

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

CASE No. EXP/414/ICANN/31

PROF. ALAIN PELLET, INDEPENDENT OBJECTOR

(FRANCE)

vs/

MEDISTRY, 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.

INTERNATIONAL CHAMBER OF COMMERCE
INTERNATIONAL CENTRE FOR EXPERTISE
CASE NO. EXP/414/ICANN/31

between

Prof. Alain Pellet, Independent Objector

Objector

and

Medistry, LLC

Applicant

Under ICANN's *New gTLD Dispute Resolution Procedure* and the
Rules for Expertise of the International Chamber of Commerce
as supplemented by the *ICC Practice Note* of March 2012

Re: Limited Public Interest Objection concerning Application 1-907-38758 (.MED)

Expert Panel:

Prof. Fabien Gélinas (Chair)

Mr. John Gaffney (Co-Expert)

Prof. Guglielmo Verdirame (Co-Expert)

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1. INTRODUCTION

1. The Internet Corporation for Assigned Names and Numbers (“ICANN”) has launched a program for the introduction of new generic Top-Level Domain Names (“gTLDs”). Applicants may apply for new gTLDs, in accordance with terms and conditions set by ICANN, notably in the gTLD Applicant Guidebook (the “Guidebook”).¹
2. The Guidebook contains, as an Attachment to Module 3, a New gTLD Dispute Resolution Procedure (the “Procedure”). The Procedure governs the resolution of disputes between an entity that applies for a new gTLD (an applicant) and an entity objecting to the application (an objector).
3. Dispute resolution proceedings are administered by a Dispute Resolution Service Provider (a “DRSP”) in accordance with the Procedure and the applicable DRSP rules. Four kinds of objections can be brought under the Guidebook: String Confusion, Existing Legal Rights, Limited Public Interest, and Community. The DRSP responsible for Limited Public Interest objections is the International Centre for Expertise of the International Chamber of Commerce (“ICC”), and the applicable DRSP rules are the Rules for Expertise of the ICC (the “Rules”), as supplemented by the ICC. In March 2012, the ICC supplemented the Rules by issuing a Practice Note on the Administration of Cases under the New gTLD Dispute Resolution Procedure (the “ICC Practice Note”).

¹ gTLD Applicant Guidebook, v. 2012-06-04, Module 3, available at <http://newgtlds.icann.org/en/applicants/agb> [hereinafter Guidebook].

4. According to section 3.2.5 of the Guidebook, the Independent Objector may file a formal objection to a gTLD application. The Independent Objector's role is to act not on behalf of any particular persons or entities, but in the best interests of the public who use the global Internet. Neither ICANN staff nor the ICANN Board of Directors has authority to direct or require the Independent Objector to file or not to file any particular objection. If the Independent Objector determines that an objection should be filed, he will initiate and file the objection in the public interest.
5. The Independent Objector may file objections against "highly objectionable" gTLD applications to which no objection has been filed. The Independent Objector is limited to filing two types of objections: (1) Limited Public Interest objections and (2) Community objections. The Independent Objector is granted standing to file objections on these enumerated grounds, notwithstanding the regular standing requirements imposed on others for such objections.
6. In light of the public interest goal noted above, the Independent Objector shall not object to an application unless at least one comment in opposition to the application is made in the public sphere.
7. These proceedings arise out of a Limited Public Interest objection (the "Objection") to the application filed by Medistry, LLC ("Medistry") for the .MED gTLD (the "Application").
8. The Objection to the Application was filed by the Independent Objector on 13 March 2013.

2. AGREEMENT CONCERNING THE PROCEDURE

9. As stated in Article 1(d) of the Procedure, by applying for a new gTLD under the Guidebook, an applicant accepts the Procedure and the relevant DRSP rules governing possible objections. Similarly, by filing an objection, an objector accepts the Procedure and the applicable rules.
10. Pursuant to Article 8 of the ICC Practice Note, by accepting the process defined in the Procedure, the “parties are deemed to have agreed that the expert determination shall be binding upon the parties” as provided in Article 12(3) of the Rules.
11. As provided in Article 4(d) of the Procedure, “the place of the proceedings, if relevant, shall be the location of the DRSP that is administering the proceedings”. In this case this place is Paris, France.
12. As provided in Article 5(a) of the Procedure, the language of the submissions and proceedings is English.
13. The Expert Determination Procedure to which the parties have agreed to submit this dispute provides a specific procedural framework that is different from typical legal proceedings. It involves brief submissions (which are subject to strict word limits) and an expedited schedule. Hence, while the important and complex matters at issue have received serious consideration by both the parties and the Panel within that framework, the Panel has endeavored to apply a principle of economy to the preparation of this document.

3. THE PARTIES AND THEIR COUNSEL

3.1. The Independent Objector

14. Professor Alain Pellet is the Independent Objector selected by ICANN pursuant to section 3.2.5 of the Guidebook.²

15. The contact information for the Independent Objector is as follows:

Prof. Alain Pellet, Independent Objector
16, Avenue Alphonse de Neuville
92380 Garches, France
Email: courriel@alainpellet.eu
contact@independent-objector-newgtlds.org

16. The Independent Objector is represented in these proceedings by:

Ms. Héloïse Bajer-Pellet
15, Rue de la Banque
75002 Paris, France
Email: avocat@bajer.fr

Mr. Daniel Müller
20, Avenue du Général de Gaulle
78290 Croissy sur Seine, France
Email: mail@muelerdaniel.eu

² See ICANN Press Release of 14 May 2012, available at <http://www.icann.org/en/news/announcements/announcement-14may12-en.htm>

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1016 EB Amsterdam, The Netherlands
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Mr. Sam Wordsworth
24 Lincoln's Inn Fields
London, WC2A 3EG, United Kingdom
Email: SWordsworth@essexcourt.net

