

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

CASE No. EXP/452/ICANN/69

UNITED STATES POLO ASSOCIATION, INC.

(USA)

vs/

RALPH LAUREN CORPORATION

(USA)

This document is a copy of original of the Expert Determination rendered in conformity with the New gTLD Dispute Resolution Procedure as provided in Module 3 of the gTLD Applicant Guidebook from ICANN and the ICC Rules for Expertise.

International Chamber of Commerce

ICC EXP/452/ICANN/69

UNITED STATES POLO ASSOCIATION, INC. V RALPH LAUREN CORPORATION

EXPERT DETERMINATION

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**Acting as Expert under the ICANN Proceedings related to the
New gTLD Dispute Resolution Procedure**

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Definition of Abbreviations Used

Appendix III	Appendix III to the Rules, Schedule of Expertise Costs for Proceedings under the New gTLD Dispute Resolution Procedure
Applicant	Ralph Lauren Corporation
Application	Ralph Lauren Corporation's gTLD application (Application ID: 1-1125-1032)
Centre	ICC International Centre for ADR – Centre international d'ADR de la CCI
FIP	Federation of International Polo
GAC	Governmental Advisory Committee
gTLD	Generic Top Level Domain Names
Guidebook	ICANN gTLD Applicant Guidebook (Version 2012-06-04)
ICC Practice Note	ICC Practice Note on the Administration of Cases under the New gTLD Dispute Resolution Procedure
IOC	International Olympic Committee
Objection	United States Polo Association's objection of March 13, 2013
Objector	United States Polo Association
Procedure	New gTLD Dispute Resolution Procedure
Response	Ralph Lauren Corporation's response of March 15, 2013
RLC	Ralph Lauren Corporation
Rules	Rules for Expertise of the ICC
USPA	United States Polo Association, Inc.

1. Procedure

1. The present dispute relates to a Community Objection against the Application for the registration of “.polo” as a gTLD pursuant to the New gTLD Dispute Resolution Procedure of ICANN.
2. This Panel’s Determination is rendered based upon the following Rules: Rules for Expertise of the ICC (“Rules”); Appendix III to the Rules, Schedule of Expertise Costs for Proceedings under the New gTLD Dispute Resolution Procedure (“Appendix III”); ICC Practice Note on the Administration of Cases under the New gTLD Dispute Resolution Procedure (“ICC Practice Note”); Attachment to Module 3 of the gTLD Applicant Guidebook, New gTLD Dispute Resolution Procedure (version of June 4, 2012) (“Procedure”); Module 3 of the gTLD Applicant Guidebook (version of June 4, 2012) (“Guidebook”).
3. Pursuant to Article 5(a) of the Procedure, the language of all submissions and proceedings is English. Accordingly, all documents were submitted in English in compliance with Article 5(a) of the Procedure.
4. The place of the proceedings is Paris, France (c/o ICC International Centre for Expertise, 38 Cours Albert 1^{er}, 75008 Paris, France) pursuant to Article 4(d) of the Procedure.
5. Pursuant to Article 6(a) of the Procedure, all communications by the parties, the Panel and the Centre are submitted electronically. Accordingly, all documents were submitted electronically in compliance with Article 6(a) of the Procedure.

2. Summary of Procedural Steps

6. The United States Polo Association, Inc. (“USPA”) has submitted a Community Objection against the Application for the registration of the “.polo” gTLD string by Ralph Lauren Corporation (“RLC”). The Objection was received by the ICC on March 13, 2013.
7. ICANN published its dispute announcement on April 12, 2013, according to Article 10(a) of the Procedure.
8. RLC filed a Response on May 15, 2013.

