

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

CASE No. EXP/416/ICANN/33

PROF. ALAIN PELLET, INDEPENDENT OBJECTOR

(FRANCE)

vs/

DOTHEALTH, LLC

(USA)

(Consolidated with case No. EXP/417/ICANN/34

PROF. ALAIN PELLET, INDEPENDENT OBJECTOR (FRANCE) vs/ GOOSE FEST,  
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/416/ICANN/33**

**PROF. ALAIN PELLET, INDEPENDENT OBJECTOR**

(Objector)

vs.

**DOTHEALTH, 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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***Applicant DotHealth, LLC:***

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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	DotHealth, LLC
Centre	International Centre for Expertise of the International Chamber of Commerce
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 DotHealth, LLC (“DotHealth” 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. DotHealth, LLC is a company incorporated and organized under the laws of Delaware, USA, with its principal place of business at 354 Walthery Avenue, Ridgewood, New Jersey 07450, USA. Mr. Andrew Ryan Weissberg (weissberga@gmail.com), Chief Executive Officer of DotHealth, represented DotHealth before the Panel.

5. The present case, EXP/416/ICANN/33, is consolidated with another case involving an LPI Objection asserted by the IO against an application for the .health gTLD string, EXP/417/ICANN/34. The Applicant in that matter, Goose Fest, LLC (“Goose Fest”), is a company incorporated and organized under the laws of Delaware, USA, with its principal place

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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.

of business at 155 108th Avenue NE, Suite 510, Bellevue, Washington 98004, USA. The Panel is rendering a separate determination in the consolidated case EXP/417/ICANN/34.

## **II. Procedural History**

6. On 13 June 2012, DotHealth submitted its Application to operate a new .health gTLD registry. ICANN reviewed DotHealth'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 DotHealth'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 accordance 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 DotHealth to file a Response under Article 11(b) of the Procedure. The Centre reminded

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<sup>8</sup> See ICANN, New gTLD Program: Initial Evaluation Report: DotHealth, 7 June 2013, *available at* <http://newgtlds.icann.org/sites/default/files/ier/Oriusp5e5hoes40ji6vlayi6/ie-1-1684-6394-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 IO that 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 DotHealth 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/416/ICANN/33 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 DotHealth to acknowledge receipt of the e-mail Andrew Weissberg sent the Centre on behalf of DotHealth regarding the Centre’s consolidation proposal. The Centre further informed the Parties that it had decided not to proceed with the consolidation “on its initiative at this stage of the proceeding,” while noting that the Parties themselves may propose consolidation of the objections across the four cases involving the .health gTLD within seven (7) days of their receipt of the 19 April letter.<sup>14</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 & Andrew Ryan Weissberg, DotHealth, LLC (12 April 2013).

<sup>14</sup> *See* the Centre’s letter to Prof. Alain Pellet, Independent Objector & Andrew Ryan Weissberg, DotHealth, LLC (19 April 2013).

the Procedure. Each of the Parties in Case No. EXP/416/ICANN/33 was invited to provide the Centre with comments regarding the potential consolidation on or before 3 May 2013.<sup>15</sup>

12. DotHealth filed a letter expressing its opinion on consolidation with the Centre on 3 May 2013.<sup>16</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 (DotHealth); EXP/417/ICANN/34 (Goose Fest); and EXP/418/ICANN/35 (Dot Health Ltd. (Gibraltar)). 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>17</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>18</sup>

14. On 2 June 2013, DotHealth 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>15</sup> See the Centre’s letter to Prof. Alain Pellet, Independent Objector & Andrew Ryan Weissberg, DotHealth, LLC (30 April 2013).

<sup>16</sup> See DotHealth, LLC’s letter to the ICC International Centre for Expertise et al. (3 May 2013). (Agenda)

<sup>17</sup> *Id.*

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

ICC Expertise Rules (“Rules”), the Vice-Chairman of the Standing Committee 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:

Mr. Stanimir A. Alexandrov  
Sidley Austin LLP  
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Prof. Frédéric Bachand  
Faculty of Law, McGill University  
3644 Peel  
Montreal (Qc) H3A 1W9  
Canada  
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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>19</sup>

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

21. In its response dated 5 August 2013, DotHealth objected “in the strongest possible terms” to the IO’s request.

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; DotHealth 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 21 August 2013, DotHealth filed its additional written statement, including annexes in support (“DotHealth’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 AGB, Section 3.2.2.3.