3.2. The Applicant

17. Medistry, LLC (“Medistry” or the “Applicant”) was created by the Cleveland Clinic to apply for, obtain and operate the .MED gTLD under its guidance and direction. The Cleveland Clinic is an international medical center headquartered in Cleveland Ohio with the mission to integrate clinical and hospital care with research and education.
18. The contact information for the Applicant is as follows:

Medistry, LLC
Mr. Brian David Johnson
3029 Prospect Avenue
Cleveland Ohio 44115, United States
Email: bdj@secondgen.com

19. The Applicant is represented in these proceedings by:

The Cleveland Clinic Foundation
Mr. Kevin Michael Mooney, Esq., Counsel

3050 Science Park Drive – AC321
Beachwood, Ohio 44122, United States
Email: mooneyk@ccf.org

The Cleveland Clinic Foundation
Mr. David W. Rowan, Esq., Chief Legal Officer
9500 Euclid Avenue
Cleveland, Ohio 44195, United States

4. THE EXPERT PANEL

20. According to Article 13(b)(iii) of the Procedure, proceedings involving a Limited Public Interest objection are referred to a panel of three experts (the “Expert Panel” or “Panel”), recognized as eminent jurists of international reputation, one of whom shall be designated as the Chair. The Chair shall be of a nationality different from the nationalities of the Applicant and of the Independent Objector. Pursuant to Article 3 of Appendix 1 to the Rules, experts are appointed by the Chairman of the Standing Committee of the ICC Centre for Expertise.
21. On 12, 13 and 14 June 2013, each of the experts completed and filed a Declaration of Acceptance and Availability and Statement of Impartiality and Independence, in accordance with Article 3 of the Rules.
22. On 21 June 2013, the Chairman of the Standing Committee of the ICC International Centre for Expertise appointed the Panel pursuant to Article 3(3) of Appendix I to the Rules. Professor Fabien Gélinas, a Canadian national, was appointed as the Chair of the Panel and Mr. John Gaffney and Professor Guglielmo Verdirame were appointed as Co-Experts of the Panel in accordance with Article 13(b)(iii) of the Procedure. The experts’ contact details are as follows:

Prof. Fabien Gélinas
McGill University, Faculty of Law
3644 Peel Street,
Montreal (Quebec), H3A 1W9, Canada
Email: fabien.gelinas@mcgill.ca

Mr. John Gaffney
25 rue de Chazelles
Paris 75017, France
Email: jp_gaffney@yahoo.com

Prof. Guglielmo Verdirame
20 Essex Street
London WC2R 3AL, United Kingdom
Email: gverdirame@20essexst.com

23. The parties were notified of the appointment of the Panel on 24 June 2013 and asked to pay an advance on costs before transmission of the file to the Panel.
24. After payment of the advance by both parties, the Panel received the file on 1 August 2013 and was deemed fully constituted on that date for the purpose of the Procedure.

5. HISTORY OF THE PROCEEDINGS

25. This Objection relates to Medistry's application to register the string .MED. The Application was posted on ICANN's website on 13 June 2012 and given ID Number

1-907-38758 in the ICANN system.³ The Application passed the initial evaluation process in accordance with subsection 1.1.2.5 of Module 1 of the Guidebook, which is independent from the dispute resolution process laid out in the Procedure.⁴

26. On 12 March 2013, the Independent Objector filed the Objection to the Application with the DRSP. A copy of the Objection was transmitted to the Applicant on 13 March 2013. The requisite filing fee had been paid to the DRSP when the Objection was filed, following Article 8(c) of the Procedure and Article 1 of Appendix III to the Rules.
27. Pursuant to Article 9 of the Procedure, the DRSP conducted an administrative review of the Objection for compliance with its Rules and with Articles 5-8 of the Procedure (Language, Communications and Time Limits, Filing of the Objection, and Content of the Objection). On 2 April 2013, the DRSP notified the parties that the Objection was compliant. On 12 April 2013, ICANN made a dispute announcement under Article 10 of the Procedure, listing the objections that had passed administrative review, including this Objection.
28. On 12 April 2013, the DRSP sought the comments of the parties on the possible consolidation of this case with two other cases in which the string .MED was at issue, as contemplated by Article 12 of the Procedure. On 19 April 2013, the DRSP notified the parties that the cases would not be consolidated.
29. On 22 May 2013, the Applicant filed a Response to the Objection (the “Response”). A copy of the Response was transmitted to the Independent Objector and his Representatives on the same day. Pursuant to Article 11(f) of the Procedure, the Applicant paid the requisite filing fee to the ICC on the same day.

³ <https://gtldresult.icann.org/application-result/applicationstatus/applicationdetails/216>.

⁴ <http://newgtlds.icann.org/sites/default/files/ier/ciasie0hjec3lamxawrle7ia/ie-1-907-38758-en.pdf>.

30. On 21 June 2013, the Chairman of the Standing Committee of the ICC International Centre for Expertise appointed the Expert Panel pursuant to Article 13 of the Procedure and Article 9(5)(d) of the Rules.
31. On 24 June 2013, the DRSP informed the parties of the appointment of the Expert Panel and of the estimate of total costs in this matter. The parties were informed that the Panel would not be deemed fully constituted and the matter would not proceed until each of the parties had made advance payment of the estimated costs.
32. On 1 August 2013, the DRSP informed the parties of the receipt of the necessary advance payment and transferred the file to the Panel. The Panel received the file and was deemed fully constituted on that date for the purpose of the Procedure.
33. On 2 August 2013, the Independent Objector requested leave from the Panel to file an additional written statement to address issues that were raised in the Applicant's Response. On the same date, the Applicant responded to the Independent Objector's request.
34. On 5 August 2013, the Expert Panel wrote to the parties asking the Applicant to comment on the Independent Objector's request and seeking the parties' observations on the conduct of the proceedings generally and, in the event the Independent Objector's request were to be granted, the appropriate length and timing of any additional round of submissions.
35. On 9 August 2013, the Independent Objector and the Applicant each provided observations.
36. On 12 August 2013, the Expert Panel notified the parties that it had conducted the "quick look procedure" in accordance with subsection 3.2.2.3 of Module 3 of the

Guidebook and had not found the Objection to be manifestly unfounded or an abuse of the right to object such that it should be summarily dismissed.