9. Prof. Dr. Burkhard Hess, Director of the Max Planck Institute Luxembourg, was appointed by the Centre as sole member of the Expert Panel to these proceedings on July 10, 2013.
10. The ICC EXP/452/ICANN/69 was transferred to the Panel on July 10, 2013, and this Expert Determination was submitted to the Centre within 45-day time limit in accordance with Article 21(a) of the Procedure.
11. The Objector filed a request to submit and actually submitted additional materials on July 18, 2013, in response to RLC's challenge of the authenticity of the community letters in support of USPA's Objection. The Objector requested that supplemental submissions be permitted within 10 business days of the granting of its application.
12. The Applicant opposed to the Objector's request with its letter of July 19, 2013, and noted that Article 17 of the Procedure does not allow the submission of any additional arguments or documents unless requested by the Panel.
13. In a letter of July 22, 2013, the Objector stated that it had no objection to the Applicant being allowed an equal and simultaneous opportunity to submit its own evidence and/or written materials regarding the same two issues USPA sought to address with its submissions.
14. In a letter of July 22, 2013, the Applicant reiterated the arguments set out in its letter of July 19, 2013, and requested the denial of the Objector's requests.
15. Pursuant to Article 17 of the Guidebook and according to the general principles of the right to be heard and of the equal treatment of the parties, this Panel held admissible the additional written submissions filed on July 18, 2013, by the Objector, USPA. As the Applicant contested the signatures of the letters supporting the Objection, the Panel would otherwise have ordered the Objector to produce conclusive evidence with regard to the signatures. Finally, the Panel invited the Parties to submit additional submissions by August 5, 2013, on the following topics 1) clarifying the procedural status of the Federation of International Polo ("FIP") and other related parties; 2) clarifying the standing of the Objector with regard to a delineated community of the polo sports community; 3) elaborating the degree of harm caused to the polo sports world by the registration of the gTLD in favour of RLC; 4) specifying the standard of proof to be applied in the present proceedings; 5) addressing the issue of whether the assignation of the ".polo" gTLD string to one of

the actors connected to “polo” would entail a kind of monopolization of a term which has many depictions as fragrances, shirts, cars and sports.

16. On August 5, 2013, Objector and Applicant submitted additional statements within the time limit provided by this Panel.
17. On August 6, 2013, Applicant submitted an objection to USPA’s additional submission of August 5, 2013. On August 7, 2013, USPA filed a response to Applicant’s letter of August 6, 2013. USPA requested that the Panel disregard RLC’s letter of August 6, 2013, as unauthorized. Alternatively, USPA asked that the Panel consider its response of August 7, 2013, to the Applicant’s letter.
18. With regard to RLC’s reply of August 6, 2013, to USPA’s additional submissions and to USPA’s Response of August 7, 2013, the Panel notes that the parties did not comply with the given time limit. This Panel would like to stress the importance of respecting time limits, as delayed submissions can affect the ability of the Panel to organize speedy proceedings and deliver its Determination in the given and appropriate time limit. However, as the delayed submissions of the parties do not substantially delay the rendering of the Expert Opinion, the Panel takes note of these submissions.

3. Summary of Parties’ Positions and Relief Sought

3.1 Objector’s Submissions

Admissibility and standing

19. USPA brings the Objection in these proceedings as a representative of the global polo sports community and as the chief governing body of the sport of polo in the U.S.A.
20. USPA is a non-profit organization established under the laws of the State of Illinois; it was formed in 1890 with the objective to grow, promote and market the game of polo in the U.S.A.
21. With regards to standing, the Objector refers to its recognition in 2008 by the International Olympic Committee (“IOC”) as the governing body of the sport of polo

in the U.S.A. (Objection, p. 4). Moreover, USPA is a full member of the Federation of International Polo (“FIP”), which has been recognized as the worldwide body of the sport of polo, representing the interests of over 85 polo associations around the globe. USPA also refers to its leading role within the governing Council of FIP, where its chairman has a permanent seat as one of FIP’s three Vice Presidents of the Federation.

