to, but do not substantively alter, the IO’s position with regard to the principles of international law relating to health.

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<sup>148</sup> See AGB, Section 3.5.3.

<sup>149</sup> See discussion *supra*, ¶¶ 40-41.



105. The IO thus fails to connect the alleged right to health-related information to his key assertion that Goose Fest could only validly operate a .health gTLD string under the conditions envisaged by the IO. No explanation was provided as to why the Panel should so conceive the scope of the alleged right to health-related information, and no sources supporting the IO’s key assertion—even if only indirectly—were provided to the Panel. As the IO bears the burden of proof, his LPI Objection must be rejected.

106. To be clear, the Panel wishes to underscore that none of the preceding points can be taken to suggest that the string “health” is, in and of itself, objectionable as contrary to specific principles of international law for the purpose of Section 3.5.3 of the AGB. As mentioned earlier, the string “health” is itself wholly inoffensive and, even viewed within the context of Goose Fest’s Application, the Panel does not find that the applied-for string violates such principles of international law.

107. Finally, the Panel notes that ICANN recognizes the right to exercise the freedom of expression, and suggests that the exercise of this right should be limited only in instances where free expression would result in a string that “may be considered contrary to generally accepted legal norms . . . that are recognized under principles of international law.”<sup>150</sup>

#### **B. The Alternative Remedy Sought by the IO**

108. The IO requests, as an “alternative” remedy, that the Panel “hold that the present objection is valid as long as the Applicant has not provided solutions for the serious objections raised above.”<sup>151</sup> Essentially, the IO is asking the Panel to sustain the Objection until such point as Goose Fest makes the public policy commitments requested by the IO. Given the Panel’s

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<sup>150</sup> AGB, Section 3.5.3.

<sup>151</sup> Objection, at page 15.

finding above that the manner in which Goose Fest proposes to operate a .health gTLD registry does not conflict with general principles of international law for morality and public order, the IO's alternative request becomes moot. The Panel nevertheless will briefly explain why the alternative relief sought by the IO would be outside its powers.

109. First, the Panel is limited under Article 21 of the Procedure to ruling on the merits of the objection. The AGB, Attachment to Module 3, Article 21(d) states that “[t]he remedies available to an Applicant or an Objector pursuant to any proceedings before a Panel shall be limited to the success or dismissal of an Objection and to [fees determinations].” Nothing in the AGB, Procedure, or Rules suggests that the Panel could or should set conditions necessary for satisfying public policy concerns in gTLD applications while carrying out its task of evaluating the merits of the LPI Objection. To entertain such a proposal would circumvent the procedural reviews and safeguards ICANN established in the AGB to ensure that new gTLD registry operators would have the technical, institutional, and organizational means to operate by the end of 2013. A determination of the Panel that dictated restrictions on the use of an applied-for gTLD would exceed the Panel's authority under the Procedure and would go beyond the role of the Panel contemplated by ICANN.

110. Second, the Panel's mission is not to implement safeguards on the operation of a gTLD registry; such safeguards are implemented by ICANN. In light of the safeguards contemplated by ICANN with respect to the new gTLD process—including input from the GAC and other authorities in the development of the final new gTLD Registry Agreements (“Registry Agreements”)<sup>152</sup>—the IO's public policy argument concerning the operation of a .health gTLD registry is rendered much less effective. As detailed above, the Panel is mindful of the legitimate

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<sup>152</sup> See, e.g., ICANN, NGPC [New gTLD Program Committee] Progress on Addressing GAC Beijing Advice on New gTLDs, 27 June 2013, <https://www.icann.org/en/news/announcements/announcement-27jun13-en.htm>.

public interest concerns inherent in the Application for any new gTLD that is health-related, and their importance in the new gTLD application process.<sup>153</sup> However, the Panel recognizes that ICANN can and will impose several layers of responsibilities, including intellectual property safeguards and public policy considerations, on the selected registry operator.<sup>154</sup> Thus, there is no sufficient public policy argument that would satisfy the IO's demands, while also upholding free speech and ensuring that the ICANN gTLD application process continues in a manner that respects the process ICANN established for developing new gTLDs, in which there is a predisposition towards new domain names.

### **C. Costs**

111. Article 21(d) of the Procedure states that “[t]he remedies available to an Applicant or an Objector pursuant to any proceeding before a Panel shall be limited to the success or dismissal of an Objection and to the refund by the DRSP to the prevailing party, as determined by the Panel in its Expert Determination, of its advance payment(s) of Costs pursuant to Article 14(e) of this Procedure and any relevant provisions of the applicable DRSP Rules.”<sup>155</sup>

112. Article 14(e) of the Procedure states: “[u]pon the termination of the proceedings, after the Panel has rendered its Expert Determination, the DRSP shall refund to the prevailing party, as determined by the Panel, its advance payment(s) of Costs.”<sup>156</sup>

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<sup>153</sup> See discussion *supra* at ¶¶ 85-87.

<sup>154</sup> Note also that public sources illustrate how ICANN has enforced its Registry Agreements and attempted to exercise effective control over registries that fail to honor the Registry Agreements signed with ICANN. ICANN has asserted its ability to dictate the terms of registry maintenance, including the process by which names are assigned. See Letter from John O. Jeffrey to Brian Johnson and Ray Fassett, Employ Media, LLC, 27 Feb. 2011, available at <http://icann.org/en/correspondence/burnette-to-johnson-fassett-27feb11-en.pdf> (regarding administration of the .Jobs gTLD).

<sup>155</sup> Procedure, Art. 21(d).

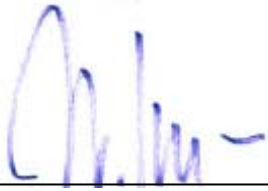
<sup>156</sup> *Id.*, Art. 14(e).

113. Further to the Centre's 2 August 2013 correspondence with the Panel and the Parties, Goose Fest made a payment of the estimated costs of these proceedings. In accordance with Articles 14(e) and 21(d) of the Procedure, the advance payment by Goose Fest is to be refunded.

**VI. Determination of the Panel**

114. On the basis of the foregoing and in accordance with Article 21(d) of the Procedure, the Panel makes the following determination:

- i.** The IO's LPI Objection against Goose Fest, LLC's Application is dismissed.
- ii.** The Applicant Goose Fest, LLC prevails.
- iii.** The Applicant shall be refunded its advance payment of costs made under Article 21(g) of the Procedure by the Centre.



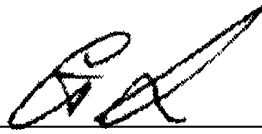
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Dr. Maxi C. Scherer  
Co-Expert



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Prof. Frédéric Bachand  
Co-Expert



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Dr. Stanimir A. Alexandrov  
Chair of the Expert Panel

Date: 12/16/2013