37. On the same day, in accordance with Article 17 of the Procedure, the Expert Panel granted the Independent Objector leave to submit an additional written statement within ten days and gave the Applicant the opportunity to reply within ten days of the Independent Objector's submission.
38. The Independent Objector submitted an additional statement on 22 August 2013 and the Applicant a reply on 30 August 2013. These submissions addressed, among other things, a preliminary issue raised by the Independent Objector concerning the admissibility of certain documents annexed to the Response.
39. As required by Article 5(a) of the Procedure, submissions and communications were made in English. In accordance with Article 6(a) of the Procedure, all communications in the proceedings were submitted electronically.
40. On 3 September 2013, the Panel notified the parties that it was moving into a deliberative phase. The Panel also notified the parties that the issue raised by the Independent Objector concerning the admissibility of certain documents would be addressed in the Determination. The Panel then considered the entire record, except for two documents, as noted later, and proceeded with the preparation of a draft Expert Determination.
41. On 4 September and on 3 October 2013, the DRSP granted the Panel extensions for the submission of its draft Expert Determination to 5 October and 12 October 2013, respectively.

42. On 12 October 2013, the Expert Determination was submitted in draft form to the DRSP for scrutiny in accordance with Article 12(6) of the Rules and Article 21(b) of the Procedure.

6. SUMMARY OF THE PARTIES' RESPECTIVE POSITIONS

43. The Objection considered in these proceedings is a Limited Public Interest objection. The Guidebook provides the applicable standards, or principles of adjudication, for a Limited Public Interest objection. In terms of standing, since the Independent Objector acts solely in the best interest of the public who use the global Internet, he shall not object to an application unless at least one comment in opposition to the application has been made in the public sphere. On the merits, the Independent Objector must demonstrate that the applied-for gTLD string is contrary to generally accepted legal norms of morality and public order that are recognized under principles of international law. The parties' respective positions concerning the application of these principles are summarized below.

6.1. The Independent Objector's Objection

44. The Independent Objector first argues that he has standing to bring this Objection because, as required by the Guidebook, at least one comment in opposition to the Application was made in the public sphere. In fact, various non-governmental organizations have submitted Public Comments with respect to all four of the Applications that have been submitted to ICANN for the .MED gTLD. Many of these comments express great concern about the reliability and trustworthiness of a .MED gTLD that is run by a private enterprise. Although several of these Comments were submitted under the heading of a Community objection, the Independent Objector has

taken notice of the contents thereof in his decision to submit the present Objection since the substance of the objections expressed often refers to “public interest” and “public health” as rationale for these concerns. Given the status of health as a fundamental human right and of the medical sector as a constitutive element thereof, the Independent Objector argues, these concerns fall within the parameters set for a Limited Public Interest objection.

45. Concerning the merits, the Independent Objector’s position is that the applied-for gTLD string would be contrary to specific principles of international law as reflected in relevant international instruments of law.
46. The Independent Objector alleges that “med” as an abbreviation for “medical” and “medicine”, as well as similar terms in multiple languages, is inextricably connected to health, since it refers to the goods, services and facilities that are necessary for the effective fulfillment of the right to health. Therefore, the Independent Objector states that his appreciation of a .MED gTLD is directly linked to his appreciation of the very concept of health.
47. The Independent Objector submits that health was recognized as a fundamental human right in international law for the first time in 1948, in the Universal Declaration of Human Rights. Since then, several instruments of international law have confirmed the human rights status of health. The Independent Objector argues that the promotion and protection of international health is inherent in the due respect of generally accepted legal norms of public order that are recognized under fundamental principles of international law.
48. The right to health was defined by the United Nations Committee on Economic, Social and Cultural Rights (the “Committee”) as “a right to the enjoyment of a variety of facilities, goods, services and conditions necessary for the realization of the highest attainable standard of health.” The Committee lists health care as the very first

element covered by the right to health while interpreting the right to health as not only extending to health care but also to the underlying determinants including access to health-related education and information. The Independent Objector also refers to the case law of regional human rights courts that confirm that access to information is an essential element of specific human rights.

49. The Independent Objector is of the view that any entity applying for a .MED gTLD should demonstrate awareness of its duty to see to it that this gTLD is organized, set up and managed in such a way that the right to health, with all of the implications discussed above, including the necessity of reliability and trustworthiness of medical information, 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 fulfill the right to health. In the view of the Independent Objector, these are requirements that are fully justified given the specific principles of international law as reflected in the relevant international instruments of law discussed above.

50. The Application shows that the applied-for gTLD is intended to become a trusted source for medical-related information, that the eligibility for domain operating will be restricted, that there is no clear view on future developments and related policies and that the stated goal is to operate the gTLD in a professional and commercially reasonable manner. It is also clear that all relevant decisions will be made by the Applicant and Cleveland Clinic and that all these stated positions, rules and policies may be changed in the Applicant's and Cleveland Clinic's sole discretion. In the view of the Independent Objector, the Application does not provide for any views on the international nature of this undertaking, while for a gTLD the world at large seems to be the natural environment, as is confirmed by the Applicant.

