

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

CASE No. EXP/421/ICANN/38

FÉDÉRATION INTERNATIONALE DE SKI

(SWITZERLAND)

vs/

WILD LAKE, 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.

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## EXPERT DETERMINATION OF A COMMUNITY OBJECTION TO AN APPLICATION FOR A NEW GENERIC TOP-LEVEL DOMAIN NAME (<.SKI>)

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The undersigned Expert, appointed by the ICC's International Centre for Expertise to sit alone as the Expert Panel in the above-referenced matter, hereby issues the following Expert Determination resolving the above-referenced objection:

### A INTRODUCTION

1. This dispute arises under the programme established by the Internet Corporation for Assigned Names and Numbers ('**ICANN**') for the operation of new generic top-level domain names ('**gTLD**'). Background information about that programme can be found in the ICANN Generic Names Supporting Organisation, Final Report, Introduction of New Generic Top-Level Domains, 8 August 2007 (the '**GNSO Final Report**').
2. Wild Lake, LLC of 155 108<sup>th</sup> Avenue NE, Suite 510, Bellevue, WA 20166, United States of America (the '**Applicant**'), represented by John M. Genga and Don C. Moody of The IP & Technology Legal Group, P.C., 15260 Ventura Blvd. Suite 1810, Sherman Oaks, CA 91403, USA, is a subsidiary of Donuts Inc., which has applied (either directly or through its affiliated enterprises, including the Applicant) for more than 300 new gTLDs.
3. Fédération Internationale de Ski of Blochstrasse, 2, CH-3653 Oberhofen/Thunersee, Switzerland (the '**Objector**'), is an association organised under Swiss law.
4. On 13 June 2012, the Applicant submitted an application for the new gTLD <.SKI> (Application No. 1-1636-27531: the '**Application**'). On 13 March 2013, the Objector filed a 'Community Objection' to the Application, i.e., it objected to the Application on the basis that '[there is substantial opposition to the gTLD application from a significant portion of the community to which the gTLD string may be explicitly or implicitly targeted](#)' (the '**Objection**').
5. The purpose of these proceedings is to determine whether or not the Objection is well-founded and should therefore prevail over the Application. The rules that govern this matter are (1) the ICANN's gTLD Applicant Guidebook (v. 2012-06-04) (the '**Guidebook**'); (2) in particular, the New gTLD Dispute Resolution Procedure attached to Module 3 of the Guidebook (the '**Procedure**'); and (3) the Rules for Expertise of the ICC (the '**Rules**'), as supplemented by (4) the ICC Practice Note on the Administration of Cases under the New gTLD Dispute Resolution Procedure. Article 20 of the Procedure states that to determine whether an objection to an application for a new gTLD should prevail, '[the Panel shall apply the standards that have been defined by ICANN. In addition, 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](#)'. The standards defined by ICANN in relation to Community Objections to new gTLD

applications are set out in Module 3 of the Guidebook, and the most relevant parts are quoted below.

## **B. PROCEDURAL HISTORY**

### **B.1 Administrative review of the Objection, and Response**

6. Under Article 3(d) of the Procedure, Community Objections are administered by the ICC's International Centre for Expertise (the '**Centre**'). On 2 April 2013, the Centre completed its administrative review of the Objection, determined that the Objection complied with all applicable requirements, and therefore notified the Applicant of the Objection on 15 April 2013.
7. The Applicant filed a response to the Objection on 16 May 2013 (the '**Response**').

### **B.2 Appointment of the Expert**

8. On 19 June 2013, the Centre notified the parties that it had appointed the undersigned, Jonathan Taylor of Bird & Bird LLP, 15 Fetter Lane, London, UK, to sit alone as the Expert determining this matter, and provided them with the undersigned's Declaration of Acceptance and Availability, Statement of Impartiality and Independence, in which the undersigned had included the following statement:

Acceptance with disclosure: I am impartial and independent and intend to remain so. However, mindful of my obligation to disclose any facts or circumstances which might be of such a nature as to call into question my independence in the eyes of any of the parties or that could give rise to reasonable doubts as to my impartiality, I draw attention to the matters below ... .

Neither my firm nor I has ever acted for either party. However, I do know Sarah Lewis of FIS. I met her in 2007, when I advised a working party convened by the World Anti-Doping Agency to consider revisions to the International Standard for Testing, and she was a member of that Working Party. I have seen her at anti-doping seminars from time to time since then. I do not consider this affects my independence and impartiality but note it in the interests of full disclosure.

9. On 1 July 2013, the Applicant objected to the appointment of the undersigned as Expert in this matter on the following grounds: '**Applicant has considered and appreciates Mr. Taylor's disclosure [that he personally knows and has specifically worked with someone within Objector's organization]. It does not doubt his best intentions when he states that he does not expect that his professional familiarity with Sarah Lewis of FIS would affect his independence and impartiality. However, Applicant respectfully submits that the connection between the two impacts the appearance of impartiality, regrettably making disqualification of Mr. Taylor appropriate**'. The Objector opposed that request on 1 July 2013, asserting that there were no factual grounds to doubt the undersigned's independence and impartiality.
10. On 12 July 2013, the Centre requested that the undersigned provide his comments on the Applicant's objection (which it treated as a request for replacement of the Expert). The undersigned provided the following comments on 16 July 2013:

My understanding is that the Applicant is not suggesting actual bias on my part. I am grateful for that and can confirm it would be my clear intention and commitment to decide the matter based on the merits alone.

However, the Applicant is concerned that there is an 'appearance of bias' that necessitates my replacement as Expert in this matter. It is for others to decide whether this is a proper ground for objection under the applicable rules and, if so, what is the proper test to determine if appearance of bias exists. (For what it is worth, the test under English law would be whether the facts would lead a fair-minded and informed observer to conclude that there was a real possibility that I would be pre-disposed or prejudiced in favour of the Objector and/or against the Applicant for reasons unconnected with the merits of the case). For my part, I would only say that I do not think it unreasonable for the Applicant to raise this concern and I am not offended in any way by its doing so.