22. According to the Objector, FIP and seven other polo clubs (Austrian Polo Association, Dutch Polo Association, Federaciòn Mexicana de Polo, Monte Carlo Polo Club, Northern Ireland Polo Club, Polo de Paris, and Quito Polo Club) as well as ten U.S.A. polo clubs join the Objection as “related parties” (Objection, p. 2). The Objector clarifies that FIP and the other joining polo clubs shall not be considered as joining parties. They shall merely provide evidentiary support as to USPA’s ongoing relation to the polo sports community.

Grounds for Community Objection

23. With regard to the grounds of the Objection, the Objector contends that the polo sports community is a delineated community in the sense of § 3.5.4. of the Guidebook, consisting of polo clubs, polo players, and polo aficionados with the common goal of promoting the sport of polo.
24. The Objector contends that there is substantial opposition within the polo sports community to the Application for the registration of the “.polo” string, as allegedly indicated by the submitted letters of support in favor of the Objection (Objection, p. 7).
25. The Objector further points out that the requirement for a strong association with the polo sports community is fulfilled as the sport of polo is dependent for each identification on the word polo to which RLC’s Application relates.
26. As per USPA’s allegations (Objection, p. 11 *et seq.*), the Application for the registration of “.polo” by the Applicant, RLC, will be of material detriment to the entire polo sports community. The monopolization of “.polo” by RLC would incorrectly give the impression that the polo sports community is associated with the commercial “.polo” domain. Members and other persons interested in polo sports would be drawn to “.polo” under the misbelief that the domain is run or sponsored by a

member of the polo sports community. In this context, confusion of internet users with regard to the source or sponsorship of the “.polo” string and subsequent loss of polo fans would likely occur.

27. Finally, the Objector points out that U.S.A. courts have continually affirmed the right of USPA to use the word "polo" to describe the sport of polo, and have never granted RLC an exclusive right to use the word “polo” (Objection, p. 13).
28. USPA requests, on behalf of the polo sports community, the denial of the RLC’s Application for registration of “.polo” and the refunding of the portion of the expert fees borne by it.

3.2 Applicant’s Submissions

29. RLC, the Applicant, is a company incorporated under the laws of the State of Delaware that designs, markets and sells worldwide apparel, accessories, fragrances and home furnishings.
30. RLC states that it should not be prevented from using its registered POLO trademark as a gTLD string to promote its brand. Accordingly, it requests the panel to dismiss the Objection.
31. Firstly, the Applicant contends that USPA lacks standing as an Objector, as this Panel should only consider the Objector itself, but not “related entities” such as the FIP (Response, p. 4). According to the Applicant, the parties purported by USPA as being “related parties” are not sufficiently affiliated to the Objector and they do not represent a sufficiently affiliated community.
32. The Applicant contests the existence of substantial opposition within the polo sports community as only 7 out of the 75 member organizations affiliated with the FIP support the Objection brought by USPA (Response, p. 6).
33. In addition, the Applicant refers to its own trademark registrations for the POLO marks in 76 countries and territories which are used for the promotion and sale of RLC designer products (Response, p. 10). As a result of the well-known brand, RLC’s use of the gTLD would not entail any consumer confusion with regard to the use of the word “polo”.

34. Besides, the Applicant refers to numerous court proceedings among the parties on the registration of trademarks and concludes that the Objector did not file its Objection for the benefit of the polo sports community, but in an attempt to gain an advantage in promoting its own competitive products.
35. Accordingly, the Applicant disputes that the use of the gTLD “.polo” would entail any material economic damage to the sport of polo (Response, p. 7 *et seq.*).
36. Therefore, the Applicant contends that the Objector failed to meet the standard of proof required by ICANN to file a successful Objection against RLC’s Application for the “.polo” string. In the Applicant’s opinion, the language chosen by ICANN in drafting the standards that govern the Community Objection imposes a high standard of proof. In particular, the Applicant alleges that the Objector failed to provide substantial and concrete proof with regard to the requirements that: (i) a significant portion of the polo sports community substantially objects to the string; (ii) that a strong association may be established between “.polo” and the community, especially due to the fact that the POLO trademark, as a source identifier, is worldwide associated to RLC Products; (iii) the Application creates a likelihood of material harm to the community (Response p. 6; RLC’s additional submission of August 5, 2013, p. 8 *et seq.*).
37. Again, the Applicant asserts that there is a presumption generally in favor of granting new gTLD to applicants who can satisfy the requirements for obtaining a gTLD and that the burden of proving substantial disadvantages to the community of the polo sports world lies with the Objector (Response, p. 9).

