INDEPENDENT REVIEW PROCESS

INTERNATIONAL CENTRE FOR DISPUTE RESOLUTION
ICDR CASE NO. 01-15-0002-9483

DOT SPORT LIMITED
(Claimant)

And

INTERNET CORPORATION FOR ASSIGNED
NAMES AND NUMBERS
(Respondent)

INDEX TO DOCUMENTS SUBMITTED WITH ICANN'S RESPONSE TO CLAIMANT'S SECOND ADDITIONAL SUBMISSION

Exhibit	Description
Resp. Ex. 15	*Commercial Connect LLC v. Amazon EU*, Case No. 50 504 T 00261 13 Expert Determination.
Resp. Ex. 16	*Commercial Connect LLC v. Zodiac Libra Limited*, Case No. 50 504 T 00256 13 Expert Determination.
Resp. Ex. 17	Recommendation of the Board Governance Committee (BGC) Recommendation for Request 13-10.
Resp. Ex. 18	Proposed Review Mechanism to Address Perceived Inconsistent Expert Determinations on String Confusion Objections.
Resp. Ex. 19	The Mandate of the Independent Objector.
Resp. Ex. 20	Recommendation of the Board Governance Committee (BGC) Recommendation for Request 13-23.
Resp. Ex. 21	Official Website of the Independent Objector – The Objections Filed by the Independent Objector.
Resp. Ex. 22	SportAccord Council web page.
Resp. Ex. 23	ICANN New gTLDs – New gTLD Program Personal Data Privacy Statement.
Resp. Ex. 24	California Corporation Code section 330, Legislative Committee Comments (Deering's 2016).

Resp. Ex. 15

RESPONDENT'S EXHIBIT

International Centre for Dispute Resolution

New gTLD String Confusion Panel

RE: 50 504 T 00261 13

Commercial Connect LLC, OBJECTOR

vs

Amazon EU S.à r.l., APPLICANT

String: <.通販>

EXPERT DETERMINATION

The Parties:

The Objector is Commercial Connect LLC, 1418 South 3rd Street, Louisville, Kentucky 40208 USA and is represented by Jeffrey S. Smith.

The Applicant is Amazon EU S.à r.l., 5 Rue Plaetis L-2338 Luxembourg, and is represented by Flip Petillion, Crowell & Moring, rue Joseph Stevens 7, Brussels 1000 Belgium.

The New gTLD String Objected To:

The new gTLD string applied for and objected to is: **<.通販>**

Prevailing Party:

The Objector has prevailed and the Objection is sustained.

Background:

Module 3 of the ICANN gTLD Applicant Guidebook ("Guidebook") contains Objection Procedures and the New gTLD Dispute Resolution Procedure ("the Procedure").

Article 1(b) of the Procedure states that "The new gTLD program includes a dispute resolution procedure, pursuant to which disputes between a person or entity who applies for a new gTLD and a person or entity who objects to that gTLD are resolved in accordance with this New gTLD Dispute Resolution Procedure."

Section 3.1 of the Guidebook provides: "The independent dispute resolution process is designed to protect certain limited interests and rights. The process provides a path for formal

objections during evaluation of the applications. It allows a party with standing to have its objection considered before a panel of qualified experts."

Article 3(a) of the Procedure states that "String Confusion Objections shall be administered by the International Centre for Dispute Resolution".

A formal objection initiates a dispute resolution proceeding. In filing an application for a gTLD, the applicant agrees to accept the applicability of the gTLD dispute resolution process. Similarly, an objector accepts the applicability of the gTLD dispute resolution process by filing its objection.

Article 4(b)(i) of the Procedure provides that the applicable Dispute Resolution Service Provider ("DRSP") Rules are the ICDR Supplementary Procedures for ICANN's New gTLD Program.

A formal objection can be filed on four enumerated grounds, only one of which is relevant here. Specifically, as expressed in the Guidebook, and the Procedure, one of the grounds expressed is "String Confusion." Article 2(e)(i) of the Procedure provides: "(i) 'String Confusion Objection' refers to the objection that the string comprising the potential gTLD is confusingly similar to an existing top-level domain or another string applied for in the same round of applications."

A panel hearing a string confusion objection will consider whether the applied-for gTLD string is likely to result in string confusion. String confusion exists where a string so nearly resembles another that it is likely to deceive or cause confusion. For a likelihood of confusion to exist, it must be probable, not merely possible that confusion will arise in the mind of the average, reasonable Internet user. Mere association, in the sense that the string brings another string to mind, is insufficient to find a likelihood of confusion. Guidebook, Section 3.4.1.

Standing and Other Procedural Matters:

Objectors must satisfy standing requirements to have their objections considered. Standing requirements for objections on the grounds of string confusion require that the Objector be existing TLD operators or TLD applicants in the current round.

An existing TLD operator may file a string confusion objection to assert string confusion between an applied-for gTLD and the TLD that the Objector currently operates.

Any gTLD applicant in the same application round may file a string confusion objection to assert string confusion between an applied-for gTLD and the gTLD for which it has applied, where string confusion between the two applicants has not already been found. That is, an applicant does not have standing to object to another application with which it is already in a contention set.

Here, Objector has applied for the gTLD string <.shop>. Applicant has applied for the gTLD string <.通販(Online Shopping)> aka <.xn--gk3at1e (Online Shopping)>. Accordingly, Objector has standing to file this string confusion objection.

In the case where an existing TLD operator successfully asserts string confusion with an applicant, the application will be rejected.

In the case where a gTLD applicant successfully asserts string confusion with another applicant, the only possible outcome is for both applicants to be placed in a contention set and to be referred to a contention resolution procedure (refer to Module 4, String Contention Procedures). If an objection by one gTLD applicant to another gTLD applicant is unsuccessful, the applicants may both move forward in the process without being considered in contention with one another.

Article 21(d) of the Procedure provides: "The Expert Determination shall be in writing, shall identify the prevailing party and shall state the reasons upon which it is based. The remedies available to an Applicant or an Objector pursuant to any proceeding before a Panel shall be limited to the success or dismissal of an Objection and to the refund by the DRSP to the prevailing party, as determined by the Panel in its Expert Determination, of its advance payment(s) of Costs pursuant to Article 14(e) of this Procedure and any relevant provisions of the applicable DRSP Rules."

Applicant asks that the Objection be denied because Objector allegedly did not properly serve the objection on Applicant in accord with applicable rules set out in the Procedure. However, Applicant acknowledges that it previously has been provided with a copy of Objector's application for the <.shop> gTLD string, the Objector's Demand for Arbitration and other materials. Applicant's able counsel also has submitted a detailed brief in support of its application, and the panel has reviewed and considered all of Applicant's submissions, arguments and contentions. Thus, it appears that Applicant received actual notice of the Objection, and has been accorded a full and fair opportunity to be heard on its application. Applicant also has not shown that it was prejudiced by any alleged defects in the filing of the Objection. As the procedures for String Confusion Objections are relatively new, in the absence of a showing of actual prejudice to the applicant, the panel is of the view that the Objection should be evaluated on the merits. Consequently, Applicants procedural objections are denied.

Parties' Contentions:

Objector asserts that confusing similarity exists because the Applicant's proposed string has a similar meaning to the Objector's string. The Object further asserts that visual or aural similarity is not required, if the two strings have the same meaning, even if in different languages using different characters.

Applicant responds by contending that the objection should be denied because its application will promote innovation and competition among domain name registries. Applicant asserts that such competition advances the program's goals, to expand consumer choice in the gTLD space.

Applicant also asserts that the string it has applied for will not create confusion. Applicant argues that the strings have a different meaning, because the word “shop” means “commercial establishment” or “store” and is a noun, while “online shopping” refers either to an action of purchasing something online or to order something for delivery via mail.

Lastly, Applicant asserts that the likelihood of confusion is merely possible, not probable, because the two strings are in different languages and the characters used by the two languages for the two strings have no visual similarity.

Discussion and Findings:

Here, the issue is whether the string <.通販(Online Shopping)> aka <.xn--gk3at1e (Online Shopping)> comprising the potential gTLD is confusingly similar to <.shop>.

There are three distinct, but related issues to be determined. The first issue is whether the root of a word in a string should be accorded protection from usage of variations of the root word, including participles. For example, there are several variations of the root word “shop” in the English language, including the plural “shops,” (when used as a noun), the participle “shopping” and the past tense of the verb “shopped.”

The second issue is whether the addition of the word “online” before the word “shopping” makes the two strings sufficiently distinct as to avoid string confusion.

The third issue is whether the use of Japanese characters and language (or any other language) instead of the English alphabet and language for the same word avoids the possibility of confusion.

As noted above, the applicable standard of review is the following: “String confusion exists where a string so nearly resembles another that it is likely to deceive or cause confusion. For a likelihood of confusion to exist, it must be probable, not merely possible that confusion will arise in the mind of the average, reasonable Internet user. Mere association, in the sense that the string brings another string to mind, is insufficient to find a likelihood of confusion.”

Generally speaking, “confusion” may include jumbled or disorganized thought. A person who is confused may have difficulty solving problems or tasks, especially those known to have been previously easy for the person, or the inability to recognize familiar objects or locations, and uncertainty about what is happening, intended, or required. Confusion may include the state of being unclear in one’s mind about something, or the mistaking of one person or thing for another, including the inability to differentiate between similar words. In the context of internet searches, confusion can arise if the user is unable to differentiate between top level domain names, and becomes unable to access information using a logical, organized thought process. A confused internet user will be unable to find his or her way around the domain in a definite or familiar manner.

Here, the word “shop” can be used either as a noun, designating a physical establishment where one can buy goods or services, or as a verb. The concurrent use of “shopping”, the

participle of the root word "shop", in a gTLD string will result in probable confusion by the average, reasonable Internet user, because the two strings have virtually the same sound, meaning, look and feel. The average Internet user would not be able to differentiate between the two strings, and in the absence of some other external information (such as an index or guidebook) would have to guess which of the two strings contains the information the user is looking to view.

Likewise, the addition of the word "online" before "shopping" does not add sufficient uniqueness to the string. The meaning of the string arises from the use of the root word "shop", not the modifier "online." The meaning of the string remains the same if the word "online", or some other similar modifier such as "internet," "digital" or "virtual", appears or not.

The adopters of the applicable standard of review for string confusion hypothetically could have allowed an unlimited number of top level domain names using the same root, and simply differentiate them by numbers, e.g., <.shop1>, <.shop2>, <.shop3>, etc., or other modifiers, including pluralization, or other similar variations of a root word, or other modifiers before or after the root word. While that might allow for increased competition, as argued by Applicant, it would only lead to a greater level of confusion and uncertainty among average, reasonable Internet users. Accordingly, the Applicant's argument that the concurrent use of a root word and its participle version in a string increases competition is not persuasive in this context, and is rejected.

Finally, the Applicant has not persuaded the panel that simply using a foreign language or foreign characters in a gTLD string is a sufficient basis to differentiate two strings with essentially the same meaning when the string is translated from one language to the other. Many Internet users speak more than one language, including English. The use of essentially the same word in two different languages is sufficient to cause string confusion among the average, reasonable Internet user.