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 request on 13 September 2013. A draft of this Expert Determination was submitted for scrutiny

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<sup>19</sup> See Letter from Prof. Alain Pellet, Independent Objector, to Stanimir Alexandrov, et al. (2 August 2013).

<sup>20</sup> See Letter from Stanimir A. Alexandrov to Andrew Ryan Weissberg, DotHealth LLC, et al. (5 August 2013).

to the Centre within the extended time limit in accordance with Article 21(a) and (b) of the Procedure.

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

28. 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**

29. 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”).

30. 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>21</sup>

31. The language of all submissions and proceedings in this matter is English.<sup>22</sup> No other language was used in any submissions, supporting evidence, or proceedings.

#### **A. Quick Look Procedure**

32. Under AGB Section 3.2.2.3, “[a]nyone may file a Limited Public Interest Objection.”<sup>23</sup> Due to the open standing provided under the AGB, LPI Objections are subject to a

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<sup>21</sup> See also AGB, Section 3.5.

<sup>22</sup> Art. 5(a) of the Procedure.

<sup>23</sup> AGB, Section 3.2.2.3.

“Quick Look” procedure “designed to identify and eliminate frivolous and/or abusive objections.”<sup>24</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>25</sup>

33. 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>26</sup> DotHealth contends that the Objection is “manifestly unfounded.”<sup>27</sup>

34. 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 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.

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<sup>24</sup> *Id.*

<sup>25</sup> *Id.*

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

<sup>27</sup> DotHealth Response, ¶ 45.

35. In response to the Applicant’s request that the Panel dismiss the Objection under the Quick Look procedure,<sup>28</sup> the Panel ruled on the matter in its letter to the Parties dated 23 August 2013. 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>29</sup>

36. The Panel further reviewed the Objection to consider whether they constituted an “abuse of the right to object.”<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.”

37. The Panel also did not find that the IO’s Objection constituted an abuse of the right to object as contemplated in the AGB.<sup>31</sup>

38. The Panel concluded, in its letter to the Parties dated 23 August 2013, that the IO’s Objection was neither manifestly unfounded nor abuses of the right to object. The Panel thus declined to dismiss the Objection through the Quick Look procedure.

## **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

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

<sup>29</sup> See Letter from Stanimir A. Alexandrov to Prof. Alain Pellet, Independent Objector, et al. (23 August 2013).

<sup>30</sup> AGB, Section 3.2.2.3.

<sup>31</sup> See Letter from Stanimir A. Alexandrov to Prof. Alain Pellet, Independent Objector, et al. (23 August 2013).

gTLD string is contrary to general principles of international law for morality and public order.”<sup>32</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>33</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>34</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 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>35</sup>

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<sup>32</sup> AGB, Section 3.5.3.

<sup>33</sup> *Id.*

<sup>34</sup> *Id.*

<sup>35</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

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>36</sup>

42. The IO objected to DotHealth’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>37</sup>

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

##### **A. The IO’s LPI Objection**

43. The IO’s LPI Objection to the DotHealth Application is based on the IO’s “determination that an applied-for gTLD string would be contrary to specific principles of

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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>36</sup> AGB, Section 3.5.3.

<sup>37</sup> Objection at ¶ 6 (citing AGB, Section 3.5.3)

international law as reflected in relevant international instruments of law.”<sup>38</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>39</sup>

44. The IO filed LPI objections to four .health gTLD applications, including the DotHealth 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 [sic] this human right, which is primarily entrusted to States and to intergovernmental organizations such as the United Nations.”<sup>40</sup>

45. In support of his Objection to the DotHealth 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>41</sup> to highlight that health is a fundamental human right.<sup>42</sup>

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

<sup>39</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>40</sup> *Id.* at ¶ 9. At the same time, the IO does note that “this responsibility is no exclusively reserved for these public entities.” *Id.*

<sup>41</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>42</sup> Objection. at ¶ 10.

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>43</sup> to buttress his conclusion that “numerous instruments of international law confirm[ ] the human rights-status of ‘health.’”<sup>44</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>45</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:

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 [sic] the right to health.<sup>46</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>47</sup> Consequently, the IO avers, DotHealth—or any entity

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<sup>43</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>44</sup> Objection. at ¶ 11.

<sup>45</sup> *Id.* at ¶¶ 9-20.

<sup>46</sup> *Id.* at ¶ 25.

<sup>47</sup> *Id.* at ¶ 15.