I obviously could not rule on any such objection myself. I can only comment on the relevant facts, as to which I can confirm that the Objector is correct in saying that (a) neither my firm nor I has ever acted for either party in the past; (b) I have never been engaged by or acted for FIS 'as legal counsel, advisor or suchlike'; (c) I was instructed by WADA to work on the revision of the International Standard for Testing in the period 2007-2009; (d) WADA also convened a working party (which had 8 members in total, as I recall, including Sarah Lewis) of representatives of stakeholders to provide their input into proposed revisions to the Standard, and I attended the meetings of that working party; (e) no register was taken of attendance at meetings so I cannot specifically confirm that Ms Lewis attended only two meetings of the working party, but I recall that she did not attend all of the meetings and that her assistant Ms Fussek took on some of the role on her behalf at some point; and (f) while I am currently working on a further revision of the International Standard for Testing for WADA, neither Sarah Lewis nor anyone else from the FIS is involved in that process.

11. On 25 July 2013 the Chairman of the Standing Committee of the Centre rejected the Applicant's request for replacement of the Expert, and confirmed the appointment of the undersigned as Expert in this matter. On 26 July 2013 the file was transferred to the Expert. All subsequent communications between the Parties, the Expert and the Centre were submitted electronically pursuant to Article 6(a) of the Procedure. The language of all submissions and proceedings was English pursuant to Article 5(a) of the Procedure.

### **B.3 Reply and Sur-Reply**

12. On 27 June 2013, the Objector sought to make a supplementary submission (the '**Reply**'), 'solely for the purpose of responding to certain factual and legal inaccuracies set forth in' the Response. By email dated 4 July 2013, the Applicant objected to the Reply and asked that it be rejected without consideration.
13. On 2 August 2013, the Expert advised the parties that he was willing to accept the Reply, in exercise of the discretion given to him under Article 17 of the Procedure, on the basis that the Applicant would have two weeks to file any response to the Reply that it saw fit. The Applicant submitted such response (the '**Sur-Reply**') on 16 August 2013.
14. Neither party has sought leave to file any further submissions since then, and therefore the record is considered complete. No hearing was requested or took place.
15. Article 21(a) of the Procedure provides that the Centre and the Expert shall make reasonable efforts to ensure that the Expert renders his decision within 45 days of '**the constitution of the Panel**'. The Centre considers that the Panel is constituted when the Expert is appointed, the

Parties have paid their respective advances on costs in full and the file is transmitted to the Expert. In this case, the Panel was constituted on 26 July 2013. The Centre and the Expert were accordingly to make reasonable efforts to ensure that his determination was rendered no later than 9 September 2013 (as calculated in accordance with Articles 6(e) and 6(f) of the Procedure). Pursuant to Article 21(b) of the Procedure, the Expert submitted his determination in draft form to the Centre for scrutiny as to form before it was signed.

16. The Expert has considered carefully all of the submissions made and the materials put forward by the Objector (in the Objection and the Reply) and by the Applicant (in the Application and the Sur-Reply) to determine whether the Objection satisfies the standards defined by ICANN and set out in Module 3 of the Procedure. The Expert's findings are set out below, first in relation to standing and then in relation to the substantive requirements.

**C. FINDINGS IN RELATION TO STANDING (SECTIONS 3.2.2 AND 3.2.2.4 OF THE GUIDEBOOK)**

17. The Guidebook states that to be 'eligible' to file a Community Objection, the objector must show that it is an 'established institution associated with a clearly delineated community' that is 'strongly associated with the applied-for gTLD string'. (Guidebook sections 3.2.2 and 3.2.2.4). However, it then states that 'standing' to make the objection is established by proof that the objector is an 'established institution associated with a clearly delineated community', and appears to leave the issue of whether that community is 'strongly associated with the applied-for gTLD string' to the substantive part of the process. The Expert will therefore do the same. (See section D.3 below).

**C.1 'Threshold Considerations'**

18. Before getting to the 'Guidebook Elements' of the standing requirements, however, the Applicant raises two 'Threshold Considerations'. (Response pp.5-6).
19. First, the Applicant states that 'the Objector's organization' does not 'constitute a "community" as ICANN contemplated it. ... ICANN envisaged a "community" as a locality, a group of individuals sharing specific characteristics or interests, or entities that provide common services. See, e.g., AGB s.4.2.3 at 4-11. It did not intend for private parties purportedly representing an entire industry to claim community status. *Id.*' (Response pp.6-7). However, these citations are to Module 4 of the Procedure, relating to a Community-Based Evaluation conducted as part of a string contention procedure, where the applicant for a new gTLD has to show that it will operate the gTLD on behalf of a community. That is an entirely separate process from the objection procedure set out at Module 3 of the Procedure, which is the Module that governs these proceedings. The standing requirements for Community Objections, as specified in Module 3, are set out and discussed in detail in the next section of this Expert Determination. Either the Objector can meet those requirements or it cannot, but if

it can, then whether or not it could also meet requirements set out in a different Module in relation to a string contention procedure is irrelevant.

