

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

CASE No. EXP/411/ICANN/28

PROF. ALAIN PELLET, INDEPENDENT OBJECTOR

(FRANCE)

vs/

SILVER GLEN, 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.

ICC Case No. EXP/411/ICANN/28

PROFESSOR ALAIN PELLET, INDEPENDENT OBJECTOR

Objector

(France)

vs

SILVER GLEN, LLC

Applicant/Respondent

(USA)

EXPERT DETERMINATION

Professor James Crawford (Chair)

Professor Maria Gavouneli (Co-Expert)

Mr James Bridgeman (Co-Expert)

26 November 2013

TABLE OF CONTENTS

TABLE OF ABBREVIATIONS.....	3
THE EXPERT PANEL	4
IDENTIFICATION OF THE PARTIES AND THEIR REPRESENTATIVES	4
I. INTRODUCTION.....	7
II. PROCEDURAL HISTORY.....	8
III. THE RELEVANT PROVISIONS.....	10
IV. THE OBJECTION AND THE APPLICANT’S RESPONSES	10
(a) The Application	10
(b) The Objection.....	11
(c) The Applicant’s Response	11
(d) The Independent Objector’s Additional Written Statement	12
(e) The Applicant’s Response to the Additional Written Statement	13
V. THE PANEL’S DECISION	13
(a) The role of good faith	15
(b) Relevant principles of international law	15
(c) Application of the Independent Objector’s arguments to the facts of this case....	18
(d) Remedies available	22
(e) Decision	23

TABLE OF ABBREVIATIONS

AGB	gTLD Applicant Guidebook
Applicant	Silver Glen, LLC, Applicant/Respondent (USA)
Centre	International Centre for Expertise of the ICC
DNSSEC	Domain Name System Security Extensions
DPML	Domain Protected Marks List
DRSP	dispute resolution service provider
GAC	ICANN Governmental Advisory Committee
Guidebook	gTLD Applicant Guidebook
gTLD	generic top-level domain
ICANN	Internet Corporation for Assigned Names and Numbers
ICC	International Chamber of Commerce
ICESCR	International Covenant on Economic, Social and Cultural Rights
IO	Independent Objector
Practice Note	Practice Note on the Administration of Cases under the New gTLD Dispute Resolution Procedure
Procedure	New gTLD Dispute Resolution Procedure
Rules	Procedure and the Rules for Expertise of the ICC
TLD	top-level domain
UDHR	Universal Declaration of Human Rights
UDRP	Universal Domain-Name Dispute-Resolution Policy

THE EXPERT PANEL

Name	Prof. James Crawford
Address	LAUTERPACHT CENTRE FOR INTERNATIONAL LAW 5 Cranmer Road
City, Country	Cambridge CB3 9BL, United Kingdom
Telephone	
Email	jrc1000@cam.ac.uk

Name	Prof. Maria Gavouneli
Address	GAVOUNELI MICHA LAW FIRM Karneadou 43
City, Country	Athens 10676, Greece
Telephone	
Email	mgavoun@law.uoa.gr

Name	Mr James Jude Bridgeman
Address	JAMES BRIDGEMAN, BARRISTER AT LAW The Law Library, The Four Courts, Inns Quay
City, Country	Dublin 7, Ireland
Telephone	
Email	bridgeman@adreupe.com

IDENTIFICATION OF THE PARTIES AND THEIR REPRESENTATIVES

Objector

Name	Prof. Alain Pellet, Independent Objector
Contact	
Address	16, Avenue Alphonse de Neuville
City, Country	92380 Garches, France
Telephone	
Email	contact@independent-objector-newgtlds.org

Objector's Representatives

Name	Ms Héloïse Bajer-Pellet
Contact	
Address	15, Rue de la Banque
City, Country	75002 Paris, France
Telephone	+33 1 53 45 47 47
Email	avocat@bajer.fr

Name	Mr Daniel Müller
Contact	
Address	20, Avenue du Général de Gaulle
City, Country	78290 Croissy sur Seine, France
Telephone	+33 1 39 76 52 29
Email	mail@muellerdaniel.eu