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>48</sup> In the IO’s view, DotHealth’s Application lacks appropriate safeguards to explain “to what extent and how the public interest at stake will be honoured in the way the TLD is managed . . . [or] how it expects to be able to effectively take into account the obligations of public authorities, national as well as international, to protect, promote and respect health as a human right.”<sup>49</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>50</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 having considered how to include mechanisms that at all times would rather strengthen than hinder these obligations and fundamental rights.”<sup>51</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>52</sup>

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<sup>48</sup> *Id.* at ¶ 25.

<sup>49</sup> *Id.* at ¶ 30.

<sup>50</sup> *Id.* at ¶ 17.

<sup>51</sup> *Id.* at ¶ 21.

<sup>52</sup> *Id.* at ¶ 20.

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>53</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>54</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>55</sup>

54. The IO further asserts that in its Application, DotHealth failed to demonstrate any “awareness of the fact that ‘health’ . . . represents a fundamental right.”<sup>56</sup> The IO adds that, in his communication with DotHealth, the Applicant “did not provide any additional information that could demonstrate how the Applicant has sought the effective involvement of private and public actors that have responsibilities for and within the health system let alone what level of global involvement the Applicant deems necessary in order to realize the reliability and trustworthiness needed for this TLD.”<sup>57</sup>

55. 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

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<sup>53</sup> *Id.* at ¶ 22.

<sup>54</sup> *Id.* at ¶ 25.

<sup>55</sup> *Id.*

<sup>56</sup> *Id.* at ¶ 28.

<sup>57</sup> *Id.* at ¶ 30.

that ICANN should postpone decisions on .health applications to allow for consultation with the global health community. The IO asserts that “the Applicant . . . does not explain why the reasons for such a postponement would not be valid” and indicates that, at a minimum, the Panel should consider postponing DotHealth’s Application.<sup>58</sup>

56. 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.

### **B. DotHealth’s Response**

57. DotHealth’s Response makes an affirmative case in support of a .health gTLD, noting that DotHealth’s Application, DotHealth’s response to the IO’s initial notice regarding the strings, and DotHealth’s website all provide

detailed information about the team that will execute on the DotHealth Mission, which evidences our collective, international expertise in the Internet, health, life sciences, information services, and government and public policy sectors. We have public and private sector experience with regulators, patient groups, drug and device companies, academic, corporate and government libraries, doctor and nursing organizations, health plans, standards bodies, and professional medical societies and possess the tools and experiences to execute on that vision.<sup>59</sup>

58. DotHealth refers in its Response to the statements in its Application relating to its intended use and safeguards for a DotHealth-managed .health registry.<sup>60</sup>

59. For instance, in its Application, DotHealth explained its view that:

“Health” is the general condition of the body or mind with reference to soundness and vigor. As a global society, health is a measure of soundness of body, mind or being.

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<sup>58</sup> *Id.* at ¶ 32.

<sup>59</sup> DotHealth Response at ¶ 6.

<sup>60</sup> *See id.* at ¶¶ 38-39.

Health can mean freedom from disease or ailment. Virtually everywhere in the world, and across many stakeholder segments, health is a major contributor to the economy and serves as a leading and influential indicator for measuring any one country or territory's economic and societal strengths and weaknesses against others. Throughout the world, people rate health one of their highest priorities and concerns. Whether these are mental, physical, economic or social, these concerns are commonly linked to education and literacy, food and nutrition, fitness and exercise, medicines and therapies, environment and nature, technology and innovation, insurance and employment, for professional research and others.<sup>61</sup>

60. DotHealth also explains at a high level the safeguards that DotHealth would establish to ensure that there is meaning given to the term "health" and to make the .health gTLD a trusted online resource:

At DotHealth, LLC, in recognition of these opportunities, challenges and risks, our mission is to establish .health as a safe, trustworthy and secure top-level domain for global health stakeholders. Our goals and objectives are to establish .health as the preferred online namespace for the trusted communication, dissemination, exchange and fulfillment of health-related information and resources. In support of the safety and protection of online health consumers and rights holders, DotHealth has identified a series of policies, safeguards and standard operating procedures for the .health gTLD that collectively comprise our proposed registry services and procedural framework. This framework will be operated in enterprise collaboration with Neustar, Inc., the world's leading provider of essential clearinghouse services to the global communications and Internet industry.