51. The Independent Objector submits that, more importantly, the Applicant does not demonstrate awareness of the fact that “med”, referring to medical services and to medical-related information as essential elements, is not only a “term” but that it also represents a fundamental right, indissociable from the right to health, which involves extensive obligations for national and international public authorities across the globe as well as for citizens and private enterprises. Providing medical related information on a worldwide basis might interfere with efforts of public authorities to fulfill their obligations, while for developing countries “there is a growing concern that an unrestricted health gTLD will bypass regulatory controls”. The Application is silent on these aspects of fundamental importance. The “Public Interest Commitments” filed by the Applicant on 6 March 2013 do not change this picture. They merely reiterate elements already contained in the Application.
52. For these reasons the Independent Objector requests the Expert Panel to hold that the Objection is valid and to uphold the Objection against the Application. In the alternative, the Independent Objector requests the Expert Panel to hold that the Objection is valid as long as the Applicant has not provided solutions for the serious objections raised above.
53. In addition, the Independent Objector requests that his advance payment of costs be refunded in accordance with Article 14(e) of the Procedure.

6.2. The Applicant’s Response

54. The Applicant’s position is that the Objection must be dismissed.
55. The mission stated in the Application for the .MED gTLD is to serve as a trusted source on the Internet for medical-related information, providing people greater choice for obtaining such information, allowing the sharing of trusted information by multiple

sectors of the healthcare industry, and fostering collaboration, in the public interest and in a new online environment, between producers and users of medical-related information.

56. The Applicant submits that the Objection must be considered in light of the scope of both the role of the Independent Objector and the substantive rules for a Limited Public Interest objection, which are far more limited than the Independent Objector has portrayed them. In particular, the Limited Public Interest standards cover only objectionable strings, not the presumed content within a domain. The Independent Objector is authorized under the Guidebook to object to “highly objectionable” strings. The possibility of objectionable content is insufficient for an objection if the string itself is not objectionable. The Applicant emphasizes that .MED is not contrary to international law because it “might” interfere with states’ obligations. Not only is it unlikely, given the Cleveland Clinic’s reputation for reliability and its corresponding plans for .MED, that the information will be unreliable, but the mere possibility is not enough justification to restrict the almost-universally recognized right to freedom of expression.

57. The Applicant submits that the right to health is more limited than portrayed in the Objection. First, although the scope and content of the right, and who it obligates, are far from clear, it is clear that it does not prevent anyone from simply sharing health information, in a gTLD or otherwise, and that non-state actors have no direct international obligations related to health. Second, international law does not limit private actions just because they interfere with state obligations, and even if it did, private dissemination of health information does not interfere with any state obligations. Third, international law affirmatively protects, and even encourages, private creation and dissemination of health-related information. Finally, even assuming the right to health could be impaired by a health-related gTLD, such a concern does not rise to the level of a threat to public order, and, moreover, is inapplicable to the restricted .MED gTLD proposed by Medistry.

58. As the Independent Objector notes, access to reliable and trustworthy information is an essential element of the right to health. The Applicant believes that since .MED will only allow information posted by vetted, reliable sources, and will provide increased global access to accurate, reliable information, it will actually promote the right to health. As provided in the Public Interest Commitments (PICs) submitted in relation to the .MED Application, any eventual registry agreement for .MED will contain specific contract commitments to maintaining the gTLD as a trusted space with reliable information and to giving the Cleveland Clinic sole discretion to approve or reject all potential registrants. This demonstrates the Applicant's commitment to maintaining the quality of the gTLD, to subjecting itself to liability in the event that its commitment is not fulfilled, as well as its willingness to respond to concerns expressed by governments.
59. The Applicant further submits that the Independent Objector cannot meet his burden because no principle of international law prevents private parties from providing health-related information. The Applicant is a non-state actor and the right to health as reflected in relevant instruments of law is limited and directed to state actors. Furthermore, to the extent customary international law recognizes a right to health, it is very limited. International law imposes no direct obligations on non-state actors regarding provision of health-related information. Finally, potential violations are not contrary to international law. Indeed, the assertion that .MED might conflict with the right to health is insufficient.
60. Besides, the Applicant states that .MED is not contrary to any generally accepted legal norm of morality and public order. .MED poses no threat to either public or individual health, and certainly poses no threat serious enough to qualify as a question of public order. Accordingly, even if .MED is somehow contrary to a specific principle of international law as reflected in some international instrument, which the Applicant contends it is not, .MED is not contrary to any norm of public order and therefore the Objection must fail.

61. The Applicant states that there is no generally accepted norm limiting private actions that interfere or might interfere with state obligations. Provision of health-related information by private parties does not interfere with state obligations to protect the right to health. Whether or not .MED exists, states have the right to regulate certain health-related information. Regulations applicable to existing information sources, including online information, will apply to .MED.
62. The Applicant goes further by stating that international law actually protects the right of private parties to provide health-related information – i.e., the Limited Public Interest objection is explicitly limited by the right to freedom of expression. Furthermore, the Applicant argues that preventing dissemination of health-related information to protect the right to health is not proportional, since the violation is only potential.
63. The Applicant submits that the Objection should be dismissed as it fails to establish a specific right to health, reflected in any binding international instrument, regarding private dissemination of health information; fails to establish any direct obligation on private actors to respect the right to health; and fails to demonstrate that .MED is contrary to any specific, generally accepted principles of international law reflected in international instruments. It is instead both protected by the right to freedom of expression and consistent with the right to health and the goal of increasing access to trustworthy, reliable health information.

6.3. The Independent Objector's Additional Statement

64. The Independent Objector raises a preliminary issue concerning the length of the Response. According to the Procedure, the Objection and the Response are each limited to 5,000 words or 20 pages, whichever is less, excluding attachments. The Independent Objector submits that the substantive part of the Response, including the

footnotes, counts well over 6,600 words; without the footnotes, the Response remains within the 5,000 words limit. However, among the Annexes (2 and 3) submitted by the Applicant there are two expert reports that may be taken as extensions or expansions of the Applicant's Response, bringing the latter to a page number well in excess of the limit imposed by the Procedure.