Name	Mr Phon van den Biesen
Contact	
Address	De Groene Bocht, Keizersgracht 253
City, Country	1016 EB Amsterdam, The Netherlands
Telephone	+31 20 7 37 18 69
Email	phonvandenbiesen@vdbkadvocaten.eu

Name	Mr Sam Wordsworth, QC
Contact	
Address	24 Lincoln's Inn Fields
City, Country	London, WC2A 3EG, United Kingdom
Telephone	+44 20 7813 8000
Email	SWordsworth@essexcourt.net

Applicant

Name	Silver Glen, LLC
Contact person	Daniel Schindler, Jon Nevett
Address	10500 NE 8th Street, Suite 350
City, Country	Bellevue, WA 98004, USA
Telephone	+1-424-254-8537
Email	silverglen@donuts.co, secondary@donuts.co

Applicant's Representative

Name	The IP & Technology Legal Group, P.C. dba New gTLD Disputes http://www.newgtlddisputes.com
Contact person	John M. Genga, Don C. Moody
Address	15260 Ventura Blvd., Suite 1810
City, Country	Sherman Oaks, CA 91403, USA
Telephone	+1-888-402-7706; +1-818-444-4582
Email	john@newgtlddisputes.com, don@newgtlddisputes.com

I. INTRODUCTION

1. In 2012, the Internet Corporation for Assigned Names and Numbers (*ICANN*) opened applications for new generic top-level domains (*gTLDs*). This Expert Determination relates to one of those applications and the Objection filed against it by the Independent Objector.
2. The Independent Objector is empowered to file objections against ‘highly objectionable’ *gTLD* applications to which no objection has otherwise been filed. The Independent Objector ‘does not act on behalf of any particular persons or entities, but acts solely in the best interests of the public who use the global Internet’.¹ Objections may be of two types: (i) Limited Public Interest Objections and (ii) Community Objections.² The Independent Objector is currently Professor Alain Pellet.
3. The Application in question here was made by Silver Glen, LLC (*Applicant*), for the *gTLD* <.healthcare> (Application ID 1-1492-32589). The Applicant is a wholly-owned subsidiary of Dozen Donuts, LLC, which has applied for 307 *gTLDs*, both directly and through various subsidiaries. A number of those applications relate to the health sector, but many are in unrelated sectors.
4. The Independent Objector brought a Limited Public Interest Objection against that Application. The basis of such an objection is 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’.³
5. Pursuant to Article 3(c) of the ‘New *gTLD* Dispute Resolution Procedure’ (*Procedure*),⁴ Limited Public Interest Objections are administered by the International Centre for Expertise (*Centre*) of the International Chamber of Commerce (*ICC*). By applying for a

¹ *gTLD Applicant Guidebook*, version 2012-06-04, §3.2.5, available at <http://newgtlds.icann.org/en/applicants/agb> (*Guidebook*).

² *Ibid.*

³ *Guidebook*, §3.2.1.

⁴ New *gTLD Dispute Resolution Procedure*, version 2012-06-04, available at <http://newgtlds.icann.org/en/applicants/agb> (*Procedure*).

gTLD, the Applicant accepted the applicability of the Procedure and the Rules for Expertise of the ICC (*Rules*), as supplemented by the ICC. The ICC has issued a ‘Practice Note on the Administration of Cases under the New gTLD Dispute Resolution Procedure’ (*Practice Note*), which is to be considered such a supplement.⁵ By filing its Objection, the Independent Objector likewise accepted the applicability of those instruments.⁶