4. Findings

38. This Panel holds that USPA’s Objection against the Application for the registration of the “.polo” gTLD string is successful, as the Objector has met all the applicable standards.

4.1 Reasons upon which the Expert Determination is Based

4.1.1 USPA's Standing

39. As a result of RLC's challenging USPA's standing (Response, p. 4), the Panel has to determine whether USPA has standing to object to the Application for the registration of the ".polo" gTLD string pursuant to § 3.2.2.4. of the Guidebook.
40. The Panel notes, as a preliminary issue, that USPA is the sole community Objector. FIP, the global governing body of the sport of Polo, and the other Polo Associations which allegedly joined USPA's Objection as "related parties" have not submitted a formal Objection to the Application for the registration of the ".polo" gTLD string. Hence, they cannot be considered as objecting Parties within the sense of Article 2(b) of the Procedure. Accordingly, the Panel will examine the question of standing only with regard to the Objector, as provided for in the ICC "Clarifications regarding multiple Objections and multiple Objectors".¹
41. Pursuant to § 3.2.2.4 of the Guidebook, a community Objector has standing when: 1) it is an established institution; and 2) it has an ongoing relationship with a clearly delineated community. The Objector has to prove that both requirements are met.
42. With regard to the first requirement, § 3.2.2.4 of the Guidebook provides that the qualification of the objecting party as an established institution is contingent upon the level of global recognition of the institution, the length of time the institution has been in existence, as well as the public historical evidence of its existence or validation by a government, inter-governmental organization, or treaty.
43. As established by the Objector (Objection, p. 3-4), USPA, a non-profit organization incorporated in Illinois, is the governing body of the sport of polo in the U.S.A. It was founded in 1890 with the objective of promoting the sport of polo. Hence, USPA has participated in American and international polo activities for more than 120 years. Moreover, in 2008 USPA was recognized by the IOC as the chief governing body of the sport of polo in the U.S.A., and is one of the three full members of the FIP. In view of these facts, the Panel considers that USPA is an established institution within the sense of § 3.2.2.4 of the Guidebook.

¹ Available at <http://www.iccwbo.org/products-and-services/arbitration-and-adr/expertise/icann-new-gtld-dispute-resolution/how-to-file-an-objection/>.

44. As for the second requirement, § 3.2.2.4 of the Guidebook sets forth an illustrative list of factors that indicate the existence of an ongoing relationship with a clearly delineated community. Such factors are the presence of mechanisms for participation in activities, membership and leadership, the institutional purpose related to the benefit of the associated community, the performance of regular activities that benefit the associated community, as well as the level of formal boundaries around the community.
45. The Objector states (Objection, p. 5), and the Applicant does not contest, that the polo sports community is a delineated community consisting of polo clubs, polo players, and polo fans having a certain interest in the promotion of the sport of polo (see *infra* para 56 of the present Expert's Determination).
46. The mere fact that the Objector is not the global governing body of the sport of Polo, *i.e.* the FIP, but one of its three full members is, *per se*, irrelevant. § 3.2.2.4 of the Guidebook does not restrict standing to the most representative entity of the community's interests. In this respect, the Panel recalls that FIP, the body representing the sport of polo worldwide, has expressly consented to USPA bringing the Objection against RLC's Application for the registration of ".polo" string. In any case, USPA, as above illustrated, is a prominent member of the polo sports community; it represents, at a regional level, the interests of the U.S.A. polo sports community. At the international level, it constantly participates in the governance of the FIP.
47. Additionally, the Panel pays due attention to the regional aspects of the dispute, as USPA and RLC are legal entities incorporated under U.S.A. law. In the present case, the most efficient option is put forth by the representation of the interests of the polo sports community not by the FIP, which is incorporated in the Republic of Uruguay, but by USPA, an entity incorporated and performing its activities in the U.S.A. Hence, as an important U.S.A. regional organization, USPA represents the world polo sports community in this dispute. Consequently, USPA, as an established institution, has its own independent standing.
48. As a full member of the FIP, the USPA has a conclusively proven leading role in the governance of FIP: its chairman has a permanent seat as one of the three Vice Presidents and it appoints two out of twelve of FIP's Council Members. USPA further