DotHealth will leverage Neustar's unparalleled technical infrastructure and experience in operating the global registries for numerous top level domains, as well as its malicious monitoring service levels as further described throughout this application submission. We have also executed an exclusive agreement with LegitScript to provide enterprise fraud and abuse monitoring and intelligence services for the .health gTLD. LegitScript's continued cooperation with leading U.S. and international industry organizations, including the National Association of Boards of Pharmacy, The International Pharmaceutical Federation, the US Food and Drug Administration, and the International Medical Product Anti-Counterfeiting Task Force will play an important role in the creation and ongoing enforcement of DotHealth policies and standards for registrant compliance.

...

DotHealth's proposed policies and registry services have been developed with consensus and affirmations of support from numerous global and regional health sciences industry organizations including the National Association of Boards of Pharmacy (NABP), The Inter-American College of Physicians and Services (ICPS), The Association of Black

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<sup>61</sup> Application of DotHealth, at 18(a).

Cardiologists and the World Federation of Chiropractic. Our continued cooperation these organizations and others will play an important and influential role in advocating and promoting widespread adoption and the meaningful uses of .health domain names.<sup>62</sup>

61. With regard to public and official use of the .health gTLD, DotHealth expresses its intention to reserve second-level domain names for geographic designations and for other public health authorities:

DotHealth is committed to initially reserving the country and territory names contained in the internationally recognized lists described in Article 5 of Specification 5 attached to the New gTLD Applicant Guidebook at the second level and at all other levels within the .health gTLD at which domain name registrations will be provided. Specifically, DotHealth will reserve:

-The short form (in English) of all country and territory names contained on the ISO 3166- 1 list, as updated from time to time, including the European Union, which is exceptionally reserved on the ISO 3166-1 list, and its scope extended in August 1999 to any application needing to represent the name European Union ... ;

-The United Nations Group of Experts on Geographical Names, Technical Reference Manual for the Standardization of Geographical Names, Part III Names of Countries of the World; and

-The list of United Nations member states in six official United Nations languages prepared by the Working Group on Country Names of the United Nations Conference on the Standardization of Geographical Names. . . .

During its Sunrise period, DotHealth will implement an outreach campaign targeting senior leadership representing health ministries and/or government agencies in each Country or Territory to inform them about .health and to facilitate the responsible release of names as previously described. Ministers of Health as identified and verified by the U.S. Food and Drug Administration (FDA) will be established as the primary point of contact for each Country or Territory.<sup>63</sup>

62. DotHealth also elaborated upon the measures it anticipates taking to “eliminate or minimize social costs” associated with the operation of a .health gTLD registry:

If warranted, DotHealth may take down any .health domains verified to be harboring and/or supporting online threats to the .health registry and the broader Internet

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<sup>62</sup> *Id.*

<sup>63</sup> *Id.* at 18(b).

community of users. This action shuts down all activities associated with the domain name, including all websites. Our philosophy in administering this procedure is that removing threats to the consumer outweighs any potential damage to the registrar/registrant relationship. DotHealth will commit to keeping its registrars updated of any malicious activity within the .health TLD through weekly or monthly reporting. We will also leverage our back-end provider's existing relationships with international law enforcement agencies as necessary and in support of these procedures.

...

In support of our enterprise commitment to improving the quality of online health information, we also plan to administer a Request for Information (RFI) Process for select reserved .health names to ensure their trusted and meaningful use among registrants and end-users, and to help promote awareness, usage and uptake of the .health gTLD. All policies and procedures as described herein with respect to reserved names have been developed in accordance with the ICANN New gTLD Registry Agreement and specifically Provision 2.6 as it is currently published and available.<sup>64</sup>

63. DotHealth also provides a number of substantive criticisms of the IO's Objection.

64. First, DotHealth takes the position that the term "health" "has no single authoritative spokesperson, no monolithic representative organization, and no sole arbiter of the oftentimes-competing inputs, goals, and resource allocation priorities of its diverse stakeholders," adding that "the myriad products and services affecting health are not the exclusive province of any government."<sup>65</sup> Beyond this, DotHealth notes that different governments apply different standards and regulations to the term health, indicating its view that the gTLD should be beyond the reach of national government concerns.<sup>66</sup>

65. Thus, DotHealth explains, the IO's Objection describes concerns that "clearly fall within the category of regulation that is subject to wide variation in national application and [is]

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<sup>64</sup> *Id.* at 18(c).

<sup>65</sup> DotHealth Response at ¶ 12.