Accordingly, the Applicant's arguments do not appear to be consistent with the applicable standard of review, the apparent purpose or goal of implementing gTLD's, or the purpose or goal in allowing a string confusion objection.

Determination:

Therefore, the Objector has prevailed and the Objection is sustained.

DATED: August 21, 2013

Robert M Nau

ROBERT M. NAU,
Sole Expert Panelist

Resp. Ex. 16

RESPONDENT'S EXHIBIT

International Centre for Dispute Resolution

New gTLD String Confusion Panel

Re: 50 504 T 00256 13

Commercial Connect LLC, OBJECTOR

and

Zodiac Libra Limited, APPLICANT

String: **<.网店>**

EXPERT DETERMINATION

The Parties

The Objector is Commercial Connect LLC (1418 South 3rd Street, Louisville, KY 40208) and is represented by Jeffery S. Smith (same address) .Contact Information Redacted

The Applicant is Zodiac Libra Limited (c/o Pam Little, Zodiac Holdings Limited, Contact Information Redacted Contact Information) and is represented by Chinghong Seng Contact Information Redacted Redacted Contact Information - and Pam Little (same address) - Contact Information Redacted Redacted

The New gTLD String Objected To

The new gTLD string applied for and objected to is: **<.网店>**

Prevailing Party

The Applicant has prevailed and the Objection is dismissed.

The New gTLD String Confusion Process

Module 3 of the ICANN gTLD Applicant Guidebook (the Guidebook) contains as an attachment the New gTLD Dispute Resolution Procedure (the Procedure).

Article 1(b) of the Procedure states that "The new gTLD program includes a dispute resolution procedure, pursuant to which disputes between a person or entity who applies for a new gTLD and a person or entity who objects to that gTLD are resolved in accordance with this Procedure.

As expressed in the Guidebook and the Procedure, there are four (4) grounds to object to the registration of new gTLDs. One of these grounds expressed String Confusion, as described in the Procedure Article 2(e)(i): **"(i) 'String Confusion Objection' refers to the objection that the string comprising the potential gTLD is confusingly similar to an existing top-level domain or another string applied for in the same round of applications."**

Procedural History of this Case

On October 11, 2000, Commercial Connect LLC (the Objector) filed an unsponsored TLD application with ICANN for, *inter alia*, .shop. This application was supplemented by a new gTLD application to ICANN by the Objector on June 13, 2002 for .shop (Application ID: 1-1830-1672).

Zodiac Libra Limited (the Applicant) filed a TLD application for .网店 (Application ID: 1-858-36255).

On March 14, 2013, the Objector filed a gTLD String Confusion Objection to the gTLD application of the Applicant for .网店 on the ground that "The gTLD applied for so nearly resembles the .shop TLD that it is probable that confusion will arise in the mind of the average, reasonable internet user because the IDN for eshop gTLD application is similar either visually, aurally or has a similar meaning".

The objection was accepted for filing by the ICDR on April 11, 2013, as complying with Article 5-8 of the Procedure.

On April 18, 2013 the Applicant was advised that it shall file a response to the objection within 30 days from that date.

That response to the objection was delivered in a timely way and on May 24, 2013 was noted as complying with Article 11 of the Procedure and the applicable Dispute Resolution Service Provider Rules (the DRSP Rules).

On June 17, 2013 I was appointed as the Expert to decide the objection, and the parties were to submit comments and challenges, if any, to the appointment by June 20, 2013. No comments or challenges to my appointment were received.

Basis for Objector's Standing to Object based on String Confusion

As appears from its 2000 application and its June 13, 2002 new gTLD application, the Objector has a lengthy history of efforts to bring the .shop gTLD to the internet. It bases its standing to object on the Guidebook s. 3.2.2, on the grounds of string confusion with respect to any application that uses words (in whatever language) that have similar meaning to "shop". It takes the position that the string .网店 put forward by the Applicant has such a similar meaning because it so "nearly resembles the .shop TLD that it is probable that confusion will arise in the mind of the average, reasonable internet user because the IDN for eshop gTLD application is similar either visually, aurally or has a similar meaning".

As such, the Objector, in my view, has standing to object based on the allegation of string confusion.

Factual Background

The Objector claims that:

> From 2004 to present eCWR and Commercial Connect LLC have been active in obtaining supporters for our .shop cause which is to provide a safe and secure eCommerce experience which meets and exceeds what is offered currently. To date there are in excess of 15,000 members which represent over $650 trillion is annual revenues that support our application for .shop.
>
> On June 4, 2012 the final version of the Applicant Guidebook was release which stands as a contract for anyone wishing to apply for the delegation of new gTLD¿s in or about 2012/2013.
>
> ...
>
> The gTLD filed by Zodiac Libra, so nearly resembles the .shop TLD that it is probable that confusion will arise in the mind of the average, reasonable internet user because the IDN for eShop gTLD application is similar either visually, aurally, or has a similar meaning.

.网店 is said by the Applicant to be a Chinese IDN string. The Applicant claims that it is a general application with the prioritization number 31. The Applicant claims that the proposed TLD is targeted at Chinese speaking internet users, primarily within China, and notes that China has over 560 million internet users whose mother tongue is Chinese.

Parties' Contentions

(a) Objector

The objection is stated in general terms as set out above. The Objector filed a document described as a dispute resolution objection, which contains a general review of the history of the application for the .shop TLD and the requirements for an application and a string confusion dispute. On page 5 of the submission the following appears:

> The gTLD filed by _____, so nearly resembles the .shop TLD that it is probable that confusion will arise in the mind of the average, reasonable internet user because the _____ gTLD application is similar either visually, aurally, or has a similar meaning.

In the document headed additional claim information, the Objector notes a variety of words that have similar meanings to shop:

> Agency
> Boutique
> Bureau
> Chain
> Deli
> Department store
> Emporium
> Five-and-dime
> Mall
> Market
> Mart
> Mill
> Office
> Outlet
> Service
> Showroom
> Stand
> Store
> Supermarket

The Objector then sets out the basis for standing and repeats again "The gTLD filed by Zodiac Libra, so nearly resembles the .shop TLD that it is probable that confusion will arise in the mind of the average, reasonable internet user because the IDN for eShop gTLD application is similar either visually, aurally, or has a similar meaning".

In its objection, the Objector refers to a variety of Articles of the Procedure, including Articles 1.1.2.10, 2.2, 2.2.1.1 and 2.2.1.2 and includes extracts from what appears to be earlier versions of what became either the Guidebook or the Procedure.

The Objector takes the position that visual, aural and meaning confusion should be considered when evaluating string confusion.

The Objector provides no evidence in support of its objection.

(b) Applicant's Response

The Applicant has a procedural response, on the basis that the objection is not properly brought because it does not contain a description of the basis for the objection sufficient for the Applicant to comply with Article 11 (d)(ii) of the Procedure so as to allow the Applicant to provide a "point by point response to the statements made in the objection".

The substantive response is that the objection does not show similarity between .shop and .网店 and that there is a probability of user confusion as required by s. 3.5.1 of the Guidebook.

In particular, the Applicant contends that the translation of .网店 in its gTLD application as "online store" does not have similar meanings or similarity to .shop that rise to the level required to meet the requirements of string confusion.

The Applicant argues that the two proposed strings are not similar visually or aurally, and that the Chinese phrase .网店 has multiple meanings in English, none of which are confusing with .shop.

The Applicant argues that the strings target different internet user groups who use different languages, such that user confusion cannot arise.

The Applicant relies on the stated policy goal of ICANN to allow users to register and use domains based on their local languages and scripts, given ICANN's statement that 70% of internet users worldwide are non-English speakers.

The Applicant bolsters its position with evidence which I will address in the discussion and findings section of this Expert report.

Discussion and Findings

The Objector has standing to file a String Confusion Objection to assert a String Confusion between an applied – for gTLD and the gTLD for which it has applied, where, as here, String Confusion between the two Applicants has not already been found in the Initial Evaluation. (Guidebook s. 3.2.2.1)

"String Confusion Objection" is defined in Article 2(e)(i) of the Procedure as referring "to the objection that the string comprising the potential gTLD is confusingly similar to an existing top-level domain or another string applied for in the same round of application".

Section 3.5 of the Guidebook sets out the principles and standards that are to be applied. With respect to a String Confusion, I am to:

> "consider whether the applied-for gTLD string is likely to result in string confusion. String confusion exists where a string so nearly resembles another that it is likely to deceive or cause confusion. For a likelihood of confusion to exist, it must be probable, not merely possible that confusion will arise in the mind of the average, reasonable internet user. Mere association, in the sense that the string brings another string to mind, is insufficient to find a likelihood of confusion."

(a) The Procedural Objection

The Applicant takes the position that the objection has not been properly filed, and should not have been accepted as a proper objection under the Procedure because it does not contain a description of the basis for the objection as required by Article 8 of the Procedure, specifically Article 8(a)(iii) which requires an explanation of the validity of the objection and why the objection should be upheld, such that the Applicant can respond as required by Article 11(d)(ii) with .网店 point-by-point response to the statement made in the objection.

As appears from the foregoing, the Objector's position is stated in the most general terms, alleging similar meaning and that confusion will arise visually and aurally. No particularity is given, and no evidence is put forward to support the allegations, and why the objection should be upheld.

While there is force to the Applicant's procedural objection, in view of my opinion on the substance of the objection, it is not necessary for me to come to a conclusion as to whether the objection should fail on procedural grounds.

(b) The Substantive Objection

It is apparent that visually there can be no confusion between .shop and .网店, and there is no evidence that there is any possibility of aural confusion. .shop is aimed at English speakers, and .网店 is aimed at a Chinese speaking public.

The affidavit of Kevin Lin provided by the Applicant is instructive. Dr. Lin, a PhD in linguistics, provided an expert opinion on the meaning of the Chinese word 网店 in connection with the domain name issue, and whether it would be confused with the English word "shop". Dr. Lin is highly qualified to render such an opinion.

Dr. Lin noted that standard for String Confusion and opined as follows:

> "First there is no visual resemblance whatsoever between 网店 and 'shop' as is evident in this line.
>
> Second, the Chinese phrase 网店 needs to be translated into English before a comparison with 'shop' can be made and vice versa.
>
> Third, the Chines phrase 网店 consists of two characters. The first one means 'web' or 'net'. The second one means 'shop'. Together, the phrase means, if translated literally, 'web shop' or 'net shop'. Although read in English translation, one may wonder if 'web shop' or 'net shop' causes confusion with 'shop', in Chinese, there is no confusion between 网店 and 商店."

Dr. Lin concludes as follows:

> "Finally, 网店 and 'shop' are in two completely different languages. Internet users will have to reasonably good bi-lingual speakers of English and Mandarin Chinese before being to make any association between 网店 and 'shop'. Such internet users are the relative minority of the whole population of internet users, not the average."