participates in the FIP's annual conference, which primarily aims at developing the international rules governing the sport of polo. USPA's established institutional leadership is accompanied by the performance of a number of activities to the benefit of the polo sports community, such as the propagation of standard rules for polo in the U.S.A., the provision of umpire services, the arrangement of polo tournaments both in the U.S.A. and abroad, the selection of U.S.A's team of elite polo players and the participation of its members in committees, such as the Tournament Committee, the International Committee, the Safety Committee, and the Equine Welfare Committee.

49. Besides, the Applicant's allegation that USPA's Objection purports not to represent the interests of the polo sports community, but rather to promote the sale of its trademark USPA products worldwide through its for-profit subsidiary (Response, p. 4), is not convincing. In fact, this dispute is not about trademarks. In any event, profitable activities of USPA do not deprive it of its ongoing connection with the polo sports community, as required in § 3.2.2.4. of the Guidebook. It is a truism that modern sport is largely financed by sponsoring and merchandising activities. Therefore, even if USPA does not use the profits out of the sale of its products to the benefit of the sport of polo, this cannot affect its standing in these proceedings.
50. For these reasons, the Panel concludes that USPA has standing to object to the Application for the registration of the ".polo" string by RLC.

4.1.2 Grounds for Community Objection

51. In order for the Objection to be grounded, the Panel has to determine whether there is substantial opposition from a significant portion of the community, to which the string may be targeted. Pursuant to § 3.5.4 of the Guidebook, the Objector must prove that: the community invoked by the Objector is a clearly delineated community; the community opposition to the Application is substantial; there is a strong association between the community invoked and the applied-for gTLD string and the Application creates a likelihood of material detriment to the rights or legitimate interests of a significant portion of the community.

4.1.2.1 The Standard of Proof to be Applied

52. As it clearly emerges from the standards that govern the Community Objection, while standing is determined with regard only to the Objector, *i.e.* USPA, the grounds for the Community Objection relate to the whole polo sports community.
53. All four grounds for the Community Objection must be satisfied, and pursuant to Article 20(c) of the Procedure the Objector bears the burden of proof. For each ground, § 3.5.4 of the Guidebook lists several examples of factors that can be taken into account by the Panel while examining the Objection. However, the Objector is not expected to demonstrate satisfaction of each and every of the factors illustrated in the Guidebook. To the contrary, a balancing of the factors, as well as any other relevant information, must be weighed by the Panel in order to draw its conclusions. When weighing and balancing these factors, the Panel takes into account that some of these factors might have not been fully established by the Objector.
54. While the Applicant contends that under the applicable standards, full standard of proof is required (RLC's additional submissions, August 5, 2013, p. 8 *et seq.*), this Panel disagrees and considers that a balancing of the factors within their framework is sufficient. The Guidebook standards do not define or specify the required standards of proof. It is the understanding of this Panel that the standards of proof must correspond to the legal rules and principles applied to the case. Here, the Panel shall base its findings on an assessment and balancing of a multitude of factors. The relevant factors must be established with sufficient probability, and not necessarily with certainty. The Panel may take into account factors ascertained with a lower degree of likelihood by giving them less weight. On the other hand, the mere assertion of facts is not sufficient to fulfill the standard of proof.