65. The Independent Objector is of the opinion that the only way to remedy this violation of the Procedure is to have Annexes 2 and 3 removed from the file as inadmissible.
66. The Independent Objector therefore requests that Annexes 2 and 3 be declared inadmissible, that the Applicant be ordered to delete these Annexes from the file and that any reference to them in the text of the Applicant's Response be ignored.
67. Reacting to the substance of the Applicant's Response, the Independent Objector contends that he did not act outside his mandate as alleged by the Applicant. Limited Public Interest objections are not exclusively reserved for objections holding that the string, as such, would be objectionable. In this case, the subject-matter of the Objection is not the text of the string ".MED" but rather its intended use, and in particular, its confiscation for purely commercial purposes which is contrary to general principles of international law for morality and public order and likely to cause harmful consequences to the public. From the definition provided in the Guidebook, the Independent Objector's position is not that the word, or better the abbreviation "med", would be objectionable *per se* but that the Application does not guarantee its use in full respect for these general principles.
68. Concerning the Applicant's suggestion that the Independent Objector infringes on its, and the public's, right to free speech, the Independent Objector recalls that the concept of freedom of expression is not free of any limits and carries special duties and responsibilities. The concept of raising Limited Public Interest objections, and for that matter all objections envisaged by the Guidebook, implies that these limits may lead to the rejection of certain applied-for strings, as it is the case for this particular gTLD.

69. The Independent Objector refers to the recent Resolution adopted by the Sixty-sixth World Health Assembly on 27 May 2013 on “eHealth standardization and interoperability” as providing a confirmation of his approach. In this Resolution, the World Health Assembly requests its Director-General “to convey to the appropriate bodies, including the ICANN Governmental Advisory Committee and ICANN constituencies, the need for health-related global top-level domain names in all languages, including “.HEALTH”, to be consistent with global public health objectives”.
70. The Independent Objector submits that the Application does not meet the standards that have to be applied to a highly sensitive gTLD and that the launch of this applied-for .MED gTLD would, indeed, be contrary to specific principles of international law as reflected in relevant international instruments of law.

6.4. The Applicant’s Reply to the Independent Objector’s Additional Statement

71. The Applicant maintains that the Independent Objector is wrong in arguing that it exceeded permitted length limit through the use of footnotes and inclusion of expert reports. According to the Procedure and the Guidebook, attachments are excluded from the length limitation. Although the Rules are silent on the inclusion of footnotes, the DRSP expressly directed that neither table of contents nor footnotes will count towards the 5000-word limit and the DRSP moreover confirmed that the Response was compliant with Article 11. Furthermore, every significant element of Medistry’s analysis was presented within the allowed length limit; the expert reports simply provide additional background on the relevant principles applicable to a controversial and unsettled aspect of international law. It is common to provide expert opinions on the scope of relevant international law and justice demands a thorough analysis of relevant international law principles.

72. On the merits, the Applicant submits that the .MED gTLD will be restricted to trustworthy sources of information; the Cleveland Clinic possesses the requisite expertise and incentives to vet sources of information; and the strategy for operating the gTLD includes review of any complaints by the Cleveland Clinic for quality assurance.
73. Concerning the World Health Assembly Resolution quoted by the Independent Objector, the Applicant argues that not only is such a resolution not binding, but its very general exhortation “that health-related gTLDs should “be consistent with global public health objectives” does not call for prohibiting such gTLDs, or even imposing the Independent Objector’s suggested requirement of connection with public authorities and non-commercial purpose.
74. The Independent Objector has not proven, and cannot prove, that international law would prevent a private party from disseminating health-related information, even if such actions “might” interfere with states’ obligations. .MED is not contrary to any principles of international law, is consistent with the goal of promoting health and is protected by the right to free expression.

7. ANALYSIS

75. In the following section the standards of adjudication and relevant legal principles for a Limited Public Interest objection are discussed in detail and applied to the facts of the case. In applying the standards the Panel is mindful that the Independent Objector bears the burden of proof in respect of both standing and merits.⁵ If he has standing, the Independent Objector must show that the applied-for gTLD string is contrary to

⁵ Guidebook, s. 3.5; Procedure, art. 20(c).

generally accepted legal norms of morality and public order that are recognized under principles of international law.

76. It should be noted that the Expert Panel comes to this Determination applying a principle of judicial economy arising out of the nature of these proceedings, which involve brief submissions (which are subject to strict word limits) and an expedited schedule for their disposal. Hence, while the issues raised are complex and have received serious consideration by both the parties and the Panel, the Panel's determination will be correspondingly brief.

7.1. The “Quick Look” Procedure

77. Subsection 3.2.2.3 of the Guidebook provides that anyone may file a Limited Public Interest objection. Due to this inclusive standing base, however, objectors are subject to a “quick look” procedure designed to identify and eliminate frivolous or abusive objections. An objection found to be manifestly unfounded or an abuse of the right to object may be dismissed at any time.
78. The quick look was the Panel's first task after its appointment by the DRSP and involved an initial review on the merits of the Objection in the light of the requirements of subsection 3.2.2.3 of the Guidebook. A Limited Public Interest objection would be manifestly unfounded if it did not fall within one of the categories defined as the grounds for such an objection at section 3.5.3 of the Guidebook. A Limited Public Interest objection may also be an abuse of the right to object. An objection may be framed to fall within one of the accepted categories for Limited Public Interest objections, but other facts may clearly show that the objection is abusive.

79. On 13 August 2013, the Expert Panel informed the parties that it had conducted the “quick look” procedure contemplated in subsection 3.2.2.3 of the Guidebook and had not found the Objection to be manifestly unfounded or an abuse of the right to object such that it should be summarily dismissed.