20. Second, the Applicant notes that if a party (or an affiliate) makes a community-based application for a new gTLD, and there is also a standard (i.e., not community-based) application for the same gTLD, then that will trigger a string contention procedure under Module 4 of the Procedure, in which the community-based application will prevail over the standard application if it passes the 'Community Priority Evaluation' set out in that Module 4. The Applicant asserts that in that situation, it is an 'abuse [of] the process' for the community-based applicant also to file an objection to the standard application, in order to get 'a "free shot" at eliminating its principal's competitor'. The Applicant says that is what the Objector is doing here, since it is a 'proxy' for Starting Dot SAS, which has made a community-based application for the <.SKI> gTLD. It says the Expert 'should not countenance such subversive behaviour'. (Response, pp.6-7). In other words, if you (or your affiliate) make a community-based application for a new gTLD and someone else makes a standard application for that same gTLD, you are confined to the string contention procedure, and do not have standing to object to the standard application as well. Otherwise, 'there would be no need for both processes'. (Sur-Reply p.1).
21. The Objector disagrees, noting: 'This assertion is not part of the criteria set by ICANN in the Applicant Guidebook related to the standing of an Objector. Applying for a TLD or supporting an existing Application which serves the interest of a community does not prevent the same community to defend its rights and interests against any other application the community consider as detrimental to its interests'. (Reply p.2).
22. The Expert agrees with the Objector. If ICANN had intended that a community had a choice of either making a community-based application for a new gTLD or opposing a standard application for that new gTLD, but not both, it could easily have said so in the Guidebook. Whereas in fact section 3.2.2 of the Guidebook states what a party must show to establish standing to bring a Community Objection; and section 3.2.2 does not require the party to show that neither it (nor anyone associated with it) has filed a community-based application for the same gTLD. If there was nevertheless such a requirement, tucked away somewhere else, one would assume that the Centre would have disallowed the Objection on that basis alone during its administrative review, i.e., there would have been no need to appoint an Expert to deal with it. The Expert therefore finds there is no such requirement: the fact that the Objector is associated with a community-based application for the <.SKI> gTLD does not prevent it from filing the Objection to the (standard) Application for that gTLD.

## **C.2 'Guidebook Elements'**

23. Focusing, then, on the 'standing' requirements set out in Module 3 of the Guidebook (identified at paragraph 17 above), the Objector must show that it is (i) an established institution (ii) associated with (iii) a clearly delineated community. The Guidebook identifies factors that may

be considered in determining these issues, but explains that '[t]he panel will perform a balancing of the factors listed above, as well as other relevant information, in making its determination. It is not expected that an objector must demonstrate satisfaction of each and every factor considered in order to satisfy the standing requirements'. (Guidebook, section 3.2.2.4).

24. First, then, is the Objector 'an established institution'?

24.1 According to the Guidebook (at p.3-8), '[f]actors that may be considered in making this determination include, but are not limited to, level of global recognition of the institution; length of time the institution has been in existence; and public historical evidence of its existence, such as the presence of a formal charter or national or international registration, or validation by a government, inter-governmental organization, or treaty. The institution must not have been established solely in conjunction with the gTLD application process'.

24.2 The Objector states that it is an association organised under Swiss law that has been in existence since 1924, and that it is recognised by the International Olympic Committee as the sole international governing body for ski sport, governing, regulating and administering ski sport around the world, and directing the development and promotion of ski sport both at the recreational level and at competitive level (local, national, world, and Olympic level competition), directly and/or through its 115 member national federations. (See FIS Statutes, Article 2, Objection Annex 4; and list of registered members, Objection Annex 10). For example, the Objector organises the ski sport events at the quadrennial Winter Olympic Games, as well as World Championships, World Cups and Continental Cups, 'which total around 7,000 international competitions globally each year involving the nine ski disciplines of Cross-Country Skiing, Ski-jumping, Nordic Combined, Alpine skiing, Freestyle Skiing, Snowboard, Speed Skiing, Grass Skiing and Telemark'. (Objection p.5).

24.3 The Applicant says that 'independent evidence' of the existence and 'global recognition' of the Objector is required, and that copies of its Statutes, 'entirely unsworn statements', and references to 'its self-promotional website', do not satisfy this requirement. (Response p.6). However, the Applicant does not cite any authority for this alleged requirement, and in fact as far as the Expert is aware there is no such requirement. To the contrary, according to the Guidebook, an institution's existence 'may' be demonstrated by 'public historical evidence of its existence, such as the presence of a formal charter or national or international registration, or validation by a government, inter-governmental organization, or treaty'. (Guidebook, section 3.2.2.4). The 'may' indicates that this is not mandatory, i.e., other evidence may suffice. Such evidence comes here in the form of the Objector's detailed account of its creation, its



history, its current membership, and its extensive activities as the international governing body of ski sport. That account may be 'unsworn', but in the absence of any suggestion from the Applicant that any of it is untrue, the Expert is prepared to accept its accuracy. And as a result, it is more than clear, in the Expert's view, that the Objector's existence as an established institution has been sufficiently evidenced.

25. Next, is the community on behalf of which the Objector claims to bring the objection 'a clearly delineated community'?

25.1 According to the GNSO Final Report, the term 'community' 'should be interpreted broadly and will include, for example, an economic sector, a cultural community, or a linguistic community. It may be a closely related community which believes it is impacted'. (GNSO Final Report, Implementation Guideline P). According to the Guidebook, factors that may be considered in determining whether the 'community' identified by the objector is a clearly delineated community 'include, but are not limited to, ... the level of formal boundaries around the community'.

25.2 The Objector brings the objection on behalf of 'the Ski community'. It says that community 'is highly organized on local, national and international levels. It is clearly delineated by way of its organizational structure, its values and specialized equipment and resorts'. (Objection p.4). It identifies the following persons and entities as members of that community (ibid. pp.4-6):

25.2.1 Itself, as the sports federation recognised by the IOC as having sole authority to govern and regulate ski sport on a global level, and to organise the ski sport events at the Winter Olympic Games.

25.2.2 Its 115 member national federations (from all five continents), whose responsibility is to govern and regulate ski sport on behalf of the FIS at the national level, directing the developing and promotion of ski sport both as a recreational pastime and as a competitive activity, from the amateur level up to national level and beyond.

25.2.3 The local and regional ski clubs, ski schools, and individuals who are members of the FIS's member national federations. This includes those who compete at international-level competition (for example, in 2012 more than 34,000 registered athletes competed in international ski sport competitions: Objection Annex 20), as well as those who only compete at national level and below.

25.2.4 In addition, some member national federations admit leisure skiers as members. Eleven of FIS's member national federations together have more than 3 million individual members. (Objection Annex 9). And while others do

not, leisure skiers in those countries still 'consider themselves part of the broad ski community', and they can be clearly identified by a 'physical boundary', in that 'without use of equipment ... and access to alpine ski slopes or cross-country courses, it is not possible to be a skier'.