II. PROCEDURAL HISTORY

6. The Applicant made its Application on 13 June 2012 and the Independent Objector filed the Objection on 12 March 2013.
7. As required by Article 9(a) of the Procedure, the Centre conducted an administrative review of the Objection and determined that it complied with Articles 5 to 8 of the Procedure and the Rules on 29 March 2013. The Objection was thus registered for processing pursuant to Article 9(b) of the Procedure.
8. On 15 April 2013, the Centre invited the Applicant to file a response within 30 days; the Applicant did so on 15 May 2013.
9. The Chairman of the Standing Committee of the Centre appointed Lord Collins of Mapesbury as Chair of the Panel and Professor Maria Gavouneli and Mr James Jude Bridgeman as Co-Experts of the Panel on 12 June 2013 and by letter dated 18 June 2013, the Centre advised the parties that such appointment had been made. On 10 July 2013, Lord Collins resigned as Chair, and subsequently on 19 July 2013 the Chairman of the Standing Committee of the Centre appointed Professor James Crawford as Chair of the Panel. The Centre informed the parties of this appointment by letter dated 23 July 2013.

⁵ ICC Practice Note on the Administration of Cases under the New gTLD Dispute Resolution Procedure, version 2012-01-11, available at <http://www.iccwbo.org/products-and-services/arbitration-and-adr/expertise/introduction-to-icann-new-gtld-dispute-resolution> (*Practice Note*).

⁶ Procedure, Arts. 1(c), 1(d) and 4(b)(iii).

10. As no objection to the appointment of Professor Crawford was received and as the parties had paid their advance payments of the estimated costs, the Centre confirmed the full constitution of the Panel on 31 July 2013 and transferred the file to the Panel on the same day. In accordance with Article 21(a) of the Procedure, the Panel is required to make ‘reasonable efforts’ to ensure that the Expert Determination is rendered within forty-five days of that date.
11. On 2 August 2013, the Independent Objector requested that the Panel authorize him to submit an additional written statement pursuant to Article 17(a) of the Procedure. On 5 August 2013, the Panel authorized the Independent Objector to file further observations, responsive to the Applicant’s submissions, by 12 August 2013 and the Applicant to file further observations, similarly responsive, by 19 August 2013.
12. On the same date the Panel informed the parties that the Objection was not dismissed under the ‘quick look’ procedure detailed in section 3.2.2.3 of the ‘gTLD Applicant Guidebook’ (*Guidebook*), which is ‘designed to identify and eliminate frivolous and/or abusive objections’.
13. The Independent Objector subsequently filed an Additional Written Statement dated 12 August 2013, and the Applicant filed a Response to the Additional Written Statement dated 19 August 2013.
14. The language of all submissions and proceedings is English pursuant to Article 5(a) of the Procedure. All communications by the parties, the Panel and the Centre were submitted electronically pursuant to Article 6(a) of the Procedure. No hearing has taken place, nor was one requested by the parties. The Expert Determination was rendered to the Centre within the 45-day time limit as requested by Article 21(a) of the Procedure.

III. THE RELEVANT PROVISIONS

15. The Guidebook sets out 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. It provides:

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 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;
- 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.⁷

16. The Objection here is based on the fourth ground viz. that the applied-for gTLD string would be contrary to specific principles of international law as reflected in relevant international instruments of law.

IV. THE OBJECTION AND THE APPLICANT'S RESPONSES

(a) The Application

17. The Applicant has made a standard, as distinct from a community-based, application and proposes an 'open', commercially-based gTLD. The Application states, *inter alia*, that:

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

⁷ Guidebook, §3.5.3.

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

As detailed throughout this application, we have struck the correct balance between consumer and business safety, and open access to second level names...

We will use our significant protection mechanisms to prevent and eradicate abuse, rather than attempting to do so by limiting registrant eligibility...

[We] will specifically adhere to ICANN-required registration policies and will comply with all requirements of the Registry Agreement and associated specifications regarding registration policies. Further, [we] will not tolerate abuse or illegal activity in this TLD, and will have strict registration policies that provide for remediation and takedown as necessary.⁸

(b) The Objection

18. The Independent Objector's arguments are essentially that there is a right to health established under principles of international law and reflected in identified international instruments; that healthcare is an essential aspect of the right to health; that there is an obligation on both states (government and local government) and individuals to respect the right to health; that access to health-related information and goods is essential to the right to health; and that the establishment of <.healthcare> as an open gTLD without restrictions or proper safeguards demonstrates that the Applicant is not conscious of its responsibilities, which may compromise the right to health. He concludes that an open gTLD is inappropriate.⁹

(c) The Applicant's Response

19. The Applicant confirms that it proposes to 'make the <.healthcare> registry open to all consumers, creating paths of communication more expansive than the narrow use to

⁸ Application, answers 18(a) and 18(b).