It is clear from the ICANN Factsheet submitted by the Applicant that internationalized domain names in local languages, including non-alphabetic languages like Mandarin Chinese, are to be encouraged.

The Applicant in its gTLD application for 网店 provides the translation "online store" as one of the English translations for 网店. I agree that even for those few persons able to read both Mandarin and English, there would be no reasonable possibility of confusion between .shop and "online store" or "net store" or "web store", especially given that the 网店 has multiple meanings in Chinese. The two strings applied for target different internet users who use different languages. Considering that the Applicant's string is targeted at the hundreds of millions in the Chinese market, and .shop is targeted at the English speaking market, and they are visually and aurally dissimilar, the chances of confusion are vanishingly small, if confusion exists at all. At its highest, there might be an association in the minds of persons fluent in both languages, in the sense that the Chinese string brings to mind .shop, but the Guidebook is clear that a mere association is insufficient to find a likelihood of confusion. The alleged confusion does not reasonably approach the level of probability of the likelihood to deceive and cause confusion required by the Guidebook s. 3 and the Procedure Article 2(e)(ii) for the objection to be upheld.

Determination

Therefore, the Applicant has prevailed and the Objection is dismissed.

August 16 2013

Earl A. Cherniak, Q.C.
Sole Expert Panelist

2483729.1

Resp. Ex. 17

RESPONDENT'S EXHIBIT

RECOMMENDATION OF THE BOARD GOVERNANCE COMMITTEE (BGC)

RECONSIDERATION REQUEST 13-10

10 OCTOBER 2013

On 5 September 2013, Commercial Connect, LLC ("Commercial Connect") submitted a reconsideration request ("Request"). The Request asked the Board to reconsider ICANN staff's acceptance of what Commercial Connect argues to be two inconsistent expert determinations from dispute resolution panels appointed by the International Centre for Dispute Resolution ("ICDR"). Specifically, the Request challenges the staff's acceptance of the 8 August 2013 Expert Determination dismissing Commercial Connect LLC's objection to Top Level Domain Holdings Limited's ("TLDH") new gTLD application for the Chinese translation of "shop" ("TLDH's Applied-for String") in light of the 21 August 2013 Expert Determination sustaining Commercial Connect's objection to Amazon EU S.a.r.l.'s ("Amazon") new gTLD application for the Japanese translation of "online shopping" ("Amazon's Applied-for String").

I. Relevant Bylaws

Article IV, Section 2.2 of ICANN's Bylaws states in relevant part that any entity may submit a request for reconsideration or review of an ICANN action or inaction to the extent that it has been adversely affected by:

> (a) one or more staff actions or inactions that contradict established ICANN policy(ies); or
>
> (b) one or more actions or inactions of the ICANN Board that have been taken or refused to be taken without consideration of material information, except where the party submitting the request could have submitted, but did not submit, the information for the Board's consideration at the time of action or refusal to act; or
>
> (c) one or more actions or inactions of the ICANN Board that are taken as a result of the Board's reliance on false or inaccurate material information.

Dismissal of a request for reconsideration is appropriate if the Board Governance Committee ("BGC") recommends, and in this case the New gTLD Program Committee ("NGPC") agrees, that the requesting party does not have standing because the party failed to satisfy the criteria set forth in the Bylaws. These standing requirements are intended to protect the reconsideration process from abuse and to ensure that it is not used as a mechanism simply to challenge an action with which someone disagrees. The reconsideration process is for situations where the staff acted in contravention of established policies (when the Request is based on staff action or inaction).

For reconsideration requests that challenge staff actions, requests must be submitted to the BGC within fifteen days after the date on which the party submitting the request became aware of, or reasonably should have become aware of, the challenged staff action. Bylaws, Art. IV, § 2.5.

The Request was received on 5 September 2013. Commercial Connect asserts that it did not become aware of the challenged staff action (the staff's acceptance of two seemingly inconsistent expert determinations) until after the second expert determination was rendered on 21 August 2013. Because the Request was received within fifteen days of the second expert determination, Commercial Connect's Request is deemed timely under the Bylaws.

II. Background

A. The New gTLD Objection Procedure

The New gTLD Program includes an objection procedure pursuant to which objections to applications for new gTLDs are submitted to an independent dispute resolution service provider ("DRSP"). The objection procedures are set out in Module 3 of the Applicant Guidebook (http://newgtlds.icann.org/en/applicants/agb/objection-procedures-04jun12-en.pdf) and the New gTLD Dispute Resolution Procedure (the "Procedure") attached thereto.

As detailed in the Request, Commercial Connect filed two string confusion objections with the ICDR asserting that two applied-for strings are "confusingly similar to an existing TLD or to another applied-for gTLD string in the same round of applications." (Guidebook, Section 3.3.2.1; Procedure, Art. 2(e).)[1]

A panel of appropriately qualified expert(s) appointed by the ICDR is required to consider an objection that has been registered for processing and for which a response has been submitted. (Guidebook, Section 3.4.4.) Each panel will determine whether the objector has standing to object and will use appropriate general principles/standards to evaluate the merits of each objection. The panel must apply the standards that have been defined in Section 3.5 of the Applicant Guidebook for each type of objection. (Guidebook, Section 3.5; Procedure, Art. 20.)

The panel's final determination will include a summary of the dispute and findings, identify the prevailing party, and provide the reasoning upon which the expert determination is based. (Guidebook, Section 3.4.6.; Procedure, Art. 21.) The findings of the panel will be

[1] With string confusion objections, where a new gTLD applicant successfully asserts string confusion with another applicant, the two applied-for strings will be placed in a "contention set" and be referred to the String Contention Procedures in Module 4 of the Applicant Guidebook. (Guidebook, Section 3.2.2.1.)

considered an expert determination and advice that ICANN will accept within the dispute resolution process. (Guidebook, Section 3.4.6.)

B. Commercial Connect's Objections to TLDH's Applied-for String and Amazon's Applied-for String

Commercial Connect is an applicant for the .SHOP string ("Commercial Connect's Applied-for String"). Commercial Connect objected to both TLDH's Applied-for String and Amazon's Applied-for String, asserting that both strings were confusingly similar to Commercial Connect's Applied-for String; TLDH and Amazon each filed responses in separate proceedings.

For Commercial Connect's objection to TLDH's Applied-for String, the ICDR's appointed panelist rendered an expert determination on 8 August 2013 ("TLDH Expert Determination"). Based on the evidence and the parties' submissions, the TLDH Panel dismissed Commercial Connect's objection on the grounds that the two-applied for strings are not confusingly similar to the average, reasonable Internet user under the standard set forth in the Procedure and the Applicant Guidebook. (TLDH Expert Determination, Pg. 7.)

Separately, for Commercial Connect's objection to Amazon's Applied-for String, a different panelist appointed by the ICDR rendered an expert determination on 21 August 2013 ("Amazon Expert Determination"). That Panelist ("Amazon Panel") determined that Commercial Connect had standing to object as an applicant for the .SHOP string. (Amazon Expert Determination, Pg. 3.) Based on the evidence and the parties' submissions, the Amazon Panel sustained Commercial Connect's objection on the grounds that the two-applied for strings are confusingly similar. (Amazon Expert Determination, Pgs. 4-5.)

Although Commercial Connect's objections were determined by a third-party DRSP, ICANN has determined that the Reconsideration process can properly be invoked for challenges of the third-party DRSP's decisions where it can be stated that either the DRSP failed to follow

the established policies or processes in reaching the decision, or that ICANN staff failed to follow its policies or processes in accepting that decision. See BGC Recommendation on Reconsideration Request 13-5 at http://www.icann.org/en/groups/board/governance/reconsideration/recommendation-booking-01aug13- en.doc.

III. Analysis of Commercial Connect's Request for Reconsideration

Commercial Connect seeks reconsideration of the staff's acceptance of the purportedly inconsistent TLDH Expert Determination and the Amazon Expert Determination. More specifically, Commercial Connect requests that ICANN "issue clear and well-defined guidance" to the expert panels and "ensure that the Panels comply with the guidelines" (especially for string similarity objections involving Internationalized Domain Names with foreign characters). Once ICANN establishes "well-defined guidance," Commercial Connect requests that staff return to the expert panels any determinations that do not comply with the guidance, and Commercial Connect contends that the TLDH Expert Determination should be returned because it is inconsistent with the standards set forth in the Applicant Guidebook and the Amazon Expert Determination. (Request, Section 9.)

A. The Purported Inconsistencies Between Expert Determinations Do Not Demonstrate A Process Violation

Commercial Connect's Request is based primarily on a claim that the TLDH Panel and the Amazon Panel inconsistently applied the standard for evaluating string confusion objections.[2]

[2] On 4 September 2013, Amazon separately sought reconsideration of the Amazon Expert Determination. (Request 13-9, available at http://www.icann.org/en/groups/board/governance/reconsideration/request-commercial-connect-05sep13-en.pdf.) Amazon's reconsideration request is based in part on Amazon's contention that the Amazon Panel applied the wrong standard in evaluating Commercial Connect's objection. Amazon relies on the TLDH Expert Determination as evidence that the Amazon

To support this assertion, Commercial Connect relies on Section 2.2.1.1.3 of the Applicant Guidebook, which states that a string confusion objection may be based on any type of similarity, including visual, aural or similarity of meaning. (Request, Pg. 4.) Although both panels concentrated on the meanings of the applied-for strings (determining there was no visual or aural similarities between the objected-to strings and Commercial Connect's application for .SHOP), Commercial Connect concludes that the two panels, applying the same standard, rendered inconsistent determinations "as to whether a Roman root and a gTLD string of foreign characters having the same meaning should be placed in the same contention set." (Request, Pg. 5.) To support this conclusion, Commercial Connect contends that the TLDH Panel determined that "the guidelines do not permit confusion to be based on meaning alone" when evaluating an application for Internationalized Domain Names with foreign characters, while the Amazon Panel determined the "use of essentially the same word in two different languages is sufficient to cause string confusion." (Request, Pg. 5.)

The fact that these two panels, evaluating similar objections, came to different conclusions does not mean that the panels inconsistently applied the standard for evaluating string confusion objections, nor does it establish a policy or process violation to support Reconsideration. On a procedural level, each expert panel generally rests its determination on the materials presented to it by the parties to that particular objection, and the objector bears the burden of proof. Two panels confronting nearly identical issues could rightfully reach different determinations, based on the strength of the materials presented. While Commercial Connect

(continued…)

Panel applied the wrong standard. For the same reasons as stated herein, Amazon's claims are unsupported and do not support Reconsideration.

was the objector in each of these determinations, each objection was rebutted by a different applicant. Thus, the panels reached different decisions at least in part because the materials submitted by each applicant (TLDH and Amazon) in defense of its proposed string were different, and not because one panel violated any established policy or process in reaching its determination.