- 25.3 In response, the Applicant states first that to be 'clearly delineated' the community must be 'strongly associated with the applied-for gTLD string'. It says this means 'the word "ski" must readily bring Objector's organization to mind. Merely stating that proposition reveals its folly'. (Response, p.6). The Expert does not agree with this analysis. It conflates the Objector with the community that it is claiming to represent, and it also conflates the requirement that the community be 'clearly delineated' with the requirement that the community be 'strongly associated with the applied-for gTLD'. The 'strong association' requirement is a distinct one, to be addressed separately. (See section D.3 below).
- 25.4 The Applicant asserts that the Objection 'fails to identify what comprises [the Ski community] or what "boundaries" surround it, and instead simply describes the boundaries of its own structure'. (Response p.6). The Expert does not agree. The Objection describes with specificity those who are in 'the Ski community' that it claims to speak for, and how they are identified. (See paragraph 25.2 above). In fact, the community it describes extends beyond 'the boundaries of its own structure' to encompass leisure skiers who are not in membership of one of its member national federations, but that does not matter: the Objector and the community it says it speaks for do not have to be coterminous.
- 25.5 The Applicant notes that 'the Ski community' that the Objector claims to speak for excludes many people who have an interest in 'ski' topics, such as 'spectators, enthusiasts, consumers, retailers, journalists, commentators, historians and others, and involves other activities such as water, sand and jet skiing, to name a few'. (Response p.7). But this is not an argument that the Ski community identified by the Objector is not clearly delineated. Rather it is a separate and distinct argument, that the gTLD <.SKI> and the Ski community identified by the Objector are not synonymous. That argument is addressed at paragraph 42 below.
- 25.6 The Applicant also asserts that the 'community' defined by Starting Dot in its separate community-based application for the gTLD <.SKI> is not clearly delineated. (Response p.7). Whether or not that is true is not for the Expert to decide; all that is relevant here is whether the community that the Objector claims to speak for in relation to this Objection is clearly delineated. For the reasons set out above, the Expert finds that it is.

26. Finally, is the Objector 'associated with' the Ski community?
- 26.1 According to the Guidebook, factors that may be considered in determining whether the objector is associated with the community in question 'include, but are not limited to, the presence of mechanisms for participation in activities, membership, and leadership; institutional purpose related to the benefit of the associated community; performance of regular activities that benefit the associated community; ...'. (Guidebook pp. 3-8).
- 26.2 Clearly the Objector is associated with its member national federations and their members, all of whom can benefit (by means of membership and/or registration) from participation in competitive ski sport as organised and/or sanctioned by the FIS and its members. The Objector runs an Aid & Promotion programme through which it has provided financial support for 50 national ski associations. (Objection p.6). It has also organised a Symposium on the Development of Alpine Ski Sport to investigate cost reduction strategies for top level alpine ski competition, which has involved working with representatives of the ski industry and national ski associations. (Objection, Annex 6 p.58).
- 26.3 However, the Objector asserts that it also works for the benefit of those leisure skiers who may not be formally members of one of its member national federations, but who nevertheless participate in the sport on a recreational level. For example, the Objector backs projects such as 'Bring Children to the Snow' and 'World Snow Day'. (Objection Annex 6 p.59).<sup>1</sup> In addition, it has promulgated the '10 FIS Rules of Conduct of Skiers and Snowboarders' (Objection Annex 16 pp.2-5), which are 'considered globally as the laws for conduct on the [ski] pistes' (Objection Annex 19 p.5) and are adopted by 'hundreds of ski resorts all over the world to define and encourage safe behaviour on the slopes'.
- 26.4 The Applicant asserts that '[t]he only information that [the Objector] offers concerning its activities consists of unsworn statements in the Objection and reference to its self-serving statutes and website. Such sweeping pronouncements with no evidentiary support do not demonstrate an institutional purpose or activities to benefit its putative community'. (Response p.7). Again, the Expert is not aware of any requirement that evidence offered in support of the Objection be 'sworn'. Given the detail that the Objector has provided in relation to those activities, and in the absence of any

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<sup>1</sup> According to the Objector (and not disputed by the Applicant), 'Bring Children to the Snow' is 'designed to be a worldwide campaign to encourage children and families to skiing and the snow'. The second phase of the campaign is the annual event 'World Snow Day', a project initiated and co-ordinated by the Objector to raise public awareness of 'the pleasures that can be enjoyed through activities in the snow'. The World Snow Day website states that the project 'looks beyond FIS membership to the wider snow sports community' and indicates that 435 events were organised across 39 countries on World Snow Day 2013 ([www.world-snow-day.com/cmsfiles/2nd\\_edition\\_world\\_snow\\_day\\_final\\_report.pdf](http://www.world-snow-day.com/cmsfiles/2nd_edition_world_snow_day_final_report.pdf)).

suggestion from the Applicant that anything the Objector says is untrue, the Expert accepts its accuracy.

26.5 The Applicant asserts that the Objector lacks 'any significant relationship with a substantial portion of the community it claims to represent' (Response p.7), but it bases that assertion not on the description of Ski community put forward by the Objector but on the description of community included in Starting Dot's community-based application for the gTLD <.SKI>, which is not relevant for purposes of these proceedings. (See paragraph 25.6 above).

26.6 The Expert therefore finds that the Objector is 'associated with' the Ski community that it has identified in the Objection.

27. Based on the foregoing, the Expert determines that the Objector meets the standing requirements set out in sections 3.2.2 and 3.2.2.4 of the Guidebook, and therefore has standing to object to the Application.

**D. FINDINGS IN RELATION TO THE SUBSTANTIVE REQUIREMENTS FOR A COMMUNITY OBJECTION (SECTION 3.5.4 OF THE GUIDEBOOK)**

28. The Applicant correctly states (Response p.8) that there is a presumption in favour of granting new gTLDs, and therefore a corresponding burden on those who object to an application for a new gTLD to show why the application should not be granted. (See Guidebook, section 3.5). For example, to sustain a Community Objection, the Objector must show that 'there is substantial opposition to the gTLD application from a significant portion of the community to which the gTLD string may be explicitly or implicitly targeted'. (Ibid., section 3.2.1). According to section 3.5.4 of the Guidebook, in order to do that, the Objector must satisfy each of the following four substantive requirements. If it does so, it has made the requisite showing; if it does not, then it has not.