⁹ Objection, pp. 7-15.

which Objector believes the TLD should be put'.¹⁰ It argues that the fourth ground on which gTLDs can be considered contrary to international legal norms relating to morality and public order 'does not serve as a simple "catch-all"'¹¹ but that, read in accordance with the *eiusdem generis* principle, a gTLD, to fall within the fourth category, 'must violate precepts of international law closely akin to those proscribing such severe transgressions as lawless violence, discrimination based on race or similar inborn characteristics, or child pornography and sexual abuse'.¹² The Applicant argues that '[n]owhere ... does the Objector identify anything about the *string*, or regarding how the Applicant plans to administer it, that runs *contrary* to any *specific* principle of international law'.¹³

(d) The Independent Objector's Additional Written Statement

20. In his Additional Written Statement, the Independent Objector argues that the Safeguard Advice issued by the ICANN Governmental Advisory Committee (GAC) on 11 April 2013 supports his position.¹⁴ He rejects the Applicant's assumption that Limited Public Interest Objections are exclusively reserved for objections to the very term used for the string,¹⁵ and further argues that 'the Applicant pays no attention to the fact that the IO's Objection takes as its starting point that "Health" is a crucial, existential need for each and every human being'.¹⁶ The Independent Objector also argues that the *eiusdem generis* principle is not applicable and that the fourth category 'is of a quite different nature than the previous three'.¹⁷

¹⁰ Response, p. 5.

¹¹ Response, p. 9.

¹² Response, p. 10 (emphasis original).

¹³ Response, p. 8 (emphasis original).

¹⁴ Additional Written Statement, p. 8.

¹⁵ Additional Written Statement, pp. 9-10.

¹⁶ Additional Written Statement, p. 10.

¹⁷ Additional Written Statement, p. 11.

(e) The Applicant’s Response to the Additional Written Statement

21. In its further Response the Applicant states that it does not disagree that ‘health is a fundamental human right, codified in significant source [*sic*] of international law’.¹⁸ However, it argues that the Independent Objector provides no evidence that the string, or ‘Donuts’ plans for it *as stated in the Application*, would *violate* any international legal protection’.¹⁹ In the Applicant’s view ‘the Guidebook does not allow the Independent Objector or this Panel to look at anything past the string itself *other than the Application*’.²⁰ It further argues that the document issued by the GAC on 11 April 2013 ‘expressly does *not* call for disallowance of a <.HEALTHCARE> string’,²¹ and that in any event ICANN has no obligation to adopt the GAC’s recommendations regarding the string.²²

V. THE PANEL’S DECISION

(a) The Panel’s mandate

22. The Independent Objector has asked this Panel to determine that the applied-for gTLD string would be contrary to specific principles of international law as reflected in relevant international instruments.

23. An initial question is whether the Panel is restricted to the string itself or the string in the context of the Application, or something more.

24. The emphasis in the Guidebook is on the gTLD string itself, although it is explained that the Panel can also take into account the content of the Application:

¹⁸ Response to the Additional Written Statement, p. 2 (emphasis original).

¹⁹ Response to the Additional Written Statement, p. 2 (emphasis original).

²⁰ Response to the Additional Written Statement, p. 1 (emphasis original).

²¹ Response to the Additional Written Statement, p. 2 (emphasis original).

²² Response to the Additional Written Statement, p. 5.

The 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.²³

By implication a panel may not go further and take into account other matters as context.