<sup>66</sup> *Id.*

thus specifically excluded from the scope of the Panel’s discretion” in light of ICANN guidance.<sup>67</sup>

66. In its Response, DotHealth also explains that, in its view, the IO’s Objection is not within the scope ICANN intended for LPI Objections, and requested use of the Quick Look review.<sup>68</sup> In doing so, DotHealth suggests that the LPI Objection process was “developed to address ‘legitimate concerns’ about ‘offensive terms.’”<sup>69</sup> Such legitimate objections would thus not “infringe the applicant’s freedom of expression rights that are protected under internationally recognized principles of law.”<sup>70</sup> To DotHealth, the IO’s Objection is not plainly within the clear boundaries of the “offensive” terms that are deemed objectionable and, accordingly, the IO’s LPI Objection constitutes an infringement of free expression.<sup>71</sup>

67. Further, DotHealth suggests that the IO’s Objection exceeds his authority under the ICANN rules. DotHealth indicates that, as a result, the IO effectively attempts to apply a new standard under which certain gTLDs relating to health (or, presumptively, any alleged fundamental human right) are evaluated, outside of the ordinary ICANN evaluative process.<sup>72</sup> Under this standard, as DotHealth characterizes it:

An applicant for a health-related string must: (i) be aware 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 . . . including

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<sup>67</sup> *Id.* at ¶ 18 (citing New gTLD Program Explanatory Memorandum: Standards for Morality and Public Order Research (30 May 2009), available at <http://archive.icann.org/en/topics/new-gtlds/morality-public-order-30may09-en.pdf>).

<sup>68</sup> *Id.* at ¶ 45.

<sup>69</sup> *Id.* at ¶ 15 (citing GAC Principles Regarding New gTLDs (March 28, 2007), available at <http://archive.icann.org/en/topics/new-gtlds/gac-principles-regarding-new-gtlds-28mar07-en.pdf>).

<sup>70</sup> *Id.* at ¶ 14 (citing ICANN GNSO Board Report: Introduction of New Generic Top-Level Domains (11 Sept. 2007)).

<sup>71</sup> *Id.* at ¶¶ 16-18.

<sup>72</sup> *See id.* at ¶¶ 27, 29-31.

the necessity of reliability and trustworthiness, is fully respected; (ii) explain how this duty will be effectively and continuously implemented; and (iii) explain how the policies and decision-making of the applicant will be properly connected to national and international public authorities.<sup>73</sup>

68. In DotHealth’s view, the above test is “neither supported by fact, international law, or applicable ICANN Policy, and therefore must be rejected.”<sup>74</sup> Beyond this, in DotHealth’s view, the IO has attempted to “reverse the burden of proof” by asserting that applicants must prove it meets the above requirements before an Objection may be denied.<sup>75</sup> DotHealth further suggests that the IO has not “produc[ed] one piece of evidence” to support his assertions that DotHealth’s Application does not reflect the requisite degree of public authority involvement he purportedly mandates.<sup>76</sup>

69. Additionally, DotHealth suggests that the IO was inconsistent in his use of the LPI Objection directed at health-related gTLD applications. Specifically, DotHealth cites the IO’s inaction on other proposed gTLDs that similarly implicate international legal principles.<sup>77</sup> For instance, DotHealth notes that the IO submitted LPI Objections to less than twenty percent of strings identified by the GAC as related to “health and fitness.”<sup>78</sup> DotHealth also points to the IO’s inaction with respect to the applied-for “.sex” gTLD, which DotHealth considers to be inexplicable in light the similarity between the .health and .sex strings.<sup>79</sup>

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<sup>73</sup> *Id.* at ¶ 27.

<sup>74</sup> *Id.* at ¶ 29.

<sup>75</sup> *Id.* at ¶ 30.

<sup>76</sup> *Id.* at ¶ 31.

<sup>77</sup> *Id.* at ¶¶ 33-36.

<sup>78</sup> *Id.* at ¶ 4.

<sup>79</sup> *Id.* at ¶ 36.