**D.1 The Objector must prove that 'the community invoked by the objector is a clearly delineated community'**

29. The Guidebook states: 'The objector must prove that the community expressing opposition can be regarded as a clearly delineated community. A panel could balance a number of factors to determine this, including but not limited to: the level of public recognition of the group as a community at a local and/or global level; the level of formal boundaries around the community and what persons or entities are considered to form the community; the length of time the community has been in existence; the global distribution of the community ...; and the number of people or entities that make up the community. If opposition by a number of people/entities is found, but the group represented by the objector is not determined to be a clearly delineated community, the objection will fail'.

30. The Expert has already determined, in the context of the standing requirements, that the community on behalf of which the Objector claims to bring the objection is 'a clearly delineated community'. (See paragraph 25 above). Having done so, it would seem difficult (to say the least) for the Expert not to find, in this new context, that 'the community invoked by the objector is a clearly delineated community'.
31. The Applicant disagrees, asserting that the test here must be 'more stringent' than the test applied in the context of standing, because 'ICANN would have no reason to make "clearly delineated" a substantive element of objection if it meant nothing more than the criterion for standing. Rules "should be interpreted so as not to render one part inoperative"'. (Response p.8). It therefore proposes the following test: 'Objector must show that the string itself describes a clearly delineated community', and asserts that the word 'ski' has several different meanings, including water-skiing and sand-skiing, and therefore does not meet that test. (Ibid.).
32. The Expert rejects this argument, for the following reasons:
  - 32.1 Where a set of rules uses a specific phrase ('clearly delineated community') twice, it would be very strange to interpret that phrase one way the first time it appears and another way the second time it appears. Indeed, that approach is so counter-intuitive that absolutely compelling grounds would be required to adopt it.
  - 32.2 Without wishing to split hairs, technically speaking, interpreting the phrase in the same way each time it appears does not render the second requirement 'inoperative' (as the Applicant suggests) – the Objector has to show that he meets it. Rather, it renders the second requirement redundant (because it does not add anything to what has gone before). Redundancy is never ideal, but the Expert does not consider it to be a compelling reason to construe the same phrase differently in two parts of the same rule.
  - 32.3 The fact that the Applicant suggests that 'clearly delineated community' as it appears in the first substantive requirement should be construed to mean that the 'Objector must show that the string itself describes a clearly delineated community' is both ironic (because the Applicant also suggests that that is how the third substantive requirement should be construed [see paragraph 42 below], i.e., it proposes the same redundancy that it says the Expert should avoid) and unhelpful to the Applicant (because [as noted below: see paragraph 42] there is no support for any such test either in the Guidebook or in the material that the Applicant cites in purported support of that test).
  - 32.4 While there is no system of binding precedent in expert determination proceedings, the Expert notes that another expert considering a Community Objection under exactly the same rules as apply here has found that the first substantive requirement is satisfied by

satisfaction of the second standing requirement: see Case No. EXP/493/ICANN/110 (<.FLY>), Expert Determination dated 3 September 2013, para 13.

33. As a result, since the Expert has already found (in the context of the second standing requirement) that the 'Ski community' that the Objector invokes in the Objection is a clearly delineated community, it follows that the Objector has also satisfied this first substantive requirement.

**D.2 The Objector must prove that 'community opposition to the application is substantial'**

34. The Guidebook states (at section 3.5.4): 'The objector must prove substantial opposition within the community it has identified itself as representing. A panel could balance a number of factors to determine whether there is substantial opposition, including but not limited to: number of expressions of opposition relative to the composition of the community; the representative nature of entities expressing opposition; level of recognised stature or weight among sources of opposition; diversity amongst sources of expressions of opposition, including regional, subsectors of community, leadership of community, membership of community; historical defence of the community in other contexts; and costs incurred by objector in expressing opposition, including other channels the objector may have used to convey opposition. If some opposition within the community is determined, but it does not meet the standard of substantial opposition, the objection will fail'. The Applicant suggests that the Objector must establish each of these factors (Response p.9), but in fact the words quoted make it clear that these factors are not an exhaustive list of relevant factors, and that the Objector may meet its burden by establishing all of them, or some of them, or even none of them, provided that it establishes enough relevant factors (which may or may not be factors listed in the Guidebook) to outweigh any countervailing factors established by the Applicant.
35. The Objector states that it has received 'not just significant, but overwhelming' support from the Ski community for the Objection, both from its 115 member federations, and from six leading international ski sport related organisations: (i) the International Olympic Committee (the leader of the Olympic Movement); (ii) the World Anti-Doping Agency (an institution whose stakeholders are half members of the Olympic Movement and half public/governmental authorities); (iii) the International Ski Instructor Association (a body representing professional ski instructors from 39 countries); (iv) the Ski Racing Supplier's Association (which has 57 industry members: Objection Annex 11); (v) the World Federation of the Sporting Goods Industry; and (vi) the National Ski Areas Association (a trade association for ski area owners and operators that represents 325 resorts in Colorado and 472 suppliers providing equipment, goods and services to the mountain resort industry). (Objection p.8 and Annex 11).
36. The Applicant says these assertions of support are worthless because the letters from the six bodies listed that are annexed to the Objection 'reflect no independent thought showing

genuine opposition by each such member itself', no evidence is provided about the 'stature' of those bodies, and they do not 'add up to a meaningful number of expressions of opposition within the larger ski "community" that Objector claims to represent'. (Response p.9).

37. The Expert does not agree with the Applicant's criticisms of the letters of support from the six listed institutions, nor does he agree that their 'stature' is questionable. Furthermore, the opposition of the Objector as the international governing body of the sport and its 115 member federations must also be weighed in the balance. The Expert finds that the Objector has satisfied this second substantive requirement.