7.2. The Independent Objector’s Standing

80. Section 3.2.5 of the Guidebook provides that a formal objection to a gTLD application may be filed by the Independent Objector on the grounds of Limited Public Interest or Community. The Independent Objector may file a Limited Public Interest objection to an application even if a Community objection has been filed, and vice versa. The Independent Objector may file an objection notwithstanding the fact that a String Confusion objection or a Legal Rights objection has also been filed in respect of that application. Absent extraordinary circumstances, the Independent Objector is not permitted to file an objection to an application where an objection has already been filed on the same ground. There is no issue here in any of these respects because this Objection was brought on the ground of Limited Public Interest and no other objection has been filed on the same ground.
81. Section 3.2.5 of the Guidebook also imposes a public comment requirement. The Guidebook states that “in light of the public interest goal” associated with his role, “the Independent Objector shall not object to an application unless at least one comment in opposition to the application is made in the public sphere.” As the Independent Objector indicates, several public comments were filed on the ICANN website in respect of the Application. The Panel is satisfied that the public comment requirement imposed by the Guidebook has been met in this case.
82. One last point bears mention in the context of our analysis of standing. According to section 3.2.5 of the Guidebook, “the Independent Objector may file objections against

‘highly objectionable’ gTLD applications.” Conceivably, this could be viewed as raising a question of standing. The parties have not formally addressed the issue as a matter of standing, however, and the Panel will therefore treat it as a question of merits.

7.3. The Admissibility of Certain Documents

83. A preliminary objection raised by the Independent Objector as to the admissibility of certain documents submitted as evidence by the Applicant must now be considered before the Panel turns to the merits.
84. The Independent Objector raised a preliminary question concerning the admissibility of two expert reports filed by the Applicant as Annex 2 and Annex 3 to the Response. These are presented by the Applicant as expert evidence on international law and are referenced in the Response. The Independent Objector argues that the reports are essentially a means for the Applicant to get around the page limits imposed by the Procedure. Each of the reports is approximately of the same length as the maximum respectively allowed for the Objection and the Response pursuant to the Procedure. The Independent Objector concludes that the annexes, “under the disguise of ‘expert opinions’, are nothing more (or nothing less) than extensions and/or expansions of the Applicant’s Response”. The Independent Objector requests that the annexes be struck from the record as inadmissible.
85. The Applicant objects to the request and disagrees with the Independent Objector’s allegations, arguing that every significant element of its analysis was presented within the prescribed length limitation and that the expert reports simply provided additional background on the relevant principles applicable to a controversial and unsettled aspect of international law.

86. The Panel reserved this preliminary issue to its Determination and informed the parties accordingly. Neither party objected to this course of action. In the meantime, the Panel members refrained from reviewing the expert reports.
87. The Panel finds it unnecessary to decide this preliminary issue because it has been able to dispose of the Objection on the merits without having to consult the expert reports at issue.

7.4. The Standards of Adjudication and Legal Principles

88. Section 3.5 of the Guidebook stipulates that each panel will use appropriate general principles (standards) to evaluate the merits of each objection, while Article 20(a) of the Procedure obliges each panel to apply the standards that have been defined by ICANN. In addition, pursuant to Article 20(b) of the Procedure, the Panel “may refer to and base its findings upon the statements and documents submitted and any rules or principles that it determines to be applicable.”
89. In the case of a Limited Public Interest objection, section 3.5.3 of the Guidebook specifies that an expert panel will consider “whether the applied-for gTLD string is contrary to general principles of international law for morality and public order”.
90. The first point to consider is the appropriate object of the Panel’s analysis. The Applicant argues that the true purpose of the Limited Public Interest objection is to prevent the delegation of strings that are, in and of themselves, objectionable. The Independent Objector, however, maintains that the question is not, or at least not only, whether the string is objectionable, but rather whether the applied-for gTLD string and its intended operation may be objectionable from the perspective of general principles of international law for morality and public order. The Independent Objector’s position is not that the word or abbreviation “med” would be objectionable *per se* but

that the Application does not guarantee its use in full respect of general principles of international law for morality and public order.

91. One example should be enough to show that the Independent Objector's position on this point is correct. Suppose an enterprise specializing in the production of films intended for adults was applying for the .KIDS string and proposing to operate it as a domain reserved for pornographic materials. It should be obvious that the Limited Public Interest objection was intended to cover such a case. Yet, there would be nothing highly objectionable in the string .KIDS considered independently from the context of the intended purpose of the gTLD.
92. The Panel notes that the correct approach is quite clearly stated in the Guidebook, which provides that "the Panel will conduct its analysis on the basis of the applied-for gTLD string itself" but "may, if needed, use as additional context the intended purpose of the gTLD as stated in the Application." The Panel will thus proceed on that basis.
93. Section 3.5.3 of the Guidebook provides useful guidance concerning "the general principles of international law for morality and public order" which it contemplates:

Examples of instruments containing such general principles include, but are not limited to:

- 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;
- 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.

94. The Guidebook notes that these instruments “are included to serve as examples, rather than an exhaustive list,” and that they “vary in their ratification status.” The Guidebook also observes that “states may limit the scope of certain provisions through reservations and declarations indicating how they will interpret and apply certain provisions.”

95. One principle which finds express mention in section 3.5.3 of the Guidebook is freedom of expression. The Guidebook however adds that “the exercise of this right carries with it special duties and responsibilities” and that “certain limited restrictions may apply.”

96. The following part of section 3.5.3. elaborates on 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 international law. Four such grounds are identified:

- 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;
- Incitement to or promotion of child pornography or other sexual abuse of children;

or

- 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.