For instance, in dismissing Commercial Connect's objection, the TLDH Panel determined that Commercial Connect failed to meet its burden of proof that the two strings (Commercial Connect's Applied-for String and TLDH's Applied-for String) would cause probable confusion in the mind of the average, reasonable Internet user. (TLDH Expert Determination, Pg. 7.) The Amazon Panel, on the other hand, in sustaining Commercial Connect's objection, found that Amazon's arguments:

> [d]o not appear to be consistent with the applicable standard of review, the apparent purpose or goal of implementing gTLDs, or the purpose or goal in allowing a string confusion objection.

(Amazon Expert Determination, Pg. 5.) Overall, the Amazon Panel found that Amazon's arguments were "not persuasive." (Expert Determination, Pg. 5.)

Moreover, according to the TLDH Expert Determination, TLDH asserted that Commercial Connect's Applied-for String and TLDH's Applied-for String are aimed at distinct markets, as evidenced by the descriptions in the two applications. TLDH claimed that Commercial Connect's Applied-for String will be marketed to "the global ecosystem of e-commerce" with a "strict verification process where Commercial Connect researches the identity of that applicant and [the] business." (TLDH Expert Determination, Pg. 5.) In contrast, TLDH's Applied-for String is directed to "Chinese-language vendors" and requires no such pre-verification. TLDH noted that these markets may overlap to some extent, but one is "global and

restricted," while the other is "language-specific and open." (TLDH Expert Determination, Pg. 5.)

The TLDH Panel found that the similarity in meaning between the two strings is apparent only to individuals who read and understand both Chinese and English. Relying on the intended markets for the strings, the TLDH Panel determined:

> While there is some potential for overlap between these two markets, they are largely distinct. Therefore, there is little likelihood that a bilingual user would be deceived or confused.

(TLDH Expert Determination, Pg. 7.) The TLDH Panel therefore dismissed Commercial Connect's objection not because it concluded that translations of essentially the same word are insufficient to cause string confusion – as Commercial Connect contends – but because TLDH presented convincing evidence that there was little likelihood of confusion between Commercial Connect's Applied-for String and TLDH's Applied-for String.

Ultimately, Commercial Connect has not been able to establish an actual policy or process that either panel failed to follow. The Request instead challenges the substantive determinations of the panels rather than the processes by which the panels reached their determinations. While Commercial Connect may disagree with the TLDH Panel's findings, Reconsideration is not available as a mechanism to re-try the substantive determination of the TLDH Panel. Commercial Connect's claims that the panels inconsistently applied the standards set out in the Applicant Guidebook are unsupported and do not support Reconsideration.

B. ICANN's Alleged Failure To Provide Guidance To The Panels Does Not Support Reconsideration

In its Request, Commercial Connect contends that its participation in the dispute resolution process was predicated on its reliance that DRSP-appointed panels would comply with the clear and well-defined guidance provided by ICANN and that ICANN would only accept

determinations that complied with ICANN's guidance. Commercial Connect claims that ICANN's "failure to provide and ensure compliance with clear and well defined guidance has resulted in inconsistent results in identical fact patterns." (Request, Pg. 6.)

Commercial Connect does not contend that the dispute resolution procedures set out in Module 3 of the Applicant Guidebook, or the attached Procedures, were not followed. Instead, it appears that Commercial Connect is challenging an alleged inaction – *i.e.,* ICANN's purported failure to act to provide "clear and well-defined guidance" to dispute resolution panels and failure to "ensure compliance" with that guidance. (Request, Pg. 6.) But Commercial Connect does not identify any established policy or process that required ICANN to take action above the action it has already taken in implementing the New gTLD Program.

ICANN's decision to proceed with the New gTLD Program followed many years of discussion, debate and deliberation with the Internet community, including end users, business groups and governments. ICANN's work to implement the New gTLD Program – including the creation of an application and evaluation process for new gTLDs that is aligned with the policy recommendations and provides a clear roadmap for applicants to reach delegation – is reflected in the drafts of the applicant guidebook that were released for public comment, and in the explanatory papers giving insight into the rationale behind some of the conclusions reached on specific topics. Meaningful community input from participants around the globe has led to numerous and significant revisions of each the draft version of the applicant guidebook, resulting in the Applicant Guidebook that is used in the current application round.

The current Applicant Guidebook is publicly posted on an ICANN website dedicated to the New gTLD Program. See http://newgtlds.icann.org/en/applicants/agb. The standards for evaluating the merits of a string confusion objection are provided in the Applicant Guidebook,

and by filing an application for a new gTLD, each applicant agrees to accept the applicability of the gTLD dispute resolution process. (Guidebook, Section 3.5.1 & Section 3.3.2; Procedure, Art. 1(d).) Applicants are evaluated against transparent and predictable criteria, and the procedures are designed to ensure fairness.

Commercial Connect's disagreement as to whether the standards should have resulted in the TLDH Panel dismissing Commercial Connect's objection does not mean that ICANN violated any policy or process in accepting the decision (nor does it support a conclusion that either panel's decision was wrong). The Applicant Guidebook sets out the standards used to evaluate and resolve objections. The TLDH Expert Determination and the Amazon Expert Determination reflect that the panels followed the evaluation standards. As explained above, Commercial Connect has not been able to establish any policy or process that either panel failed to follow. ICANN's acceptance of the determinations as advice to ICANN is also in accordance with the established process. (Guidebook, Section 3.4.6.) Commercial Connect's attempt to claim here that the procedures set forth in the Applicant Guidebook for evaluating string confusion objections, which followed years of inclusive policy development and implementation planning, are somehow deficient because of allegedly inconsistent expert determinations is therefore not supported and should be rejected.

IV. Recommendation and Conclusion

Based on the foregoing, the BGC concludes that Commercial Connect has not stated proper grounds for reconsideration, and we therefore recommend that Commercial Connect's Request be denied without further consideration.

As there is no indication that the TLDH Panel violated any policy or process in dismissing Commercial Connect's objection, and there is similarly no indication that ICANN acted inconsistent with any established policy or procedure, this Request should not proceed. If

Commercial Connect thinks that it has somehow been treated unfairly in the process, and the Board (through the New gTLD Program Committee) adopts this Recommendation, Commercial Connect is free to ask the Ombudsman to review this matter.

Though there are no grounds for reconsideration presented in this matter, following additional discussion of the matter the BGC recommended that staff provide a report to the NGPC, for delivery in 30 days, setting out options for dealing with the situation raised within this Request, namely the differing outcomes of the String Confusion Objection Dispute Resolution process in similar disputes involving Amazon's Applied-for String and TLDH's Applied-for String. In addition, the BGC suggested that the strings not proceed to contracting prior to staff's report being produced and considered by the NGPC.

Resp. Ex. 18

RESPONDENT'S EXHIBIT

Proposed Review Mechanism to Address Perceived Inconsistent Expert Determinations on String Confusion Objections

Follow Updates

Open Date
11 Feb 2014 23:59 UTC

Close Date
12 Mar 2014 23:59 UTC

Staff Report Due
2 Apr 2014 23:59 UTC

Comments Closed

Report of Public Comments

Contents

Brief Overview

To solicit community input regarding a proposed review mechanism to address perceived inconsistent Expert Determinations in the String Confusion Objection process in the New gTLD Program. The review mechanism will be limited to the Expert Determinations made on String Confusion objections for .CAR/.CARS and .CAM/.COM.

Original Announcement
Report of Public Comments

Section I: Description, Explanation, and Purpose

If adopted, the review mechanism would constitute a change to the String Confusion Objection process in the New gTLD Applicant Guidebook. Given that the proposal to implement this review mechanism could affect the outcomes of one or more of String Confusion Objections – a process that was informed by years of debate and public comment as part of the development of the New gTLD Applicant Guidebook – the proposed review mechanism is being published for public comment.

Section II: Background

The New gTLD Applicant Guidebook (Guidebook) identifies four grounds upon which a formal objection may be filed against a gTLD application. One such objection is a String Confusion Objection (SCO), which may be filed by an objector (meeting the standing requirements) on the grounds that an applied-for gTLD string is confusingly similar to an existing TLD or to another applied-for gTLD string in the same round of applications. If successful, a SCO could change the configuration of the preliminary contention sets in that the two applied-for gTLD strings will be considered to be in contention with one another (see Guidebook Module 4, String Contention Procedures). The SCOs are administered by the International Centre for Dispute Resolution (ICDR). Expert Determinations have been issued by the ICDR for all String Confusion Objections filed.

Some members of the community have commented on perceived "inconsistent" SCO Expert Determinations. The NGPC has monitored the SCO Expert Determinations over the past several months, and discussed the community comments at more than one of its meetings. Also, on 10 October 2013 [PDF, 132 KB] the Board Governance Committee (BGC) asked staff to draft a report for the NGPC on String Confusion Objections as some requestors commented on "inconsistencies" in certain SCO Expert Determinations.

Following on from the staff report on String Confusion Objections, the NGPC identified two sets of perceived "inconsistent" SCO Expert Determinations (i.e. objections raised by the same objector against different applications for the same string, where the outcomes of the SCOs differ). At its 5 February 2014 meeting, the NGPC took action to direct the ICANN President and CEO, or his designee, to initiate a

public comment period on the framework principles of a potential review mechanism to address the perceived inconsistent SCO Expert Determinations.

Section III: Relevant Resources

- Proposed Review Mechanism to Address the Perceived Inconsistent Expert Determinations of New gTLD Program String Confusion Objections: Framework Principles [PDF, 496 KB]
- New gTLD Applicant Guidebook, Module 4 [PDF, 429 KB]
- ICANN Board New gTLD Program Committee Resolution 2014.02.05.NG02
- String Confusion Objection Expert Determinations [PDF, 223 KB]

Section IV: Additional Information

N/A

Section V: Reports

- Report

Staff Contact

Christine Willett
christine.willett@icann.org


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Community W ki


ICANN Blog

Resp. Ex. 19

RESPONDENT'S EXHIBIT

Contact

Pr. Alain Pellet
Independent Objector

Julien Boissise
Legal Assistant to the Independent Objector

Email:
Contact@Independent-Objector-newgtlds.org

You can also use our
Contact Form.

Role of the Independent Objector

Overview of the Independent Objector's Mandate

ICANN New gTLD Program protects certain interests and rights by providing a path for parties to file formal objections to gTLD applications on certain grounds. A formal objection would trigger a dispute resolution proceeding by an expert panel in the relevant subject area constituted under the auspices of appointed Dispute Resolution Service Providers.

One component of the objection process is providing for an Independent Objector (IO) function. The IO is impartial and is unaffiliated with any particular Internet community. Acting solely in the best interests of the public who use the global Internet, he will object to highly objectionable gTLD applications that would be contrary to their interests. In light of this public interest goal, the IO can file objections on Limited Public Interest and Community grounds:

1. Limited Public Interest – The applied-for gTLD string is contrary to generally accepted legal norms of morality and public order that are recognized under international principles of law.

2. Community Objection – 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.

For these two grounds, the appointed Dispute Resolution Service Provider is the Center of Expertise of the International Chamber of Commerce (ICC – Paris).