### **D.3 The Objector must prove that 'there is a strong association between the community invoked and the applied-for gTLD string'**

38. The Guidebook states (at section 3.5.4): '**Targeting.** The objector must prove a strong association between the applied-for gTLD string and the community represented by the objector. Factors that could be balanced by a panel to determine this include but are not limited to: statements contained in application; other public statements by the applicant; and associations by the public. If opposition by a community is determined, but there is no strong association between the community and the applied-for gTLD string, the objection will fail'. Again, the Applicant suggests that this is a definitive list, and the Objector must satisfy this requirement by reference to these factors and these factors alone. Again, the Expert disagrees, for the same reasons as before. (See paragraph 34 above).
39. The Applicant says it is not 'targeting' the string 'toward any particular community, let alone that which Objector claims to represent'. (Response p.10). But the Objector notes that the Application itself states that the <.SKI> gTLD 'will be appealing to the millions of people and organizations who are involved with or who simply enjoy the many variations of skiing, including alpine, snowboard, cross-country, telemark, as well as water, and sand skiing'. The Objector notes that the Ski community for which it speaks encompasses all such persons and organizations, save only for those involved in water-skiing and sand skiing. It further asserts that the word 'ski' calls those ski sports to mind for most people (including as a result of the wide television coverage of the competitions it organises in each of those sports). (Objection p.9). In addition, the Objector provides spelling and phonetic evidence that the word 'ski' is used (or recognised) in the local language of 12 of the top 16 countries for snow ski visits. (Objection Annex 8). As those 12 countries represent 79% of global snow ski visits, the Objector alleges that the ski community is therefore 'clearly recognized by the single word SKI by at least 79% of the relevant global ski-related population', in their local language. (Objection p.7).
40. The Applicant in contrast insists that the word 'ski' has 'multiple meanings ... apart from the interests for which Objector lobbies', so it cannot be said to be 'strongly associated' solely with the Ski community. (Response p.10). The Applicant presses this point more firmly in its Sur-

Reply, arguing that the Objector must show that the applied-for gTLD 'uniquely or nearly uniquely identifies' the community the Objector is representing, and that it cannot meet this requirement because the word 'ski' encompasses many meanings and activities other than just snow-skiing. (Sur-Reply p.2).

41. The Expert agrees that the word 'ski' does not mean snow-skiing alone. It is also used in the separate sports of water-skiing and (apparently) sand-skiing, albeit that it must be fair to say that the number of adherents to those sports is very small compared to the number of adherents to the ski sports that the Objector represents. (Indeed, the Expert admits that he had never even heard of sand-skiing before this case). So if the Applicant is right that the Objector must show that the <.SKI> gTLD 'uniquely or nearly uniquely identifies' the Ski community that the Objector represents, there could perhaps be an argument about whether the number of snow-skiers relative to the number of water/sand-skiers makes the identification of the word 'ski' and snow-skiing 'nearly unique'. But is this actually a requirement?
42. The Applicant insists that it is, asserting that 'ICANN designed the community objection ... "to prevent the misappropriation of a string that uniquely or nearly uniquely identifies a well-established and closely connected group of people"'. (Sur-Reply at p.2). The Applicant says that quote comes from a 'commentary' on the requirements, to which it provides a link. The clear impression given is that ICANN has said that an objector on behalf of a community must show that the applied-for gTLD 'uniquely or nearly uniquely identifies' the community represented by the objector. However, upon inspection of the document from which the Applicant has taken the quote (ICANN's 'New gTLD Program - Summary Report and Analysis of Public Comment – Applicant Guidebook Excerpts and Explanatory Memoranda'), it transpires that the words quoted are not the words of ICANN, but rather the words of a private company called eNOM, asserting (as part of its comments on the July 2009 draft of the Guidebook) what it contends the objective of the Community Objection is (or should be). In its own 'Commentary and Proposed Position' on the comments by eNOM and other stakeholders, ICANN did not endorse the eNOM comment, instead simply saying that 'the established criteria' (i.e., those set out in the draft Guidebook) should be used. And eNOM's proposed gloss on the Community Objection criteria did not make its way into the final version of the Guidebook issued in June 2012. As a result, the Expert considers this submission by the Applicant to be extremely misleading. Contriving an argument to support a particular position (viz., that the required 'strong association' between the gTLD and the community represented by the Objector does not exist) creates a strong inference that there is no valid argument for that position, and seriously undermines the Applicant's general credibility.
43. As a result, the Expert rejects the suggestion that to satisfy this third substantive requirement of 'strong association' the Objector must show that the <.SKI> gTLD 'uniquely or nearly uniquely identifies' the Ski community. The fact that a minority of people might think, when they hear the



word 'ski', not of snow-skiing but of water-skiing or (even) sand-skiing, does not change the fact that the word 'ski' is 'strongly associated' with the (snow) Ski community.

**D.4 The Objector must prove that 'the application creates a likelihood of material detriment to the rights or legitimate interests of a significant portion of the community to which the string may be explicitly or implicitly targeted'**