97. The present Objection is based upon the fourth ground, namely that the string would be contrary to specific principles of international law as reflected in relevant international instruments of law.
98. According to the Applicant, this ground should be considered in the context of the other three, pursuant to an *ejusdem generis* approach. The Applicant maintains that the first three grounds “set a high standard for general acceptance” and that “[o]nly specific international norms with a similar degree of general acceptance should form a basis” for a Limited Public Interest objection. Relying on explanatory memoranda published by ICANN during the development process of the new gTLD program, the Applicant adds that the first three categories are generally accepted as “legitimate restrictions on expression”, but that other categories – for example, incitement to non-violent illegal activities – are not.
99. The Independent Objector disagrees with this analysis, discounting the memoranda and arguing that the fourth ground is different in kind from the other three, thus excluding the *ejusdem generis* approach. He also argues that the “or” that separates the third and fourth grounds (as opposed to an “and”) takes away any doubt as to the scope for applying the *ejusdem generis* approach.
100. In the Panel’s view there can be no doubt that the four grounds are similar insofar as they all correspond to a notion of contrariety to generally accepted norms of morality and public order. If a situation of contrariety to international law does not relate to morality and public order, then an objection cannot stand. At the same time, the Panel notes that the fourth ground is indeed different from the first three in an important way.

The first three grounds each provide a specific basis for a finding that the string is “contrary to generally accepted legal norms relating to morality and public order that are recognized under principles of international law.” They refer to specific actions deemed contrary to the relevant norms, i.e., “incitement to or promotion of [...] violent, lawless action”, “discrimination” and “sexual abuse of children”. The fourth ground, by contrast, leaves open the scope of further possible substantive violations, but imposes an important requirement: the string must be contrary to *specific* principles of international law that rise to the level of generally accepted legal norms relating to morality and public order.

101. Under the overall requirement of contrariety “to generally accepted legal norms relating to morality and public order that are recognized under principles of international law”, the fourth ground leaves it to the discretion of the Expert Panel to determine if the applied-for gTLD is contrary to a specific principle or principles of international law relating to morality and public order. In this limited sense the *ejusdem generis* approach is appropriate. The three preceding grounds provide an indication to the Expert Panel of the kinds of principles of international law that are sufficiently specific, and of the kinds of grounds considered sufficiently serious, to restrict the right to freedom of expression of the Applicant.
102. The Panel notes that the first three grounds mentioned in section 3.5.3 could potentially afford a basis for necessary and proportionate restrictions on free expression under international law, in terms, for example, of Article 19(3)(b) and Article 20(2) of the ICCPR. There are other grounds on which free expression may be limited, i.e.: respect for the rights or reputations of others, national security, public order, public health or morals. In the Panel’s view, the reference to “morality” and “public order” in the first paragraph of section 3.5.3 of the Guidebook does not exclude limitations of free expression on such other grounds as are mentioned in the ICCPR. While also accepting that – as underscored in section 3.5.3 of the Guidebook – state practice on the interpretation of these provisions (including the right to free

expression) varies, in the Panel's view there is a specific principle of international law, reflected in relevant international legal instruments, which permits limitation of free expression on public health grounds.

7.5. The Merits of the Objection

103. The Independent Objector alleges that the applied-for gTLD string, in light of the Application, is contrary to a specific principle of international law, namely the right to health, as protected under international law. He argues that his appreciation of the .MED gTLD is directly linked to his appreciation of the concept of health, since the abbreviation "med" for medical and medicine is inextricably connected to health. He lists several instruments of international law that confirm the existence of a right to health and concludes that the promotion and protection of health is inherent in the due respect of generally accepted legal norms of public order that are recognized under fundamental principles of international law. He argues that the right to health extends to access to reliable and trustworthy health-related education and information.

104. The Applicant does not contest that the right to health "as reflected in relevant international instruments of law" is "generally accepted," and that it relates to "morality and public order". However, the Applicant submits that the scope and content of the right to health, and whom it obligates, are far from clear, and also contends that it clearly does not prevent anyone from simply sharing health information, in a gTLD or otherwise. The Applicant submits that non-state actors have no direct international obligations related to health. Moreover, the Applicant argues that, even assuming the right to health could be impaired by a health-related gTLD, such a concern does not rise to the level of a threat to public order, and, moreover, is inapplicable to the restricted .MED gTLD proposed by Medistry.

105. The Independent Objector has framed his Objection in terms of the right to health rather than in terms of public health as a valid ground for limiting freedom of expression. There are analytical differences between the right to health as an individual human right (enshrined, for example, in Article 12 of the International Covenant on Economic, Social, and Cultural Rights (“ICESCR”)) and public health as a ground for limiting freedom of expression (in terms, for example, of Article 19 of the ICCPR). It is worth exploring these differences to cast light on the state of international law in this area.
106. The right to health is defined by the United Nations Committee on Economic, Social and Cultural Rights as the right to the highest attainable standard of physical and mental health.⁶ In the interpretation of the Committee, the right to health also includes the right to receive and have access to information about health.⁷ As the terms of Article 12 of the ICESCR indicate, the principal obligor is the state. The Independent Objector has however stressed that “not only public authorities, but also the private sector have responsibilities vis-à-vis the protection of human rights.” The Panel does not consider it necessary to come to a definitive view on the question of the extent to which, if any, non-state actors may be bound by international human rights obligations, because, as explained below, the right to health question can be resolved by reference to the content of the right.
107. Where public health appears as a ground for restricting freedom of expression, as for example in the case of Article 19 of the ICCPR, it has permissive rather than obligatory effects. States are permitted to limit the exercise of free expression on public health grounds. But they are not obliged to do so – at least not in terms of Article 19 of the ICCPR.

⁶ 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)*, 11 August 2000, E/C. 12/2000/4, para.9.

⁷ *Id.*, para. 11.