4.1.2.2 Evaluation

4.1.2.2.1 The Community Invoked by the Objector Is a Clearly Delineated Community

55. With regard to the first requirement, the existence of a clearly delineated community, according to § 3.5.4 of the Guidebook, the Panel should take into consideration a

number of factors, such as the level of the public recognition of the group as a community, the level of formal boundaries around the community, the length of time the community has been in existence, the global distribution of the Community and the number of people that make up the community.

56. As aforementioned (*supra* at para 45), the polo sports community is a clearly delineated group of polo associations, athletes and supporters. The FIP, as a global governing body of the sport of polo, was founded in 1982 to promote the sport of polo worldwide. Pursuant to Article 3.2 of the bylaws of FIP, “[T]he purpose of FIP is (...) to represent worldwide the sport of polo at the International Olympic Committee and other international organizations or forums” (see Article 3.2 of the bylaws of the FIP, as of December 2012, available at <http://www.fippolo.com/wp-content/uploads/2013/07/Bylaws-2012.11.16.pdf>). Moreover, according to Article 3.4 of its bylaws, FIP’s purpose is, *i.a.*, to draft, approve and spread a set of rules for international polo, applicable to those international tournaments organized by the federation, promoting its diffusion and acceptance among the different national associations.
57. Furthermore, the FIP represents the interests of 85 polo associations around the world, which proves the global distribution of the community. Pursuant to Article 4.2 of its bylaws, FIP is recognized by all the national polo associations comprised by it as the governing authority of international polo.
58. Accordingly, FIP represents the internationally acknowledged polo sports community and the polo sports community is clearly delineated by the membership to the FIP.
59. As a result, the Panel concludes that the polo sports community is a clearly delineated community.

4.1.2.2.2 Substantial Opposition within the Community

60. According to § 3.5.4 of the Guidebook, the Panel must balance a number of factors in order to determine whether there is substantial opposition within the community: the number of expressions of opposition relative to the composition of the community; the representative nature of entities expressing opposition; the level of recognized stature or weight among sources of opposition; the distribution or the

diversity among sources of expressions of opposition; the historical defense of the community in other contexts and the costs incurred by Objector in expressing opposition, including other channels the Objector may have used to convey opposition.

61. Firstly, the Panel points out that the mere fact that USPA did not object to RLC's Application for the registration of ".polo" gTLD during the free public comment period (see § 1.1.2.3. of the Guidebook) does not preclude that a Community Objection be brought under the Procedure, as these rules do not provide for any preclusive effect in this respect. Moreover, the lack of comments during the free public comment period does not *per se* indicate that there is no substantial opposition within the polo sports community.
62. In order to examine the requirement of the existence of substantial opposition within the community, the Panel must have due regard to the letters of other polo associations submitted in support of the USPA's Objection, whose authenticity was proven by the additional submissions of the Objector. Among the entities supporting USPA's Opposition is the FIP (the global governing body of the sport of polo), seven national polo associations affiliated to the FIP and ten American regional polo Associations.
63. In its additional submissions of August 5, 2013 (p. 3), RLC alleges that the letters submitted by USPA in support of its Objection are drafted by USPA and recite "identically worded and conclusory language". Moreover, RLC contends that they do not constitute a valid or clear statement of opposition as the signatories do not specify the material damage that they will suffer. This Panel disagrees. As for the first argument, it is to be noted that even by signing uniformly-drafted letters, the signatories expressed clear opposition to RLC's Application. Moreover, as for the argument raised by RLC addressing material damage (Response, p. 8 *et seq.* and RLC's additional submissions of August 5, 2013, p. 6), the Panel deems that such letters are meant to support the Objector's allegations that the polo sports community would be affected by RLC's Application for the registration of the ".polo" string, and they do not need to prove detriment.
64. The Applicant contends further that the number of expressions of opposition (7 out of 85 member organizations of the FIP) does not satisfy the requirement of the

substantial opposition within the community (Response, p. 6). However, the Panel considers that the relatively small number of expressions of opposition on behalf of the members of the FIP is outweighed by the letter of support of the FIP, as the latter represents the entire polo sports community at the global level (see supra, para. 56 and Article 3.2 of the Bylaws of the FIP, as of December 2012). Being part of the global sport organization and being formally recognized by the IOC as the federation representing polo sport worldwide, FIP signifies the polo sport in all aspects of its activities as designed by its statutes and bylaws. Moreover, USPA, a major regional polo sports community, is the Objector in these proceedings.