44. The Expert does not consider that the reference in this fourth and final substantive requirement to 'the community to which the string may be explicitly or implicitly targeted' adds anything material to the already-discussed requirement of proof of 'a strong association between the applied-for gTLD string and the community represented by the objector'. (See section D.3 above). Since the Expert has already found that that requirement is satisfied, it follows that this part of the fourth substantive requirement is also satisfied.
45. That leaves the question of whether the Applicant's proposed operation of the string 'creates a likelihood of material detriment to the rights or legitimate interests of a significant portion of' the Ski community. The Guidebook provides the following guidance on this issue (at page 3-24): 'An allegation of detriment that consists only of the applicant being delegated the string instead of the objector will not be sufficient for a finding of material detriment. Factors that could be used by a panel in making this determination include but are not limited to: nature and extent of damage to the reputation of the community represented by the objector that would result from the applicant's operation of the applied-for gTLD string; evidence that the applicant is not acting or does not intend to act in accordance with the interests of the community or of users more widely, including evidence that the applicant has not proposed or does not intend to institute effective security protection for user interests; interference with the core activities of the community that would result from the applicant's operation of the applied-for gTLD string; dependence of the community on the DNS [domain name system] for its core activities; nature and extent of concrete or economic damage to the community represented by the objector that would result from the applicant's operation of the applied-for gTLD; and level of certainty that alleged detrimental outcomes would occur'. Again, the Objector does not have to establish that each of these factors is present in order to sustain its burden. It can invoke some of these factors (and/or other factors that it can show are relevant), and those factors are then balanced against any countervailing factors established by the Applicant. However, since the Objector has the burden on this point as well, the factors it invokes must outweigh any factors invoked by the Applicant, or else the Objection must be rejected.
46. The Objector's submissions on this point (Objection pp. 11-15 and related Annexes) may be summarised as follows:
  - 46.1 The 'internet is already playing a very strong, and ever increasing role, within the ski community'. (Numerous examples are given at page 10 of the Objection). And the Objector 'has developed core principles and activities [including organising

competitions and commercialising those competitions, as well as promulgating anti-racism, anti-bullying, and anti-doping values and fighting illegal or undesirable betting] ... that are key factors in communicating with all categories of skiers and potential skiers, from young newcomers to enthusiastic skiers of all ages'. A policy (such as the Applicant intends to follow) of unrestricted access to the <.SKI> gTLD 'without sports-specific registry policies and oversight' would 'allow many web sites, based on words and activities that are in fundamental contradiction with and in opposition to the core principles and values of the FIS, ski sport and the ski community at large, to benefit from, deteriorate and/or abuse the reputation of skiing and ski sport and the positive image projected by the FIS'. Because the use of the <.SKI> TDL gives an 'aura of official sanction', visitors to <.SKI> websites may perceive, through the use of that TLD, that the content of those sites is linked to, and even sanctioned by, the Objector and its member governing bodies of the Ski community, so interfering with and undermining the Objector's efforts to promote and develop ski sport through the promulgation of strong values that emphasise honesty, fairness and integrity of competition. Another well-established type of abuse is the misuse of sports themes for pornography (e.g., [www.porn.ski](http://www.porn.ski)). The Objector asserts that the proliferation of such activities 'will significantly damage the image and reputation of the ski community, with related concrete and economic damages in terms of a decrease in ski activity and skier visits'.

46.2 The Objector asserts that the Applicant's intended 'open access' operation of the gTLD would also permit abuse of the commercial assets and goodwill of the Ski community through activities such as cybersquatting, brand jacking, and registration of names of clubs, federations, events and athletes as a means of ambush of them and their commercial activities, thereby allowing unscrupulous users to benefit without authorisation from the goodwill that the Objector and its members (and star individual skiers competing in their events) have built up in their names, images, and events. For example, the Applicant is 'unwilling to ensure that second level domains related to FIS member National Associations and to FIS Alpine Ski World Cup events, and especially the "city + year" marks associated with each event, will be protected'.

46.3 The Objector asserts that it and its members 'would have considerable difficulties in getting such content removed because of a lack of legal instruments and practical access'. It is therefore concerned about many further opportunities for abuse (indeed, more targeted abuse) being created through the free availability of the <.SKI> gTLD. It asserts that the only way to prevent abuse of the kind it has identified would be to submit the gTLD operator to 'a ski community-specific acceptable use policy', and to make it accountable to the Ski community for compliance with that policy. Otherwise, for example, an unaccountable operator of a <.SKI> gTLD 'will neither be willing nor able to monitor its name space with respect to doping-abetting content' and is therefore

'certain to encumber community efforts against doping'. It notes that these elements are absent from the Applicant's plans for operation of the gTLD <.SKI>.

- 46.4 The Objector asserts that, as a result of the above, the Ski community will suffer substantial monetary losses and costs, but also reputational damage, and damage to the values and image of ski sport.
47. The Applicant responds as follows:
- 47.1 The Applicant acknowledges the risks of cyber-squatting and the other forms of abuse identified by the Objector, but asserts that the Objector 'offers no evidence that Applicant's proposed string would create any greater or different harm to the "community" than it appears to experience under the existing regime of .com and other generics. As such, objector does not prove that an open <.ski> gTLD itself would cause any such harm, since, by Objector's own admission, the issues of which it warns already exist'. (Response p.11).
- 47.2 The Applicant openly acknowledges and indeed seeks to make a virtue out of the fact that it 'will not limit eligibility or otherwise exclude legitimate registrants in second level names'. (Application p.12). However, the Applicant disagrees with the Objector that this will cause material detriment to the Ski community. In particular, it asserts it will put in place registration policies that include the 14 mechanisms required by ICANN for the new gTLDs, but also 'eight additional measures, including those to address the exact types of concerns raised by Objector' (Response p.11), to 'protect Internet users and rights-holders from fraud and abuse'. (Ibid. p.12).
- 47.3 The Applicant acknowledges these policies will not prevent the Ski community losing domain names corresponding to non-trademark protected clubs, federations, events and athletes to speculators, but contends that this is a 'reasonable consequence rather than a detriment', because 'a group without trademark status or comparable protection on existing gTLDs should not enjoy trade-mark level protection on as against any new gTLD'. (Response p.12). It argues that imposing registration restrictions as suggested by the Objector would 'stifle growth, free speech, legitimate activity and consumer choice', which would be contrary to the objectives of ICANN. (Response p.12).
- 47.4 The Applicant asserts that the Objector has not provided any competent evidence to support its assertion that the harm it is concerned about will occur, or to support its purported quantification of the monetary damage it alleges will result. (Response p.13).
48. The Expert finds as follows:
- 48.1 The Applicant does not dispute that use of current TLDs includes abusive use that unfairly prejudices the reputational and commercial interests of the Ski community. Its

argument that there is no evidence that such abuse will be 'any greater or different' if the Applicant is delegated the <.SKI> gTLD (and so that delegation cannot be considered the cause of such abuse) does not seem to the Expert to be a very attractive argument. Nor does it find any support in the Guidebook. The test is whether the Objector can show that detriment is likely to result to the rights or legitimate interests of the community it invokes from the Applicant's proposed use of the new gTLD. There is nothing in the Guidebook or elsewhere to suggest that detriment of the type that that community already suffers from abuse of the existing TLDs should be disregarded for these purposes. And in any event, the operation of the new TLD <.SKI> would at the very least create many more opportunities for such abuse (and a concomitantly increased burden on the Ski community to identify and try to take action against such abuse). And if the Objector's concern that the new gTLD risks giving new sites and their content an aura of official sanction is reasonable (as the Expert finds that it is: see paragraph 48.3 below), then not only are there more opportunities for abuse, but the risk of detriment is greater from those further opportunities. As a result, the Expert considers that this factor tips in favour of the Objector.