Scope of the IO Mandate

It is noteworthy that the IO is an independent decision maker in determining which applications merit objection. Neither ICANN staff nor the ICANN Board of Directors has authority to direct or require the IO to file or not to file any particular objection. If the IO determines that an objection should be filed, he will initiate the objection on his own

authority, in complete independence and in the public interest. His activities are only subject to reporting requirements to ICANN, as well as the public.

The IO is granted standing to file objections on the Limited Public Interest and Community grounds, notwithstanding the regular standing requirements for such objections. For instance, the IO won't have to prove the existence of an ongoing relationship with a clearly delineated community in order to qualify for standing for a community objection.

Also, the IO may file an objection against an application, notwithstanding the fact that a String Confusion objection or a Legal Rights objection was filed. However, absent extraordinary circumstances, the IO is not supposed to file an objection to an application if an objection has already been filed on the same ground. It is the responsibility of the IO himself to assess whether there are extraordinary circumstances at hand. The IO has already indicated that such extraordinary circumstances could occur should an objection be filed on the community or the limited public interest grounds while the IO might wish to file an objection on the same ground but for different reasons.

Finally, the IO may consider public comments when making an independent assessment whether an objection is warranted. It includes, but is not limited to the comments received and posted on the ICANN Website. The IO will have access to application comments received anytime during the entire application-processing life cycle. The IO may also take into consideration other publicly posted information that can be clearly referenced.

In light of the public interest goal noted above, the IO shall not object to an application unless at least one comment in opposition to the application is made in the public sphere. Therefore, public comments are of a fundamental importance for the public who use the global Internet and who would like to invite the IO to file an objection against a specific application.

Budget and funding

The Independent Objector has a dedicated budget to cover the necessary costs of the objection proceedings, including filing fees and panel fees as required. In addition, he may choose to use a portion of the dedicated budget for administrative assistance as needed.

The IO's budget comprises two principal elements: (a) fees and operating expenses, and (b) dispute resolution procedure costs.

As an objector in dispute resolution proceedings, the IO is required to pay filing and administrative fees, as well as advance payment of costs, just as all other objectors are required to do. The advance payments will be refunded by the International Chamber of Commerce (ICC) in cases where the IO is the prevailing party.

In addition, the IO will incur various expenses in presenting objections before expert panels that will not be refunded, regardless of the outcome. These expenses include the fees and expenses of outside counsel, if retained, and the costs of legal research or factual investigations.

The IO will establish and maintain a transparent budget reporting process.


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Resp. Ex. 20

RESPONDENT'S EXHIBIT

DETERMINATION OF THE BOARD GOVERNANCE COMMITTEE (BGC)

RECONSIDERATION REQUEST 13-23

5 FEBRUARY 2014

The Requester Ruby Pike, LLC seeks reconsideration of the Expert Determination upholding the Independent Objector's limited public interest objection to the application for .HOSPITAL.

I. Brief Summary.

The Requester applied for .HOSPITAL. The Independent Objector filed a Limited Public Interest Objection to the Requester's application, and his Objection was upheld. The Requester claims that the actions of the Panel were inconsistent with ICANN policies, which influenced the Panel's decision to uphold the IO's Objection. Specifically, the Requester contends that the Panel failed to adhere to and apply ICANN processes and policies concerning Limited Public Interest Objections as expressed in Sections 3.5 and 3.5.3 of the Applicant Guidebook.

The Requester asks ICANN to reverse the Expert Determination and follow the example the Requester argues to be set forth in the decisions of other panels that have adhered to the standards established by ICANN for purposes of effectuating its policies and procedures respecting limited public interest objections set forth in Sections 3.5 and 3.5.3 of the Applicant Guidebook.

With respect to each claim asserted by the Requester, there is no evidence that the Panel deviated from the standards set forth in Sections 3.5 or 3.5.3 of the Applicant Guidebook. The

Requester has failed to demonstrate that the Panel applied the wrong standard in contravention of established policy or procedure. Therefore, the BGC[1] concludes that Request 13-23 be denied.

II. Facts.

A. Background Facts.

Ruby Pike, LLC (the "Requester"), an affiliate of Donuts, Inc., applied for the gTLD string .HOSPITAL.

On 12 March 2013, the Independent Objector ("IO")[2] filed a Limited Public Interest ("LPI") Objection (the "Objection") with the ICC[3] to the Requester's application. The IO asserted that "the applied-for gTLD string is contrary to general principles of international law for morality and public order." (Applicant Guidebook ("Guidebook"), § 3.5.3.)

On 15 May 2013, the Requester responded to the IO's Objection.

On 19 June 2013, the ICC appointed Mr. Piotr Nowaczyk as the Chairman of the Expert Panel ("Expert" or "Panel"), and Professor August Reinisch and Mr. Ike Ehiribe as Co-Experts, to consider the IO's Objection.

On 2 August 2013, the IO sought leave from the Panel to file an additional round of written submissions, which the Panel granted.

On 12 August 2013, the IO filed a supplemental written statement.

On 20 August 2013, the Requester responded to the IO's supplemental written statement.

On 28 August 2013, the Panel determined that the Objection was not subject to dismissal pursuant to the Quick Look Procedure, which is aimed at eliminating frivolous and/or abusive

[1] Board Governance Committee.

[2] The Independent Objector, Professor Alain Pellet, was appointed by ICANN to serve for the duration of the New gTLD Program and object to highly objectionable gTLD applications on limited public interest and community grounds. *See* Applicant Guidebook, § 3.2.5.

[3] International Centre for Expertise of the International Chamber of Commerce.

objections.

On 11 December 2013, the Panel issued an Expert Determination in favor of the IO. One member of the three member Panel dissented. Based on the submissions and evidence provided by the parties, the Panel Majority determined that "there is no doubt that human health and its safety tips the scale in finding the Objection to be justified." (Determination, ¶ 89, Pg. 18.) The Panel upheld the Objection and deemed the IO the prevailing party. (Determination, Pg. 18, ¶ 91.)

On 12 December 2013, the ICC notified the parties of its Determination.

On 27 December 2013, the Requester filed Request 13-23. On the same day, the Requester filed Revised Request 13-23.[4]

B. The Requester's Claims.

The Requester claims that the Panel's decision to uphold the IO's Objection violates the following ICANN policies:

- Section 3.5.3 of the Guidebook, in particular the standards for evaluating whether or not "the applied-for gTLD string is contrary to general principles of international law for morality and public order"; and
- Section 3.5 of the Guidebook and Article 20(c) of the New gTLD Dispute Resolution Procedure, which together place the burden on the objector to prove "that its Objection should be sustained in accordance with applicable standards."

(Request, Section 10.b, Pgs. 13-19.) Specifically, the Requester claims that the Panel:

1. Adopted definitions of 'morality' and 'public order' based upon common understanding and respective scientific sources instead of "specific principles of international law as reflected in relevant international instruments of law";

[4] There do not appear to be any substantive differences between the Requester's original Request 13-23 and its Revised Requested 13-23. The Request considered by the BGC is the Requester's Revised Request 13-23.

2. Failed to conduct its analysis on the basis of the applied-for gTLD string itself or the intended purpose of the TLD as stated in the application; and

3. Ignored the Guidebook's burden of proof requirement and failed to recognize the "presumption" in favor of awarding new gTLD strings to otherwise qualified applicants.

(Request, Sections 10.8-10.13, pgs. 15-19.)

C. Relief Requested.

The Requester asks that ICANN reverse the Expert Determination upholding the Objection (including, specifically, the Panel's finding that .HOSPITAL would be contrary to general principles of international law for morality and public order). The Requester also asks that ICANN "[f]ollow the decisions of the other panels that have reviewed this same issue, as well as the reasoning of the Dissent, all of which adhere to the standards established by ICANN for purposes of effectuating its policies and procedures respecting [LPI] objections set forth in the [Applicant Guidebook] §§ 3.5, 3.5.3." (Request, Section 9, Pg. 12.)

III. Issues.

In view of the claims set forth in Request 13-23, the issues for reconsideration are whether the Panel incorrectly applied the standards for evaluating whether an applied-for gTLD string would be contrary to generally accepted legal norms relating to morality and public order that are recognized under principles of international law in violation of an established policy or process. Specifically, the issues are:

A. Whether the Panel improperly adopted definitions of 'morality' and 'public order' based upon common understanding and respective scientific sources instead of "specific principles of international law as reflected in relevant international instruments of law";

B. Whether the Panel improperly conducted its analysis on the basis of matters beyond the applied-for gTLD string itself or the intended purpose of the TLD as stated in the application; and

C. Whether the Panel ignored the Guidebook's burden of proof requirement and improperly failed to apply a presumption in favor of awarding new gTLD strings to otherwise qualified applicants.

IV. The Relevant Standards for Evaluating Reconsideration Requests and Independent Objector LPI Objections.

ICANN's Bylaws provide for reconsideration of a Board or staff action or inaction in accordance with specified criteria.[5] (Bylaws, Art. IV, § 2.) Dismissal of a request for reconsideration of staff action or inaction is appropriate if the BGC concludes, or if the Board or the NGPC[6] agrees to the extent that the BGC deems that further consideration is necessary, that the requesting party failed to satisfy the reconsideration criteria set forth in the Bylaws. ICANN has previously determined that the reconsideration process can properly be invoked for challenges to expert determinations rendered by panels formed by third party dispute resolution service providers, such as the ICC, where it can be stated that the Panel failed to follow the established policies or processes in reaching the expert determination, or that staff failed to follow its policies or processes in accepting that determination.[7]

In the context of the New gTLD Program, the reconsideration process does not call for the BGC to perform a substantive review of expert determinations. Accordingly, the BGC is not to evaluate the Panel's substantive conclusion that the Requester's application for .HOSPITAL is

[5] Article IV, Section 2.2 of ICANN's Bylaws states in relevant part that any entity may submit a request for reconsideration or review of an ICANN action or inaction to the extent that it has been adversely affected by:

(a) one or more staff actions or inactions that contradict established ICANN policy(ies); or

(b) one or more actions or inactions of the ICANN Board that have been taken or refused to be taken without consideration of material information, except where the party submitting the request could have submitted, but did not submit, the information for the Board's consideration at the time of action or refusal to act; or

(c) one or more actions or inactions of the ICANN Board that are taken as a result of the Board's reliance on false or inaccurate material information.

[6] New gTLD Program Committee.

[7] *See* http://www.icann.org/en/groups/board/governance/reconsideration/recommendation-booking-01aug13- en.doc, BGC Recommendation on Reconsideration Request 13-5.

contrary to general principles of international law for morality and public order. Rather, the BGC's review is limited to whether the Panel violated any established policy or process.

The standards for evaluating LPI objections are set forth in Section 3.5.3 of the Applicant Guidebook (the "Guidebook"). Pursuant to Section 3.5.3 of the Guidebook, the expert panel hearing an LPI objection will "consider whether the applied-for gTLD string is contrary to general principles of international law for morality and public order." These principles are contained in a number of human rights instruments, which are listed in a demonstrative fashion in paragraph 3.5.3 of the Guidebook.