65. In this context, the Panel notes that opposition against the Application of RLC is not only expressed by the FIP, but also by national and local associations. However, the letters of support of the national and local polo associations are not necessary for the establishment of a substantial opposition within the polo sports community, as FIP, the global governing body of said community, expresses clear opposition.
66. As a result, the Panel concludes that there is substantial opposition within the polo sports community.

4.1.2.2.3 Strong Association between the Community Invoked and the Applied-for gTLD String

67. Pursuant to § 3.5.4 of the Guidebook, the factors that can be balanced by the Panel to determine whether the Objector has proven a strong association between the applied-for gTLD string and the community represented by the Objector include but are not limited to: Statements contained in application; Other public statements by the Applicant; 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 shall fail.
68. As the Objector points out, the game of polo is identified by one word: polo, and the polo sports community relies almost exclusively on the word "polo" to identify itself and its activities (Objection, p. 9). As a reflection of the polo sports community

reliance on the word polo, internet users looking for information about polo inevitably use “polo” as entry into their search engines.

69. The Applicant’s assertion (Response, p. 2 and 10) that consumers may also associate RLC’s trademark POLO, as applied to the RLC Designer Products, as a source identifier and brand name of RLC does not prevent the polo sports community to identify itself with the name of the sport it practices and supports, i.e. “polo”.
70. Accordingly, the Panel concludes that the Objector has proven a strong association between the applied-for “.polo” string and the polo sports community.

4.1.2.2.4 Detriment

71. Pursuant to § 3.5.4 of the Guidebook, for detriment to be established, 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. 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 represented by the objector on the DNS 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 string; and level of certainty that alleged detrimental outcomes would occur. If opposition by a community is determined, but there is no likelihood of material

detriment to the targeted community resulting from the applicant's operation of the applied-for gTLD, the objection will fail.

72. As for the nature and extent of damage to the reputation of the community represented by the USPA that would result from RLC's operation of the applied-for ".polo" gTLD string, the Objector argues that RLC's monopolization of ".polo" would incorrectly give the impression that the polo sports community is associated with the commercial ".polo" domain (Objection, p. 9). In its response of May 15, 2013, RLC contested that no such damage could arise as USPA's "primary focus" is allegedly on the sale of its products. Regardless of the fact that the materials provided by RLC do not conclusively support its allegation that USPA's "primary focus" is on the sale of USPA's products, the Panel considers that USPA's commercial activities do not preclude damage to the reputation of the polo sports community, whose primary intent is to promote the sport of polo.
73. Furthermore, the Panel deems that the Objector provides conclusive 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. As illustrated by the Objector, the new ".polo" gTLD would operate as a restricted registry to promote RLC's brand identity and authenticity (Objection, p. 10 and 12). Besides, RLC's allegations (RLC's additional submissions of August 6, 2013, p. 2 *et seq.*) that ".polo" gTLD does not fall within the category of "closed generic" applications within the meaning of the ICANN Resolution of June 25, 2013 is not relevant in this case.² The Resolution merely addresses the current debate over the possible amendment of ICANN's rules on the prohibition over limiting second-level domain registration to only the applicant or its affiliates. However, this Panel has to examine the issue on the basis of the current legal applicable standards and not on the basis of potential amendments to the applicable standards. According to § 1.2.3.1 of the Guidebook, the Applicant is allowed to operate the registry in a closed manner. It is in its discretion whether it allows members of the public to register second-level domains.
74. As the registration of the ".polo" domain names would only be available to RLC and its affiliate entities and as RLC would be allowed unlimited automatic renewals of ".polo", RLC would have the ability to own and operate the ".polo" domain to the