- 48.2 Furthermore, the Applicant's assertion that permitting speculators to register domain names corresponding to non-trademark protected individuals, events and organisations is not a detriment but a 'reasonable consequence' of the freedoms contemplated by the new gTLD programme seems to the Expert to boil down to the following question: assuming that such conduct does not infringe a formal legal 'right' of those members of the Ski community, does the Ski community nevertheless have a 'legitimate interest' in preventing speculators creating and exploiting an unauthorised association between their websites and the individuals, events and organisations in question for their own commercial and other purposes, and to the detriment of those individuals, events and organisations? The Expert sees no reason why this should not be recognised as a 'legitimate interest' in this context. The Applicant's assertion that doing so would 'stifle growth, free speech, legitimate activity and consumer choice' seems to the Expert to beg the question. The purpose of the new gTLD programme is indeed stated to be to promote free speech, competition and innovation. However, the creation of the 'Community Objection' mechanism reflects a consensus that those are not absolute values, but instead can and should be subject to proportionate restrictions where necessary to avoid detriment to the rights and legitimate interests of a community. The balance is struck by putting the burden of proof on the party making the objection on behalf of the community to satisfy each of the elements of the Community Objection. Therefore, it adds nothing to say that the Objector's stance would 'stifle growth, free speech, legitimate activity and consumer choice'. The only question is whether the Objector has shown the required likelihood of detriment to the rights or legitimate interests of the Ski community. If so, then any hindrance of free speech, etc. that follows is necessarily justified, and so not a reason to reject the Objection.

- 48.3 The Expert also considers that the Ski community has a 'legitimate interest' in promoting the values, image and integrity of ski sport, and in ensuring the public has confidence in its readiness, willingness and ability to do so. Indeed, unless sport is not only 'straight' but seen to be 'straight', then the public's confidence in uncertainty of outcome – the very essence of sport -- will be compromised, which would be nothing short of disastrous for the Ski community. Therefore, if the Objector is correct that use of the <.SKI> gTLD will give the related websites an 'aura of official sanction', the Expert would agree that a likelihood of detriment to the legitimate interests of the Ski community has been established. So is the Objector's fear well-founded? The Expert has already found that there is a 'strong association' between the <.SKI> gTLD and the Ski community, in that the word will call to mind for most people the ski sports organised, promoted and developed by the Objector and its members. (See paragraph 39 above). That does not automatically mean that the public would assume that sites (or content on sites) with that string in their domain name would necessarily be 'official' or 'sanctioned' content, but it is clearly reasonable to think there is a risk that they might. As a result, this is also a factor that tilts in favour of finding the detriment requirement met.
- 48.4 The Applicant does not make good its assertion that its intended registration policies will 'address the exact type of concerns raised by Objector'. In fact, the 'fraud and abuse' that the Applicant seeks to prevent in its policies appears to be confined to infringements of intellectual property rights and 'fraudulent activity' such as distribution of malware, phishing, DNS hijacking or poisoning, and spam. (Application p.52). As noted above, the Applicant openly says it would not prevent ambush marketing through unauthorised use of famous names (because it does not regard that as improper). (See paragraph 47.3 above). Similarly, there is nothing in the Applicant's policies that would prevent users from operating their sites and/or putting content on them in a manner that falsely suggested an association with or endorsement by the Ski community. The Expert therefore accepts the Objector's submission that the Applicant's policies 'give no protection against terms in clear contradiction with the cores [sic] values of ski and sports (doping, illicit gambling, racism ...)'. It is also relevant in this regard that ICANN has said that '[w]hile ICANN will enforce obligations undertaken by the registry operator in its agreement with ICANN, it is not ICANN's duty to supervise the operation of new gTLDs and to ensure that communities are not hurt by those gTLDs'. (ICANN's 'New gTLD Program - Summary Report and Analysis of Public Comment – Applicant Guidebook Excerpts and Explanatory Memoranda', p.21).
- 48.5 The Expert agrees with the Applicant that the Objector's assessment of economic and other losses (including opportunity costs) is not well-evidenced. In particular, the Objector has not been able to come up with a meaningful estimate of the economic damage it would suffer if the Application were granted. That is not surprising, however,

given the nature of the potential detriment identified by the Objector. As the Objector says, 'many affected values cannot be measured in terms of money'. (Objection p.15). Furthermore, and in any event, the detriment test under section 3.5.4 of the Guidebook is that of 'a likelihood of material detriment', not an actual, quantified damage. As a result, the Expert does not regard this as a sufficiently strong negative factor to outweigh the factors in the Objector's favour on this point.

49. Balancing all of these factors, the Expert considers that the factors the Objector has established showing detriment to the rights and legitimate interests of the Ski community outweigh the contrary factors cited by the Applicant, and therefore the Objector has met its burden of proof on this issue as well.

**E. DETERMINATION**

50. For the reasons set out above and in accordance with Article 21(d) of the Procedure, the Expert renders the following Expert Determination:

- i. The Objection is successful and therefore the Objector is the prevailing party.
- ii. The Centre shall refund the Objector's advance payment of costs to the Objector in accordance with Article 14(e) of the Procedure.



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Jonathan Taylor, Expert

Dated: 21 January 2014