25. The Applicant's position is that the Panel must focus on the string itself. It stresses that the word 'healthcare' is not in itself objectionable and that this has been admitted by the Independent Objector. But in the Panel's view it should take a somewhat broader approach and look at how the TLD will be operated as proposed in the Application.
26. This approach is supported by the Applicant's statement in the Response: 'To prevail the Objection [*sic*] must discharge that burden and *prove* that the *string* or its intended use, as stated in the application, runs afoul of legal strictures against the type of abhorrent conduct described in the objection standard. AGB §§ 3.5, 3.5.3.'²⁴
27. A further question arises as to the scope of this Panel's remedial authority, given that the Independent Objector has not simply sought a determination that the Objection is valid but has also included an alternative submission that the Objection be upheld for so long as the Applicant has not provided solutions for the serious objections raised in the Objection.²⁵
28. Guidebook §3.5.3 contemplates that an Objection will either fail or succeed outright; it neither permits nor prohibits a conditional finding such as the alternative remedy sought in the Objection. Article 21(d) of the Procedure is similarly restricted: 'The 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... of its advanced payment(s) of Costs'.

²³ Guidebook, §3.5.3.

²⁴ Response, p. 8.

²⁵ Objection, p. 15.

(a) The role of good faith

29. In its Response, the Applicant made an attack on the good faith of the Independent Objector based primarily on writings published by a member of the Independent Objector's staff. The Independent Objector having responded in appropriate terms to these remarks, they were not pressed by the Applicant in its Response to the Additional Written Statement.

30. In the Panel's view there is no basis whatever for any allegations of bad faith or overreaching on the part of the Independent Objector in relation to this novel procedure. The allegations ought not to have been made and in the event, as noted, were not pressed. We need say nothing more about them.

(b) Relevant principles of international law

31. Paragraph 3.5.3 of the Guidebook states that:

An expert panel hearing a Limited Public Interest objection will consider whether the applied-for gTLD string is contrary to general principles of international law for morality and public order.

It lists a number of instruments containing general principles, stressing that they are only examples. In the present case, the Independent Objector relies specifically on the Universal Declaration of Human Rights (*UDHR*) and the International Covenant on Economic, Social and Cultural Rights (*ICESCR*).

32. As noted already, the Objection is based on ground four: 'an applied-for gTLD string would be contrary to specific principles of international law as reflected in relevant international instruments of law'.

33. The phrase 'general principles of international law for morality and public order' is not self-explanatory, although the guidance given in the Guidebook takes matters a little further. There is no reason to doubt that there could be principles of international law

recognizing norms of morality and public order and pertaining to the selection of global domain names; for example, in relation to child pornography²⁶ or traffic in illicit drugs.²⁷

34. In this regard the Panel agrees with the Independent Objector that there is no room for the application of the *eiusdem generis* rule in order to support a restrictive interpretation of the fourth ground of objection listed in §3.5.3 of the Guidebook. Even if there could be discerned a genus among the first three grounds (which the Panel does not accept), there is no reason not to give the fourth ground its full effect, provided it is established that the gTLD in question is indeed ‘contrary to *specific* principles of international law as reflected in relevant international instruments of law’ (emphasis added).²⁸
35. On the other hand it must be emphasized that what is at issue here is the propriety of the applied-for string and the regulation of the proposed <.healthcare> gTLD, and not the policy of ICANN in opening up new gTLDs in domains such as <.healthcare>, a policy which potentially applies to dozens or even hundreds of terms.
36. The Independent Objector relies on the right to health. He argues that health is not just another commodity, that it is a human right recognized since 1948 in Article 25 of the UDHR.²⁹ The relevant provision is rather narrowly formulated:

1. Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services...

The right is also recognized in other instruments, most notably in Article 12 of the ICESCR.³⁰

²⁶ Convention on the Rights of the Child, 20 November 1989, 1577 UNTS 3.

²⁷ United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, 20 December 1988, 1582 UNTS 164.