² See New gTLD Program Committee, Rationale for Resolutions 2013.06.25.NG04 – 2013.06.25.06, available at <http://www.icann.org/en/groups/board/documents/resolutions-new-gtld-25jun13-en.htm>.

exclusion of all others, including members of the polo sports community. This barrier to entry cannot be counterbalanced by the Applicant's statement that it will not allow any secondary domains in its gTLD to infringe trademark rights of others. In fact, this statement does not protect the interests of the polo sports community, whose members would in any event see the obtainability of second-level domains being predicated upon RLC's consent. On the contrary, RLC fails to provide effective security protection for internet users wishing to access the webpages of members of the polo sports community. As stated by the Objector, the Application for the registration of the ".polo" gTLD would interfere with the polo sports community's ability to promote polo and attract polo participants and fans.

75. The Panel determines that it was conclusively proven that, as a result of the interconnection between the applied-for string and the polo sports community, the monopolization of the ".polo" gTLD would impair the community's ability to promote the sport of polo by creating confusion among users. Accordingly, the ".polo" string cannot be monopolized especially in view of the dependence on "polo" of the polo sports community for its activities.
76. The Panel also deems that RLC's claim that monopolization of a generic string is not an appropriate basis for a Community Objection pursuant to the Guidebook is not correct. While it is true that the Guidebook does not provide for monopolization as a ground for a Community Objection, monopolization may nevertheless indeed constitute a ground for detriment under § 3.5.4 of the Guidebook.
77. With regard to the requirement of likelihood of concrete economic damage to the community, the Applicant contends that the only risk of harm alleged by USPA is that the Applicant will be delegated the string instead of the Objector, which according to § 3.5.4 of the Guidebook would not satisfy the requirement of material detriment (Response, p. 9 and RLC's additional submissions of August 5, 2013, p. 7). However, the Panel considers that if RLC's Application were approved, the polo sports community would see its presence on the internet severely affected, as the word "polo" identifies not only RLC but also the whole polo sports community. Furthermore, the confusion created in the polo supporters by RLC's registration of the ".polo" string combined with the polo sports community members' loss of the right to register second-level domains in the ".polo" gTLD would result in economic

damage as it would highly restrict and prejudice their presence on the worldwide web. Additionally, as potential sponsors will be aware that the “.polo” string will be associated to businesses other than those related to the polo sports community, they would be discouraged from sponsoring the activities within said community. This could lead to further economic loss for the polo sports community.

78. In this context, the Panel recalls ICANN’s recent decision to suspend the evaluation of more than ninety applications for registration of generic or dictionary words as gTLDs because such registration would grant unfair monopoly to the Applicant (see Attachment I to USPA’s letter of August 5, 2013). In particular, ICANN’s GAC recommended the disallowance of the application by Amazon.com for the .amazon string following the observations made by the Governments of Brazil and Peru during ICANN’s evaluation period on the grounds that granting exclusive rights to such a specific string would hinder the possibility of this domain being used by members of the community.
79. Accordingly, the Panel concludes that the Objector has persuasively proven that damage for a significant portion of the community it represents would result should the Applicant be granted the applied-for “.polo” string.

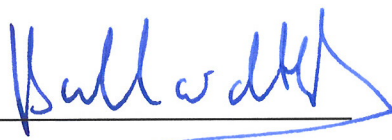
4.2 Determination on the Refund of Costs

80. Pursuant to Article 21(d) of the Procedure, this Panel grants the prevailing party, USPA, full refund by the Centre of its advance payment costs.

5. Expert's Determination

81. Objector prevails.
82. Objector shall be refunded of its full advance payment costs by the Centre.

Date: 10/10/2013

Signature: 
Prof. Dr. Burkhard Hess
Expert