70. DotHealth further claims that the IO ignored and mischaracterizes DotHealth’s stated commitments to protecting the public interest in its proposed management of a .health gTLD registry.<sup>80</sup> This relates to DotHealth’s affirmative case, referenced above; here, DotHealth explains that: it “ha[s] aggressively pursued engagement and collaboration of many key players in the global health system”<sup>81</sup>; that its “Application enjoys the support of [various health-related entities]”<sup>82</sup>; that it “has partnered with LegitScript, LLC to provide monitoring and surveillance of the .health TLD”<sup>83</sup>; that its “strategic advisory board includes some of the most respected thought leaders in the healthcare, regulatory, and healthcare communications community”<sup>84</sup>; and that Neustar, which supports DotHealth, “is a founding member of The Center for Safe Internet Pharmacies.”<sup>85</sup> Beyond this, DotHealth reiterates many of the affirmative points regarding its proposed administration of the .health gTLD reflected in its Application, discussed *supra*.<sup>86</sup>

71. Finally, as one of its many points, DotHealth reminded the Panel that “[t]he IO bears the burden of proving that the Objection should be sustained in accordance with the applicable standards.”<sup>87</sup>

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<sup>80</sup> *Id.* at ¶¶ 37-39.

<sup>81</sup> *Id.* at ¶ 38.

<sup>82</sup> *Id.* at ¶ 38.1.

<sup>83</sup> *Id.* at ¶ 38.2.

<sup>84</sup> *Id.* at ¶ 38.3.

<sup>85</sup> *Id.* at ¶ 38.4.

<sup>86</sup> See discussion *supra* ¶¶ 58-62.

<sup>87</sup> DotHealth Response at ¶ 23.

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

72. *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.

73. First, the IO asserts that his LPI Objection in the present dispute is not “manifestly unfounded,” as alleged in the DotHealth’s Response, and thus should not be dismissed under a Quick Look review by the Panel.<sup>88</sup>

74. Second, 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>89</sup> In this argumentation, the IO encourages the Panel, in making its decision, to “use as additional context the intended purpose of the TLD as stated in the application.”<sup>90</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>91</sup>

75. 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

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<sup>88</sup> IO’s Additional Written Statement at ¶¶ 2-3.

<sup>89</sup> *Id.* at ¶ 6.

<sup>90</sup> *Id.*

<sup>91</sup> *Id.*

“intended use of the applied for string . . . in particular, the confiscation of ‘health’ for purely commercial purposes” was instead contrary to international law.<sup>92</sup>

76. The IO notes, however, that the Panel has “broad discretion to consider and apply general principles [of international law] to specific cases,”<sup>93</sup> and that such principles clearly support the LPI Objection.<sup>94</sup> He explained further that, under relevant international law, “public authorities, national as well as international, across the world are under a legal obligation to respect, protect and fulfil the right to health,” and that involvement of such public authorities is necessary in the creation and operation of a .health gTLD in order to ensure that their legal obligations are not impeded or effectively abrogated by the registry operator.<sup>95</sup>

77. The IO concludes that the required involvement of public authorities in the management of the .health gTLD registry cannot occur because, according to the IO, DotHealth “does not want any outside interference with its running of the .health gTLD.”<sup>96</sup> Beyond this, the IO suggests that a recent resolution adopted by the Sixty-sixth World Health Assembly on “eHealth Standardization and Interoperability” confirms the IO’s concerns.<sup>97</sup>

78. ***DotHealth’s Additional Written Statement.*** DotHealth uses its response to the IO’s Additional Written Statement to reiterate its view that the IO’s assertion that the applied-for .health string was contrary to the general principles of international law for morality and public

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<sup>92</sup> *Id.*

<sup>93</sup> *Id.* at ¶ 7.

<sup>94</sup> *Id.* at ¶ 8.

<sup>95</sup> *Id.*

<sup>96</sup> *Id.* at ¶ 10.

<sup>97</sup> *Id.* at ¶ 11.

order was unfounded.<sup>98</sup> DotHealth again questions the necessity of additional written statements and suggests that the IO's Additional Written Statement added nothing substantive in support of his LPI Objection.<sup>99</sup>

79. In particular, DotHealth responds to several points the IO made in his Additional Written Statement. First, DotHealth states that the IO mischaracterizes the GAC communications regarding the .health string, including DotHealth's response to the GAC. Rather than rejecting "almost each and every recommendation made by the GAC," DotHealth explained that it engaged in a "pro-active adoption in its application of many safeguards addressing the GAC's concerns, and [that it demonstrated] its willingness to implement additional safeguards."<sup>100</sup> Beyond this, DotHealth notes that it has committed to many of the other safeguards advocated by the GAC, and has in fact exceeded GAC requests with respect to some safeguards.<sup>101</sup> In DotHealth's view, "none of these commitments can be considered contrary to the public interest."<sup>102</sup>

80. Further to this point, DotHealth reiterates its view that the GAC safeguards referenced by the IO clearly indicate that the term "health" is not a string that is inherently contrary to the general principles of international law.<sup>103</sup> For instance, the GAC, in response to

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<sup>98</sup> DotHealth's Additional Written Statement at ¶ 25.