²⁸ It may be noted that even in those legal systems which recognize the *eiusdem generis* rule it has been described as ‘nothing but a guide, and sometimes an uncertain guide’ to construction: *James Buchanan & Co Ltd v Babco Forwarding & Shipping (UK) Ltd* [1978] AC 141, 160; [1977] 74 ILR 574, 602 (Lord Salmon); and see AD McNair, ‘Application of the *Ejusdem Generis* Rule in International Law’, (1924) 5 *BYIL* 181, 182.

²⁹ Objection, p. 8.

³⁰ International Covenant on Economic, Social and Cultural Rights, 16 December 1966, 993 UNTS 3.

1. The States Parties to the present Covenant recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.

2. The steps to be taken by the States Parties to the present Covenant to achieve the full realization of this right shall include those necessary for:

...

(d) the creation of conditions which would assure to all medical service and medical attention in the event of sickness.

37. Both these instruments are expressly mentioned in the Guidebook. The Panel takes them as reflecting established principles for the purpose of this Determination, noting that the UDHR is widely cited and the ICESCR is widely ratified.

38. ICESCR Article 12(2)(d) obliges states to create the conditions ‘which would assure to all medical service and medical attention in the event of sickness’. The United Nations Committee on Economic, Social and Cultural Rights defines ‘health’ as including ‘healthcare’.³¹ The Independent Objector argues that access to health-related information, as well as access to health-related facilities, goods and services, are essential elements of a right to health.

39. The Independent Objector further argues that:

It is clear that the implementation of the obligations discussed above may be hindered, and therefore the right to health may be compromised in case any entity would launch a .Healthcare 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.³²

40. In the Panel’s view, even if these are components of the ‘right to health’, such right remains a very general one and does not mandate any particular arrangement of the internet or the advance prohibition of any term such as <.health> or <.healthcare>,

³¹ Committee on Economic, Social and Cultural Rights, General Comment No. 14 (2000), ‘The right to the highest attainable standard of health (article 12 of the International Covenant on Economic, Social and Cultural Rights)’, UN doc. E/C.12/2000/4, especially paras. 9-11 (*General Comment*).

³² Objection, p. 11.

provided there are adequate safeguards appropriate to the sensitive character of the <healthcare> gTLD. This is the case regardless of whether the right imposes obligations only on states or also on individuals and other entities such as ICANN. After all the Guidebook treats the relevant international standards as having to be complied with by gTLD applicants, and in effect by ICANN itself, and appropriately so.

41. The General Comment on the right to health issued by the Committee on Economic, Social and Cultural Rights states that:

Violations of the obligation to protect follow from the failure of a State to take all necessary measures to safeguard persons within their jurisdiction from infringements of the right to health by third parties. This category includes such omissions as the failure to regulate the activities of individuals, groups or corporations so as to prevent them from violating the right to health of others; the failure to protect consumers and workers from practices detrimental to health, e.g. by employers and manufacturers of medicines or food; the failure to discourage production, marketing and consumption of tobacco, narcotics and other harmful substances; the failure to protect women against violence or to prosecute perpetrators; the failure to discourage the continued observance of harmful traditional medical or cultural practices; and the failure to enact or enforce laws to prevent the pollution of water, air and soil by extractive and manufacturing industries.³³

The General Comment does not provide a binding interpretation of Article 12 of the ICESCR, but that is not the real point. The real point is that there is no reason or basis to anticipate that an open gTLD would be such that it would be signally abused, provided there are safeguards if and when abuse occurs. If the granting of a gTLD is not itself a breach of the right to health, then what is stated in the above paragraph has nothing to operate on.

(c) Application of the Independent Objector's arguments to the facts of this case

42. There is, as the Independent Objector concedes, nothing untoward in the gTLD <healthcare> as such. Nor does the further information set out in the Application give serious cause for concern.

³³ General Comment, para. 51.

43. The Applicant emphasises the right of those who will apply to it for second level names to freedom of expression.³⁴ In its response to question 18(a) in its Application, the Applicant states:

We recognize some applicants seek to address harms by constraining access to the registration of second level names. However, we believe attempts to limit abuse by limiting registrant eligibility is unnecessarily restrictive and harms users by denying access to many legitimate registrants. Restrictions on second level domain eligibility would prevent law-abiding individuals and organizations from participating in a space to which they are legitimately connected, and would inhibit the sort of positive innovation we intend to see in this TLD.