108. It is conceivable that an obligation to restrict freedom of expression may arise as part of a state's obligation vis-à-vis the right to health. But such a restriction would still have to satisfy the conditions in the limitation clause in Article 19 (or other equivalent provisions protecting free expression). A restriction of free expression cannot be justified solely on the basis of its purported positive consequences on the right to health. To do so would result in endless expansions in the permissible limitations of freedom of expression by reference to consequentialist arguments about the impact that a particular restriction could have on the enjoyment of other rights. Moreover, such restrictions must be both necessary and proportionate.
109. Furthermore, as the Independent Objector has himself noted, the information-related element of the right to health is the right to *have access* to information that is reliable and trustworthy. It does not follow from this right that a state has a duty to censor all information on health that is not deemed reliable and trustworthy.
110. The above analysis of the relationship between the right to health, freedom of expression and public health as a ground for limiting free expression informs the approach of the Panel. The Panel accepts that the right to health is a specific principle of international law, but that right has to be considered in light of the right to freedom of expression and of the limited grounds upon which it is permissible to restrict this right.
111. Starting from those premises, the Independent Objector bears the burden of proving that the applied-for gTLD string, in light of the Application, would be “contrary” to the right to health, that a restriction on freedom of expression would be permissible under section 3.5.3 of the Guidebook, and hence that the Objection should be sustained (Article 20 of the Procedure). The Panel finds that the Independent Objector has failed to discharge its burden of proof in this case.

112. The Applicant rightly points out that the right to health, on its face, does not prevent anyone from simply sharing health information, in a gTLD or otherwise. The Independent Objector affirms, but fails to establish, that the right to health prohibits the dissemination of health-related information on a commercial basis.
113. The Independent Objector claims that the private sector has responsibilities vis-à-vis the protection of human rights, but links these responsibilities to the idea of a possible interference with the obligations imposed on public authorities by international law: “[p]roviding medical related information on a worldwide basis”, he writes, “*might* interfere with efforts of public authorities to fulfill their obligations” under international law. (emphasis added)
114. The Independent Objector has not demonstrated to the Panel’s satisfaction that the capacity or efforts of public authorities to fulfill their international obligations by protecting and promoting the right to health would be affected by the delegation of the applied-for string and, furthermore, how such alleged interference by the applied-for gTLD string (in the context of the intended purpose thereof) would be contrary to a specific principle of international law relating to public morality, public health or public order.
115. Even if the Panel were to assume, *arguendo*, that the capacity and efforts of public authorities to protect and to promote the right to health might be adversely affected, it would still be necessary to show that morality and public order – or any of the other grounds on which limitations of free expression are justifiable under international law – are engaged in a way that justifies a limitation on freedom of expression. Free expression cannot be limited merely on the grounds of policy convenience. As noted earlier, the threshold for a permissible restriction is higher. In the case of public health, the restriction must also be shown to be necessary to the protection of public health. The Independent Objector does not meet this necessity test.

116. Even if one were to consider the Independent Objector’s case exclusively on right to health grounds, and not take into account the principles governing the limitation of freedom of expression, the Objection would have to fail. In fact, in the view of the Committee on Economic, Social and Cultural Rights, information accessibility in relation to the right to health “includes the right to seek, receive and impart information and ideas concerning health issues.” It does not include the right to be protected from the mere risk of misleading or misleading or unreliable information. Had there been proof of a significant risk of dissemination of misleading or unreliable information, or a deliberate intention to this effect, the Panel’s assessment may well have differed. But the Independent Objector has offered no such evidence. For its part, the Applicant has provided various assurances, most notably in relation to the administration of the gTLD.
117. The Panel thus finds that the Independent Objector has failed to bridge the large gap between, on the one hand, his bare allegation that the capacity or efforts of states to fulfill their obligations under the right to health *might* be affected by the applied-for gTLD, and, on the other hand, a demonstration of how such a scenario would be contrary to a specific principle of international law relating to public morality, public health or public order. The Objection must therefore fail.

7.6. The Alternative Remedy

118. In the event the Objection is not successful, the Independent Objector seeks an alternative remedy. He asks this Panel “to hold the present Objection is valid as long as the Applicant has not provided solutions for the serious objections raised”. The Independent Objector does not provide details of this alternative remedy or of its basis in the Guidebook or the Procedure. The Procedure indicates quite clearly that the available remedies are “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.” The Panel finds that there is no basis in the Procedure for the alternative remedy sought by the Independent Objector.

119. This does not take away from the serious concerns raised by the Independent Objector. However, the very difficult policy questions surrounding the delegation and operation of health-related strings are not matters for this Panel to decide. It was not in particular this Panel’s task to decide on matters of public interest broadly defined, although the expression “Limited Public Interest” might suggest otherwise. This Panel was asked only to determine whether the Objection could be sustained on the basis that the applied-for gTLD string (in the context of its intended purpose) was contrary to general principles of international law for morality or public order. It was not, in other words, the task of this Panel to determine whether granting the Application advances the public interest in a more general sense. This Panel’s task was to impartially apply the tests as they are found in the Guidebook and as they may be understood from a consideration of the broader context in which they came to be formulated.

8. DETERMINATION

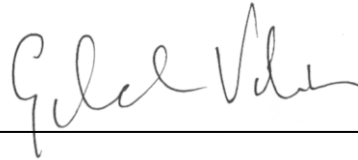
120. For the reasons provided above and in accordance with Article 21(d) of the Procedure, the Panel
- **DISMISSES** the Limited Public Interest Objection to Medistry, LLC’s Application for the string .MED brought by the Independent Objector;
 - **DECLARES** that the prevailing party for the purpose of cost advance refund under Article 14(e) of the Procedure is Medistry, LLC; and

- DISMISSES all other requests in these proceedings.



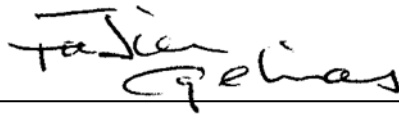
Mr. John Gaffney

Co-Expert of the Expert Panel



Professor Guglielmo Verdirame

Co-Expert of the Expert Panel



Professor Fabien Gélinas

Chair of the Expert Panel

Date: 19 December 2013