<sup>99</sup> *Id.*, Procedure.

<sup>100</sup> *Id.* at ¶ 3.

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

<sup>102</sup> *Id.* at ¶ 4.

<sup>103</sup> *Id.* at ¶¶ 5-9.

extensive lobbying to designate .health as a non-delegable gTLD, instead merely called for the establishment of certain safeguards for .health and a variety of other “sensitive” strings.<sup>104</sup>

81. DotHealth argues that the IO’s Objection relates only to “operation of a .health TLD by the private sector.”<sup>105</sup> In DotHealth’s view, such a position adopts a content-based test that is contrary to the requirements found in the AGB. In DotHealth’s view of the ICANN new gTLD application process, legitimate public-interest concerns are to be addressed by ICANN as part of its Registry Agreement development, where an opportunity will arise to factor in GAC concerns regarding the use of the gTLD.<sup>106</sup>

82. DotHealth also addresses the IO’s statements regarding the communications of the WHO relating to the establishment of a .health gTLD.<sup>107</sup> It contends that the IO misinterprets the WHO’s view on the .health gTLD by incorrectly assuming that the WHO opposes commercial oversight of the gTLD.<sup>108</sup> DotHealth adds that the WHO Resolution<sup>109</sup> “does not . . . stand for the proposition that private commercial operation of a top-level domain name for health-related information cannot be consistent with the public interest.”<sup>110</sup>

83. DotHealth concludes its Additional Written Statement by reiterating that the IO has not met the burden of proof in these proceedings because he “has not made a persuasive case that the dissemination of trusted and reliable health-related information is an inherently

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<sup>104</sup> See *id.* at ¶ 8; see also *id.* Annex 7 at 33-42; *id.* Annex 8 at 5; *id.* Annex 9.

<sup>105</sup> *Id.* at ¶ 10.

<sup>106</sup> See *id.* at ¶¶ 15-19.

<sup>107</sup> *Id.* at ¶¶ 21-22.

<sup>108</sup> *Id.* at ¶ 22.

<sup>109</sup> 66th World Health Assembly Agenda item 17.5 Resolution on *eHealth Standardization and Interoperability* (27 May 2013).

<sup>110</sup> DotHealth’s Additional Written Statement at ¶ 21.

governmental function . . . [or] that private-sector operation of a top-level domain containing health-related information and resources violates general principles of international law for morality and public order.”<sup>111</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>112</sup> Thus, there is a presumption favoring DotHealth’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>113</sup> The Panel must thus assess the Objection by considering whether the IO has satisfied his burden of showing that DotHealth’s Application to operate a .health gTLD registry would breach the standards set out in Section 3.5.3 of the AGB.

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>114</sup>

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<sup>111</sup> *Id.* at ¶ 20.

<sup>112</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>113</sup> AGB, Section 3.5.3.

<sup>114</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 10 to DotHealth’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.”).

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>115</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>116</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>117</sup>

87. The Panel further notes that various stakeholders have discussed the need for safeguarding health-related gTLDs subsequent to DotHealth’s submission of its Application. For instance, a number of public comments were submitted with regard to DotHealth’s Application for the .health gTLD. Representatives of DotHealth, specifically Mr. Andrew Weissberg, participated in ICANN-sponsored forums to discuss the proposed .health gTLD.<sup>118</sup> In addition to these comments, the governments of France and Mali submitted Governmental Advisory

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<sup>115</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>116</sup> 66th World Health Assembly Agenda item 17.5 Resolution on *eHealth Standardization and Interoperability* (27 May 2013) (attached as Annex 10 to DotHealth’s Additional Written Statement).

<sup>117</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).

<sup>118</sup> See ICANN, Objection Statement Against Applicant “DotHealth, LLC” for the “.HEALTH” String, <https://community.icann.org/pages/viewpage.action?pageId=40930487> (last visited 9 Sept. 2013).

Committee (“GAC “) Early Warnings with regard to DotHealth’s Application for the .health gTLD.<sup>119</sup>

**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**

88. 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>120</sup>

89. 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 DotHealth, 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>121</sup>

90. 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 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

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<sup>119</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>120</sup> See AGB, Section 3.5.3.

<sup>121</sup> See discussion *supra* ¶¶ 50, 53-55, 76-77.

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>122</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.