However, it goes on to state that:

As detailed throughout this application, we have struck the correct balance between consumer and business safety, and open access to second level names.

By applying our array of protection mechanisms, Donuts will make this TLD a place for Internet users that is far safer than existing TLDs. Donuts will strive to operate this TLD with fewer incidences of fraud and abuse than occur in incumbent TLDs. In addition, Donuts commits to work toward a downward trend in such incidents.

44. In the Panel's view it is necessary for the Applicant to have, at the least, a process by which unlawful, misleading or deceptive entries can be corrected, but it is desirable that the Applicant should go further and include additional safeguards appropriate to the sensitive character of the proposed <.healthcare> gTLD (see further paragraphs 50-51).

45. The Applicant takes the position that 'attempts to limit abuse by limiting registrant eligibility is unnecessarily restrictive and harms users by denying access to many legitimate registrants'. While the Panel notes that the Applicant proposes to establish a process to protect internet users, as reflected in the commitments it has made in its Application,³⁵ it is desirable that it should go further than the commitments it has made to date.

³⁴ See e.g. Declaration of John Nevett dated 15 May 2013, para. 8. (Annex B to the Response).

³⁵ Application, answers 18(a), 18(b) and 29.

46. ICANN for its part has accepted that there are particular needs in dealing with sensitive domain names, including the health sector. It has specified the following further safeguards:

1. Controls to ensure proper access to domain management functions;
2. 24/7/365 abuse point of contact at registry;
3. Procedures for handling complaints of illegal or abusive activity, including remediation and takedown processes;
4. Thick WhoIs;
5. Use of the Trademark Clearinghouse;
6. A Sunrise process;
7. A Trademark Claims process;
8. Adherence to the Uniform Rapid Suspension system;
9. Adherence to the Uniform Domain Name Dispute Resolution Policy;
10. Adherence to the Post Delegation Dispute Resolution Policy;
11. Detailed security policies and procedures;
12. Strong security controls for access, threat analysis and audit;
13. Implementation DNSSEC; and
14. Measures for the prevention of orphan glue records.³⁶

47. In addition, the Applicant has offered further commitments of its own:

1. Periodic audit of WhoIs data for accuracy;
2. Remediation of inaccurate WhoIs data, including takedown, if warranted;
3. A new Domain Protected Marks List (DPML) product for trademark protection;
4. A new Claims Plus product for trademark protection;
5. Terms of use that prohibit illegal or abusive activity;
6. Limitations on domain proxy and privacy service;
7. Published policies and procedures that define abusive activity; and
8. Proper resourcing for all of the functions above.³⁷

It adds that:

1. For this string, to supplement the periodic audit documented above, a deeper and more extensive verification of WhoIs data accuracy, with associated remediation and takedown processes.
2. Exclusion of registrars with a history of poor compliance;

³⁶ Application, answer 18(a).

³⁷ Application, answer 18(a).

3. Regular monitoring by the registry of registered domains for pharming, phishing, spam, botnets, copyright infringement and other forms of abuse, and remediation and takedown processes; and
4. In addition to registry-based procedures, requirements that registrars have a 24/7/365 abuse contact, and remediation and takedown processes.³⁸

48. In the Panel's view, these are substantial commitments which, if respected, should alleviate many of the concerns expressed by the Independent Objector. It is for ICANN, advised as necessary by the GAC, to ensure, first, that these commitments are met, and secondly that any additional commitments which may prove in practice necessary and desirable to protect consumers in this sensitive area are required to be made.

49. On the other hand the Panel considers that as a general matter it is reasonable for an applicant conforming with applicable ICANN policies to leave questions of legality and accuracy of offerings under a given gTLD to be resolved by some subsequent procedure rather than doing so in advance. It may be noted in this context that the Universal Domain-Name Dispute-Resolution Policy (*UDRP*) is a precedent for a dispute resolution mechanism that can determine issues of alleged unlawfulness or abuse, provided that appropriate guidelines are set and definitions established.