That same provision also contains a list of four "grounds upon which an applied-for gTLD string may be considered contrary to generally accepted legal norms relating to morality and public order that are recognized under principles of international law." (Guidebook, § 3.5.3.) These grounds are:

- Incitement to or promotion of violent lawless action;
- Incitement to or promotion of discrimination based upon race, color, gender, ethnicity, religion or national origin, or other similar types of discrimination that violate generally accepted legal norms recognized under principles of international law;
- Incitement to or promotion of child pornography or other sexual abuse of children; or
- A determination that an applied-for gTLD string would be contrary to specific principles of international law as reflected in relevant international instruments of law.

(*Id.*) Section 3.5.3 also states that the panel will conduct its analysis "on the basis of the applied-for gTLD string itself," but that the "panel may, if needed, use as additional context the intended purpose of the TLD as stated in the application." (*See id.*) The factors relevant to the Requester's claims are discussed in detail below.

V. Analysis and Rationale.

A. The Requester Failed To Demonstrate That The Panel Applied The Wrong Standards In Contravention Of Established Policy or Process.

The Requester contends that the Panel failed to follow the Guidebook's substantive objection standards for evaluating whether the applied-for gTLD string is contrary to generally accepted principles of international law for morality and public order. Specifically, the Requester claims that the Panel erroneously "adopted, on its own initiative, definitions of 'morality' and 'public order' … based upon common understanding and respective scientific sources, rather than upon any specific provision of international law that the String itself, as Applicant would use it as described in the Application, would contravene." (Request, Section 10.8, p. 15.) The Requester also claims that the Panel failed to apply the proper burden of proof. (*Id*. at Section 10.11, pgs. 17-18.)

As noted above, there are four grounds upon which an applied-for gTLD string may be considered contrary to generally accepted legal norms relating to morality and public order that are recognized under principles of international law. (Guidebook, § 3.5.3.) The IO's objection was based on the fourth ground: "A determination that an applied-for gTLD string would be contrary to specific principles of international law as reflected in relevant international instruments of law." (*Id*.; Determination, ¶ 21, pg. 7.) As the Requester correctly notes, in determining whether an applied-for gTLD string would be contrary to specific principles of international law as reflected in relevant instruments of law, the Panel "will conduct its analysis on the basis of the applied-for gTLD string itself," but "may, if needed, use as additional context the intended purposes of the TLD as stated in the application." (Guidebook, § 3.5.3.) As discussed in detail below, there is no support for Requester's contention that the Panel incorrectly applied any of these standards in contravention of established policy or process.

1. The Panel Did Not Fail To Apply Specific Principles Of International Law As Reflected In Relevant International Instruments Of Law.

The Requester claims that the Panel failed to apply "specific principles of international law as reflected in relevant international instruments of law" when it determined that .HOSPITAL would be contrary to general principles of international law for morality and public order. (Request, Section 10.8, Pg. 15.) To support this assertion, the Requester relies solely on the following Panel statement:

> In order to review the case under consideration, the Expert Panel has adopted, on its own initiative, definitions of 'morality' and 'public order' that are based upon common understanding and respective scientific sources.

(Determination, ¶ 76, pg. 15.)

The Panel's statement, however, cannot be viewed in isolation. The Panel went on to explain that the principles of morality and public order that require all members of society to be "extremely cautious on issues of human life and health" (Determination, ¶ 79, pg. 16), are "reflected in the right to health ***which is broadly recognized in many international law instruments***." (*Id*. at Section H, pg. 17 (emphasis added).) In other words, the principles of morality and public order relied on by the Panel were derived from the fundamental right to health, which, the Panel found, was reflected in relevant international instruments of law. Specifically, the Panel cited the following international law instruments in support of its determination that "the right to health is an important principle of international law" (*Id*. at ¶ 86):

- Article 25 of the Universal Declaration of Human Rights ("Everyone has the right to a standard of living adequate for the health and well being of himself and his family, including food, clothing, housing and medical care and necessary social services and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control.");

- Article 12(1) of the International Covenant on economic, Social and Cultural Rights ("The States Parties to the present Covenant recognize the right of

everyone to the enjoyment of the highest attainable standard of physical and mental health."); and

- The 1998 European Court of Human Rights decision in the case of *Guerra v. Italy*, [1998] ECHR 7, 26 EHRR 357 (holding that a failure by the state to provide timely information on environmental pollution issues so that the citizens of that state could assess the health risks to themselves and their families was tantamount to a violation of their right to respect for their right to private and family life in breach of Article 8 of the European Convention on Human Rights).

Based on the foregoing international law instruments, as well as others submitted by the IO, the Panel concluded that "having access to reliable and trustworthy health related information is part of the fundamental right to health." (Determination, ¶ 87, pg. 17.) The Expert Determination thus reveals that, in concluding that the right to health is a fundamental principle of international law for morality and public order, the Panel applied specific principles of international law as reflected in relevant international instruments of law, which is precisely what the Guidebook calls for. (Guidebook, § 3.5.3.) Accordingly, there is no evidence that the Panel's action contradicted any established policy or process in this regard.

2. The Panel Did Not Improperly Conduct Its Analysis On The Basis Of Matters Beyond The Applied-For gTLD String Itself Or The Intended Purpose Of The TLD As Stated In The Application.

Having concluded that the right to health is a specific principle of international law for morality and public order as reflected in relevant international instruments of law, the Guidebook next called for the Panel to determine whether the applied-for gTLD string – .HOSPITAL – would be contrary to the relevant principle of international law (here, the right to health). The Requester claims that the Panel failed to follow the standards set forth in Section 3.5.3 of the Guidebook when it determined that .HOSPITAL would in fact contravene the fundamental right to health. (Request, Section 10.8, Pgs. 15-16.) Specifically, the Requester claims that the

Panel's determination "finds no support in the only sources to which the Panel may look – the String itself and its intended use as stated in the Application." (Request, Section 10.8.2, Pg. 16.)

According to the Expert Determination, and as recognized by the Requester, "Paragraph 3.5.3 … authorizes the Expert Panel to use as additional context the intended purpose of the gTLD as stated in the Application to conduct is analysis on the basis of the applied-for gTLD string itself." (Determination, ¶ 71, pg. 14; *see also* Guidebook § 3.5.3.) Adhering to Paragraph 3.5.3 of the Guidebook, the Panel thereafter analyzed the Requester's intended purpose for .HOSPITAL, as stated in the Requester's application.

Specifically, the Panel found that the application "clearly states in answer to question 18 of the Application that the Applicant: 'intends to increase competition and consumer choice at the top level (…) In doing so, the TLD will introduce significant consumer choice and competition to the Internet namespace – the very purpose of ICANN's new TLD program.'" (Determination, ¶ 71, pgs. 15-14.) The Panel also considered the Requester's answer to question 18(c) in the .HOSPITAL application, which asked: "What operating rules will you adopt to eliminate or minimize social costs?" (Determination, ¶ 73, pg. 15.) In response to question 18(c), the Requester discussed its intended pricing policies for registering second level domains, but did not otherwise address any social costs associated with operating .HOSPITAL. (*Id*.) The Panel found the Requester's "disregard for [the] social cost of operating .HOSPITAL provides a very clear indication of the commercial purpose and mission of the Application." (*Id*.)

Based on the Requester's statements in its .HOSPITAL application, it was "the Expert Panel's opinion [that] the Applicant's sole purpose for the Application as expressed in the Application documents is simply for commercial purposes." (Determination, ¶ 71, pg. 15.) As stated by the Panel:

> [The .HOSPITAL application] presents simply a 'market approach' whereas morality and public order require a 'social approach' as is stated in the following sections.

(Determination, ¶72, pg. 15.)

According to the Panel, it was the focus on .HOSPITAL's commercial purpose as stated in the Requester's .HOSPITAL application that supported its conclusion that .HOSPITAL would be contrary to the fundamental right to health. Specifically, the Panel stated that "[t]he term 'Hospital' is a generic term that is commonly associated with healthcare and emergency. This original meaning and health related connotation cannot be replaced or obscured by the commercial use of this name." (Determination, ¶ 80, pg. 16.) The Panel thus concluded that the commercial, market approach presented by the Requester in its .HOSPITAL application, "greatly increases" the risk that misuse of the word "hospital" may cause significant harm to society in contravention of the fundamental right to health. (Determination, ¶ 81, pg. 16.) In this regard, the Panel's determination that .HOSPITAL would contravene the right to health was based on the intended purpose of the .HOSPITAL gTLD as stated in the Requester's application, which the Guidebook expressly provides for in Section 3.5.3.[8]

The Requester also claims that it is inappropriate for the IO or a Panel to consider GAC recommendations in the context of an LPI objection. (Request, ¶ 10.10, pg. 17.) As an initial matter, while the Requester notes that the IO in his Objection cited the GAC Beijing advice, the Requester does not cite any language in the Expert Determination that relies on GAC

[8] The Requester repeatedly cites the Expert Panel's dissenting opinion as support for the Requester's disagreement with the substance of the majority determination. (*See, e.g.,* Request, Section 10.10, pg. 16 (stating that the dissent "got it right" substantively). In the context of the New gTLD Program, however, the reconsideration process does not call for the BGC to perform a substantive review of expert determinations. Accordingly, the BGC is not to evaluate the Panel's substantive conclusion that the Requester's application for .HOSPITAL is contrary to general principles of international law for morality and public order.

recommendations in a manner allegedly contrary to ICANN policy or process. On this basis alone, the Requester has not established that the Panel's action contradicted any established policy or process.[9]

Even had the Requester appropriately raised this issue, the Expert Determination only references the GAC's comments in the context of evaluating the commercial purpose stated in the Requester's .HOSPITAL application, which, as set forth above, the Guidebook expressly condones. (Guidebook, § 3.5.3.) Specifically, the Panel notes that the .HOSPITAL application "does not include the specific protection safeguards listed on page 8 of the GAC's comments." (Determination, ¶ 83, pg. 16.) Instead, the .HOSPITAL application only provides the same level of protection as the applications for .CREDITCARD, .LEGAL, or .INVESTMENTS. (*Id*.) According to the Panel: "[t]he sensitivity of .HOSPITAL has a different dimension than gTLDs connected with banking or legal services since human life and health require greater care than pure commercial activity." (*Id*.) Given the Requester's market approach as stated in the .HOSPITAL application, it was clear to the Panel that the Requester had not considered how to include safeguard mechanisms that would strengthen, rather than hinder, the fundamental right to health, including the right to reliable health related information. (*Id*. at ¶ 87 (citing the eleventh principle of the "Guiding Principles" that were endorsed by the United Nations Human Rights Council in its Resolution 17/4 of 16 June 2011 and finding that "where such mechanisms for ensuring safety and reliable health related information … are non-existent or inadequate, then the Application breaches the right to health").)

[9] The Requester also cites the decisions of different panels that addressed different, unrelated gTLD applications. (Request, Section 10.10, pg. 17.)