91. The proposition that the string itself must be severely objectionable to sustain an LPI Objection is supported by ICANN’s publicly-available analysis of public comments to the AGB.<sup>123</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 may well be rare or non-existent.”<sup>124</sup> Therefore, ICANN

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<sup>122</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>123</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>.

<sup>124</sup> *Id* at 139.

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>125</sup>

92. 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.

93. The Panel’s conclusion is consistent with the position adopted by the IO himself. Indeed, the IO suggested in both his initial Objection<sup>126</sup> and his Additional Written Statement<sup>127</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>128</sup> By highlighting that the operation a .health gTLD—as opposed to the mere existence of the gTLD—is at the heart of its LPI Objection, the IO conceded that the string

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<sup>125</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>126</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>127</sup> IO’s Additional Written Statement at ¶¶ 6-7.

<sup>128</sup> *See* Objection at ¶ 31 (“[T]he present Application does not meet the standards that have to be applied for a . . . highly sensitive TLD.”).

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 DotHealth proposes to operate a .health gTLD registry does not conflict with general principles of international law for morality and public order.**

94. 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 DotHealth 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>129</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>130</sup> Implicit in the IO’s argument is the proposition that these alleged flaws in DotHealth’s Application constitute grounds upon which an LPI Objection may be sustained.

95. DotHealth disputes this last point. In its Response, it contends that, rather than objecting on the basis of the .health string itself as permitted in the AGB, the IO attempts to

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<sup>129</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>130</sup> IO’s Additional Written Statement at ¶ 6.

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>131</sup>

96. 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>132</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.

97. 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 DotHealth would be contrary to such alleged principles of international law unless certain safeguards were in place.

98. 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, however, the IO has not met his burden of demonstrating that the .health gTLD, as applied for by

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<sup>131</sup> See DotHealth Response at ¶¶ 27, 29-31.

<sup>132</sup> See AGB, Section 3.5.3 (emphasis added).

DotHealth, is “contrary to specific principles of international law.”<sup>133</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>134</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>135</sup>

99. 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>136</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.

100. 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

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<sup>133</sup> *See id.*

<sup>134</sup> *See* AGB, Section 3.5.3.

<sup>135</sup> *See* AGB, Section 3.5.3.

<sup>136</sup> Objection at ¶ 25.

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 the IO has shown 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 the right to health found in these instruments that it would be contrary to specific principles of international law for a private entity like DotHealth to operate a .health gTLD registry unless certain safeguards were in place.

101. The Panel considered additional sources beyond those cited to by the IO—as is explicitly recommended by ICANN<sup>137</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>138</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.

102. The IO thus fails to connect the alleged right to health-related information to his key assertion that DotHealth 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

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<sup>137</sup> See AGB, Section 3.5.3.

<sup>138</sup> See discussion *supra*, ¶¶ 40-41.

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.

103. 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 DotHealth’s Application, the Panel does not find that the applied-for string violates such principles of international law.

104. 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>139</sup>

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

105. 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>140</sup> Essentially, the IO is asking the Panel to sustain the Objection until such point as DotHealth makes the public policy commitments requested by the IO. Given the Panel’s finding above that the manner in which DotHealth proposes to operate a .health gTLD registry does not conflict with general principles of international law for morality and public order, the

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<sup>139</sup> AGB, Section 3.5.3.

<sup>140</sup> Objection, at page 14.

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.

106. 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 ICC Procedure and would go beyond the role of the Panel contemplated by ICANN.

107. 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>141</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 public interest concerns inherent in the application for any new gTLD that is health-related, and

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<sup>141</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>.

their importance in the new gTLD application process.<sup>142</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>143</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

108. 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>144</sup>

109. 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>145</sup>

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<sup>142</sup> See discussion *supra* at ¶¶ 85-87.

<sup>143</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>144</sup> Procedure, Art. 21(d).

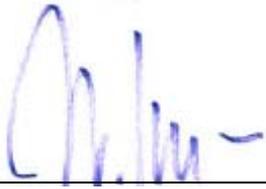
<sup>145</sup> *Id.*, Art. 14(e).

110. Further to the Centre's 2 August 2013 correspondence with the Panel and the Parties, DotHealth 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 DotHealth is to be refunded.

**VI. Determination of the Panel**

111. 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 DotHealth's Application is dismissed.
- ii.** The Applicant DotHealth, LLC prevails.
- iii.** The Applicant shall be refunded its advance payment of costs made under Article 14(e) 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