50. Both parties rely on the position taken by the GAC at the Beijing meeting in 2013. For the Independent Objector, in the Safeguard Advice issued by the GAC on 11 April 2013:

the GAC advises that extensive additional safeguards should be put in place for a whole range of TLDs. The .healthcare TLD is included in this part of the advice (Annex 1, Category 1 of the GAC's advice). Also, the GAC advises to allow registration restrictions for particular strings – among them .healthcare – which 'should be appropriate for the types of risks associated with the TLD (Annex 1, Category 2 of the GAC's advice). The GAC Safeguard Advice confirms the concerns expressed by the IO in its Objection and the sensitivity of a new '.healthcare' gTLD...³⁹

For the Applicant:

³⁸ Application, answer 18(a).

³⁹ Additional Written Statement, p. 8.

The GAC stated in its advice, however, that it recommends registration restrictions for only ‘some’ of the listed strings. We do not yet know if <.HEALTHCARE> is one of them. If it is, and the Board accepts the GAC advice, Applicant of course would abide by that decision. It is a *policy* decision, however, that should be made by the ICANN Board and not by the IO or this Panel. Current policy as expressed in the Guidebook does not allow for the onerous restrictions for which the IO advocates, providing only for determination of whether a string or application itself would violate international law.⁴⁰

51. The Panel would observe that the positions taken by the GAC are advisory and consultative only and do not become operational within the domain name system until accepted by ICANN. It further notes that while the gTLD <.healthcare> is among those of concern, the GAC has not gone so far as to recommend that it not be accepted.

52. In the Panel’s view, questions of the regime to be applied in broad areas such as the health sector fall within the general policies of ICANN and are not to be determined by expert panels acting in relation to individual, themselves not improper, strings. To the extent that the commitments undertaken by the Applicant do not sufficiently address the GAC’s policy concerns, it is for the GAC and ICANN to determine what course of action to take. It would not be appropriate for this Panel to specify in further detail the appropriate regulation of the proposed domain.

53. The Applicant also relied on the burden of proof incumbent on the Independent Objector in relation to an objection. For the reasons given, the Panel is of the opinion that the Objection fails without need to decide on burden of proof grounds.

(d) Remedies available

54. Article 14(e) of the Procedure states that:

Upon 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.

Article 21(d) provides that:

⁴⁰ Response to the Additional Written Statement, p. 5.

The 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.

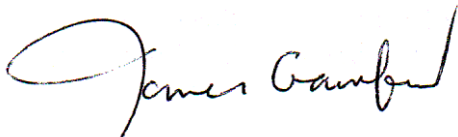
The phrasing of this provision suggests that a panel's role is limited to determining which is the prevailing party, and that a panel does not have any discretion to determine the quantum of the refund to be paid. If this Panel had such discretion, it would have reduced the refund to be paid to the Applicant to take account of the Applicant's unjustified attack on the good faith of the Independent Objector.

(e) Decision

55. For these reasons, taking into account all the arguments of the parties, and notably the commitments referred to in the Application,⁴¹ the Panel hereby renders the following Expert Determination in accordance with Article 21(d) of the Procedure:

- (a) the Objection of the Independent Objector is dismissed;
- (b) SILVER GLEN LLC, the Applicant, prevails;
- (c) the Applicant's advance payment of costs shall be refunded by the Centre.

26 November 2013



Prof. James Crawford
Chair of the Expert Panel

⁴¹ Application, answers 18(a), 18(b) and 29.

A handwritten signature in blue ink, appearing to read 'Maria Gavouneli', enclosed within a hand-drawn triangular shape.

Prof. Maria Gavouneli

Co-Expert of the Expert Panel

A handwritten signature in blue ink, appearing to read 'James Bridgeman', written in a cursive style.

Mr James Bridgeman

Co-Expert of the Expert Panel