In summary, the Expert Determination reveals that the Panel considered the GAC's comments as a means to further provide context to the intended purpose of the .HOSPITAL TLD as stated in the application, which is consistent with the standards set forth in Section 3.5.3 of the Guidebook. Moreover, the Procedure makes clear that, in addition to applying the standards that have been defined by ICANN, 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." (Procedure, Art. 20(b).)

3. The Panel Did Not Ignore The Burden Of Proof Requirement.

The Requester claims that the Panel contravened ICANN process by ignoring the Guidebook's burden of proof requirement. (Request, Section 10.11, Pgs. 17-18.) The Expert Determination correctly states, however, that the IO, as the objector, bears the burden of proof. The Panel noted:

> Article 20(c) of the Procedure requires the IO to prove that the Objection should be sustained in accordance with applicable standards. In this case the standard, provided by paragraph 3.5.3, is the following: 'an applied-for gTLD string may be considered contrary to generally accepted legal norms relating to morality and public order that are recognized under principles of international law (…) as reflected in relevant international instruments of law.' Therefore, the IO has to provide the necessary evidence that the Application is indeed contrary to those norms.

It appears that the Requester is actually claiming that the Panel applied the wrong "standard of proof." The Requester claims that the Panel ignored "ICANN's own express presumption in favor of awarding new gTLD strings to otherwise qualified applicants," a presumption which, in the Requester's view, "requires the IO to prove the Application 'more likely than not' to cause a violation of specific provisions of international law for morality or public order." (Request, Section 10.12-10.13, pg. 18; *see id.* (calling for a "preponderance of the evidence" standard).)

The relevant standard for evaluating an LPI objection is set out in Section 3.5 of the Guidebook – The objector bears the burden of proof in each case. Article 20(b) of the Procedure further provides that:

> The Objector bears the burden of proving that its Objection should be sustained in accordance with the applicable standards.

(Procedure, Art. 20(b).) Contrary to the Requester's assertion, nothing in the above quoted language, or any other applicable provision of the Guidebook or the Procedure, supports the Requester's claim that a clear presumption exists in favor of the Application or that the IO must meet a preponderance of the evidence standard. It appears that the Requester's position is based on archival notes purportedly summarizing public comments made in 2010 to the draft Applicant Guidebook. As noted by the Panel, however, the archive cited by the Requester no longer exists and therefore was not available for the Panel to evaluate.[10] As such, there is no support for the Requester's claim that the Panel's application of the burden of proof standard was in any way inconsistent with the Guidebook or the Procedure.

In all events, even assuming that the Panel was required to apply a "more likely than not" standard, it appears that the Panel has in fact done so. As stated by the Panel:

> For the majority of the Panel, there is no doubt that human health and its safety ***tips the scale in finding the Objection is justified***.

(Determination, ¶89, pg. 18.)

VI. Decision

Based on the foregoing, the BGC concludes that the Requester has not stated proper grounds for reconsideration, and therefore denies Ruby Pike, LLC's Reconsideration Request.

[10] In support of its claim that the Panel failed to apply the proper standard of proof, the Requester cites the Panel's statement that it was "not obligated to follow all ICANN bylaws or its analysis." (Request, Section 10.12, pg. 18.) Taken in context, however, it is clear that the Panel was responding to the fact that the archival notes advanced by the Requester simply do not exist.

As there is no indication that the Panel violated any policy or process in reaching the Determination, this Request should not proceed. If the Requester believes that it has somehow been treated unfairly in the process, the Requester is free to ask the Ombudsman to review this matter.

In accordance with Article IV, Section 2.15 of the Bylaws, the BGC's determination on Request 13-23 shall be final and does not require Board (or NGPC) consideration. The Bylaws provide that the BGC is authorized to make a final determination for all Reconsideration Requests brought regarding staff action or inaction and that the BGC's determination on such matters is final. (Bylaws, Art. IV, § 2.15.) As discussed above, Request 13-23 seeks reconsideration of a staff action or inaction. After consideration of this Request, the BGC concludes that this determination is final and that no further consideration by the Board is warranted.

In terms of timing of the BGC's Determination, we note that Section 2.16 of Article IV of the Bylaws provides that the BGC shall make a final determination or recommendation with respect to a Reconsideration Request within thirty days following receipt of the request, unless impractical. *See* Article IV, Section 2.16 of the Bylaws. To satisfy the thirty-day deadline, the BGC would have to have acted by 26 January 2014. Due to the volume of Reconsideration Requests received within recent weeks and the intervening holiday schedule, the first practical opportunity for the BGC to take action on this Request was on 5 February 2014; it was impractical for the BGC to consider the Request sooner. Upon making that determination, staff notified the requestor of the BGC's anticipated timing for the review of Request 13-23.

Resp. Ex. 21

RESPONDENT'S EXHIBIT

The Objections Filed by the Independent Objector

On 12 March 2013, the Independent Objector (IO) has lodged 24 objections against new applied-for gTLDs before the International Chamber of Commerce (ICC).

Acting solely in the best interests of the public who use the global internet, in full independence and impartiality, the IO is limited to filing objections on the grounds of Limited Public Interest and Community.

Following his exchanges with some applicants for new gTLDs, as part of the Initial Notice Procedure, he remained convinced that, for some applications, an objection was still warranted on the Limited Public Interest and/or Community grounds.

The following list of objections will be examined by experts' panels appointed by the ICC and in light of the New gTLD Dispute Resolution Procedure from ICANN, the ICANN gTLD Applicant Guidebook, the ICC Rules for Expertise, the Appendix III to the ICC Rules for Expertise and the ICC Practice Note on the Administration of Cases.

Following the withdrawal of 2 of his objections and the withdrawal of 3 applications which rendered the related objections moot, the number of the IO's objections was brought down to 19.

- Following the filing of his Limited Public Interest Objection against the application for ".Med" by DocCheck AG, the applicant withdrew its application. Consequently, the IO has withdrawn his objection against this application on 26 March 2013.

- On 21 May 2013, the Independent Objector has withdrawn his Community Objection against the application for the gTLD string ".Hospital", applied by Ruby Pike LLC, since an objection has been filed by another objector, the American Hospital Association, against the same gTLD string and on the same ground. He did so only after careful review of their objection to make sure there were no extraordinary circumstances which could justify that he maintains his objection.

Community Objections filed by the Independent Objector:

gTDL string	Applicant	Application ID
.Amazon	Amazon EU S.à r.l.	1-1315-58086

Controversial Applications

The Issue of "Closed Generic" gTLDs

News

Contact

Contact

Pr. Alain Pellet
Independent Objector

Julien Boissise
Legal Assistant to the Independent Objector

Email:
Contact@Independent-Objector-newgtlds.org

You can also use our
Contact Form.

.アマゾン[Amazon]	Amazon EU S.à r.l.	1-1318-83995
.亚马逊[Amazon]	Amazon EU S.à r.l.	1-1318-5591
.Charity	Corn Lake, LLC	1-1384-49318
.Charity	Spring Registry Limited	1-1241-87032
.慈善 [Charity]	Excellent First Limited	1-961-6109
.Healthcare	Silver Glen, LLC	1-1492-32589
.Hospital	Ruby Pike, LLC	1-1505-15195
.Indians	Reliance Industries Limited	1-1308-78414
.Med	Charleston Road Registry Inc.	1-1139-2965
.Med	Medistry LLC	1-907-38758
.Medical	Steel Hill, LLC	1-1561-23663
.Patagonia	Patagonia, Inc.	1-1084-78254

Limited Public Interest Objections filed by the Independent Objector:

gTDL string	Applicant	Application ID
.Health	Afilias Limited	1-868-3442
.Health	dot Health Limited	1-1178-3236
.Health	DotHealth, LLC	1-1684-6394
.Health	Goose Fest, LLC	1-1489-82287
.Healthcare	Silver Glen, LLC	1-1492-32589
.Hospital	Ruby Pike, LLC	1-1505-15195
.Med	Charleston Road Registry Inc.	1-1139-2965
.Med	DocCheck AG	1-1320-21500
.Med	HEXAP SAS	1-1192-28569
.Med	Medistry LLC	1-907-38758
.Medical	Steel Hill, LLC	1-1561-23663


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Connexion

Resp. Ex. 22

RESPONDENT'S EXHIBIT

Resp. Ex. 22

SPORTACCORD COUNCIL

THE COUNCIL IS THE EXECUTIVE ORGAN OF SPORTACCORD AND CARRIES OUT THE POLICIES ESTABLISHED BY THE MEMBERS.

The Council consists of eight people:

- 1 President, elected by the General Assembly;
- 2 members designated by the Association of Summer Olympic International Federations (ASOIF);
- 1 member designated by the Association of International Olympic Winter Sports Federations (AIOWF);
- 2 members designated by the Association of IOC Recognised International Sports Federations (ARISF);
- 1 member designated by the Alliance of Independent Members of SportAccord (AIMS);
- 1 member designated by the Associate Members that do not belong to any of the above groups.

Each organisation/group applies its own procedure to designate its representatives.

The Council is elected every four years.

PATRICK BAUMANN
President (2016)

The Secretary General of FIBA, Patrick Baumann has had a distinguished career in sports administration spanning almost 2 decades. A former basketball referee, he also boasts of a degree in law and is fluent in 5 languages. The buzz of a sports arena still drives him to stay close to the action and the development of basketball, particularly in emerging pockets of influence around the world keeps him passionately occupied with his job.

GIAN FRANCO KASPER
Vice President of SportAccord

A former journalist, Mr. Gian-Franco Kasper has been

associated with skiing for over 4 decades, most of which time has been spent with the International Skiing Federation. In 1975, he joined FIS as the secretary general and took over as the president from Marc-Hodler in 1998, a position that he occupies till today. A long-time sports manager, Mr. Kasper is also an IOC member and is the current president of the Association of International Olympic Winter Sports (AIOWF).

RAFFAELE CHIULLI

Vice President (2013)

Dr. Rafaelle Chiulli is a doctor in science from the University of Rome and the current president of the International Powerboating Federation (UIM). He was elected to the post in 2007 and won the election for the presidency of the Association of (IOC) Recognised International Sports Federations (ARISF) in 2013. His campaign for change has ensured that ARISF members are working closely with all their stakeholders with an intention of maintaining the relevance of their respective sports with evolving sporting practices.

MARISOL CASADO

Member (2013)

A former triathlete, Marisol Casado has been spearheading the global triathlon movement, starting even before her participation in the first triathlon race held in Spain. Her pioneering role in triathlon is exemplified by the fact that she created the Spanish Triathlon Federation in 1989 and is a founding member of the International Triathlon Union, of which she has been the president since 2008. Her aim is to ensure equality between both sexes in the sporting world and considers triathlon as a perfect sport that ensures this model of equality.

RICCARDO FRACCARI

Member (2015)

A world sport administrator, holding various high-ranking positions, most notably as president of the World Baseball Softball Confederation. He was elected WBSC president in May 2014, and is serving a 7-year term.

STEPHAN FOX

Member (2015)

Stephan Fox (born 1963 in Germany) is a former Muaythai world champion and the current General Secretary of International Federation of Muaythai Amateur (IFMA) and Vice-President of the World Muaythai Council. Stephan and is well known in the Muaythai world as a speaker, mentor and advocate of Thailand's national sport and combat art. His educational background is rooted both in both Germany and Australia, however he now resides in Thailand where he oversees the growth of both Amateur (IFMA) and Professional (WMC) muaythai.

JOSE PERURENA

Member (2016)

A former Olympian, Jose Perurena competed in the 1968 Mexico Olympics as a sprint canoer and has been president of the International Canoe Federation since 2008. He won the election to become president of the International World Games Association in 2014 and will be in charge of the conduct of the 2017 edition of the games in Wroclaw in Poland.

Resp. Ex. 22

Designated by:

ASSOCIATE MEMBERS

Resp. Ex. 23

RESPONDENT'S EXHIBIT

PERSONAL DATA PRIVACY STATEMENT

New gTLD Program

Personal Data Privacy Statement

The Internet Corporation for Assigned Names and Numbers' ("ICANN") respects and is committed to ensuring the protection of personal information collected from the Applicant and new gTLD Program participants, including users of the TLD Application System ("User"), and used in connection with new gTLD Program application process (the "Program"). ICANN will handle all personal information provided under the Program as described in this Personal Data Privacy Statement ("Privacy Statement").

By participating in the Program, including using the TLD Application System ("TAS"), the User and the Applicant accept the practices described in this Privacy Statement. In addition to this Privacy Statement, ICANN has established Terms of Use that set forth the general rules and policies governing the use of the TAS. You can review the Terms of Use by visiting http://newgtlds.icann.org/en/applicants/tas/terms.

1. International Transfers

The Program may be operated and administered entirely outside the jurisdiction where the User and/or Applicant are domiciled. Please note that any personal information provided to ICANN in connection with the Program will be transferred to and processed in the United States. On his/her own behalf, and on behalf of the Applicant and each of its relevant personnel, the User hereby consents to these transfers, and is solely responsible for ensuring that the personal information provided to ICANN and its designees complies with the laws of the User's and Applicant's jurisdiction(s).

2. Personal Information Collection and Use

Application submission. The Program application submission generally involves the collection and use of minimal personal information. The types of personal information ICANN collects will be: name, postal address, telephone phone number, and email address. This personal information is used to initially process and administer the Program application, including background checks of certain Applicant's personnel. This information will also be used by ICANN, its service providers, and agents to provide general support services and to process TLD applications for the Program.

Application administration: As part of the application process, ICANN may request certain personal information about the Applicant's directors and officers, and other relevant personnel, such as full name, date of birth, city and country of primary residence and country of birth. ICANN and its service providers use this information to conduct necessary background checks and other evaluations as part of the Program's application process, in accordance with the requirements of the Applicant Guidebook Terms and Conditions located at http://newgtlds.icann.org/en/applicants/agb/terms. This use is based on consent provided by agreeing to the TAS Terms of Use <http://newgtlds.icann.org/en/applicants/tas/terms> and the Applicant Guidebook Terms and Conditions <http://newgtlds.icann.org/en/applicants/agb/terms>. In certain circumstances, the results of initial background checks may require ICANN to request additional personal information to conclude necessary background checks or other Program application evaluations.

Support information. ICANN receives personal information as part of general support queries, email, feedback, comment or other communications with our Customer Service Center or other ICANN staff regarding the Program. ICANN may retain those communications in order to process inquiries, respond to requests and improve the TAS. ICANN may include your personal information in publishing your comments or feedback on the ICANN website for the benefit of others or to comply with ICANN's accountability and transparency principles located at http://www.icann.org/en/accountability/overview-en.htm and disclosure policies

located at http://www.icann.org/en/transparency/didp-en.htm. ICANN may monitor or record your call or communication sessions with the Applicant Support Center for quality assurance and staff training purposes, or as a record of communication.

Sensitive personal information. ICANN does not collect sensitive personal information (e.g. personal medical or health information, racial or ethnic origin, or political opinions, etc.) in connection with the Program. You will be notified if such sensitive personal information is necessary in connection with the Program, such as to conduct further background checks.

In addition, when using the TAS, ICANN may collect the following types of non-identifying information:

Automatically logged information: The TAS automatically records information that the browser sends whenever the TAS is used. This information may include information such as IP address, browser type, internet service provider (ISP), date/time stamp, page viewed, and other similar data. ICANN uses this information to administer the TAS, general web page analytics, track the use of TAS and to develop Program support. This information is not linked to personally identifiable information.

Cookies: Cookies and other user tracking devices (e.g., local shared objects) may be stored on the User's computer when using TAS. A cookie is a small text file that is stored on a user's computer for record-keeping purposes. ICANN uses session ID cookies to confirm that a User is logged in. These cookies terminate once the User closes the browser. ICANN may also deploy persistent cookies to improve TAS, including by storing user preferences and tracking user trends. While most browsers are set to accept cookies and other tracking devices by default, Users are always free to decline cookies if the browser permits, but some parts of TAS may not work properly. The browser manufacturer has information on changing the default setting for that specific browser. The User acknowledges the use of such tracking devices as noted in this Privacy Statement, and hereby consents to having such tracking devices stored on the User's computer.

3. Sharing of Personal Information

ICANN will share personal information with Program evaluation panelists, contractors and other agents for the purpose of processing TLD applications on ICANN's behalf, and providing other services for the Program. ICANN requires that these parties agree to handle this information in compliance with appropriate confidentiality obligations and security measures.

ICANN will provide personal information to third parties, government authorities and agencies as and when required to: (i) comply with applicable laws, regulations, legal process or enforceable governmental request; (ii) protect ICANN's or a third party's legal rights; (iii) receive contracted services or use of licensed products from third party providers; (iv) comply with any court order or legal proceeding; (v) comply with ICANN's accountability and transparency principles and disclosure policy; (vi) detect, prevent or otherwise address fraud or other criminal activity or errors, security or technical issues; or (vii) protect against imminent harm to the rights, property or safety of ICANN, our users or the public as required or permitted by law.

ICANN will not sell or otherwise share any personal information with third parties for marketing purposes. ICANN will not provide any personal information to third parties for commercial services in relation to the Program unless the User and/or the relevant Applicant personnel have given specific permission or direction.

4. Information Security and Integrity

ICANN will use industry standard safeguards, including firewalls, security patches and anti-virus programs to protect the confidentiality of personal information collected as part of the Program. When using TAS, personal information will be encrypted using secure socket layer technology ("SSL").

Access to personal information is restricted to ICANN staff, contractors and agents who need to know this information to manage the Program activities on behalf of ICANN. ICANN staff, contractors and agents will be bound by confidentiality obligations and, where appropriate, they may be subject to discipline, including termination and prosecution, if they breach these confidentiality obligations.

ICANN will take reasonable steps to ensure that personal information collected is relevant to its intended use and is complete.

ICANN's Program website contain links to other third party websites which are subject to the respective privacy polices of those third parties. ICANN is not responsible for the privacy practices of such linked third party sites, and their owners and operators.

Due to the open communication nature of the Internet, ICANN cannot represent, warrant or guarantee that communications stored on ICANN servers will be free from unauthorized access by third parties, loss, misuse or alterations. While ICANN will take reasonable and appropriate security measures noted above to protect against unauthorized access, disclosure, alteration or destruction of personal information received, ICANN DISCLAIMS ANY AND ALL LIABILITY FOR UNAUTHORIZED ACCESS OR USE OR COMPROMISE OF YOUR PERSONAL INFORMATION SUBMITTED THROUGH THE TAS. USERS AND APPLICANTS ARE HEREBY ADVISED THAT THEY SUBMIT SUCH PERSONAL INFORMATION AT THEIR OWN RISK.

5. Accessing and Updating Personal Information

The User and other authorized Applicant personnel may view stored personal information in relation to the Applicant and User profile, or a TLD application by accessing the relevant information screens within the TAS. As submitted information is used in evaluation checks and processes, submitted information cannot be modified without contacting our Customer Service Center. ICANN will endeavor to respond to requests to access, correct or update any other personal information ICANN retain in connection with the Program. Requests may be sent by email to our Customer Service Center at newgtld@icann.org.

ICANN will retain personal information stored on our servers in accordance with our general archival practices.

6. Changes to this Privacy Statement

Please note that ICANN may revise this Privacy Statement from time to time throughout the Program. ICANN will post any Privacy Statement changes on the Program's website. If the changes are material, ICANN may also provide notification via email according to the registered TAS log-in email for the Applicant. The Applicant's continued participation in the Program application process, including the User's use of TAS, after such change will be deemed acceptance by the User and the Applicant of the revised Privacy Statement.

7. Questions or Contacting ICANN

If you have any questions about this Privacy Statement, please feel free to contact ICANN at newgtld@icann.org.

Site Map

Resp. Ex. 24

RESPONDENT'S EXHIBIT

CORPORATIONS CODE
Title 1. Corporations
Division 1. General Corporation Law
Chapter 3. Directors and Management

GO TO CALIFORNIA CODES ARCHIVE DIRECTORY

Cal Corp Code § 300 (2016)

§ 300. Corporate powers exercisable by board; Delegation of day-to-day management; Close corporations; Validity of shareholders' agreement; Liability for managerial acts; Corporate formalities

(a) Subject to the provisions of this division and any limitations in the articles relating to action required to be approved by the shareholders (Section 153) or by the outstanding shares (Section 152), or by a less than majority vote of a class or series of preferred shares (Section 402.5), the business and affairs of the corporation shall be managed and all corporate powers shall be exercised by or under the direction of the board. The board may delegate the management of the day-to-day operation of the business of the corporation to a management company or other person provided that the business and affairs of the corporation shall be managed and all corporate powers shall be exercised under the ultimate direction of the board.

(b) Notwithstanding subdivision (a) or any other provision of this division, but subject to subdivision (c), no shareholders' agreement, which relates to any phase of the affairs of a close corporation, including but not limited to management of its business, division of its profits or distribution of its assets on liquidation, shall be invalid as between the parties thereto on the ground that it so relates to the conduct of the affairs of the corporation as to interfere with the discretion of the board or that it is an attempt to treat the corporation as if it were a partnership or to arrange their relationships in a manner that would be appropriate only between partners. A transferee of shares covered by such an agreement which is filed with the secretary of the corporation for inspection by any prospective purchaser of shares, who has actual knowledge thereof or notice thereof by a notation on the certificate pursuant to Section 418, is bound by its provisions and is a party thereto for the purposes of subdivision (d). Original issuance of shares by the corporation to a new shareholder who does not become a party to the agreement terminates the agreement, except that if the agreement so provides it shall continue to the extent it is enforceable apart from this subdivision. The agreement may not be modified, extended or revoked without the consent of such a transferee, subject to any provision of the agreement permitting modification, extension or revocation by less than unanimous agreement of the parties. A transferor of shares covered by such an agreement ceases to be a party thereto upon ceasing to be a shareholder of the corporation unless the

transferor is a party thereto other than as a shareholder. An agreement made pursuant to this subdivision shall terminate when the corporation ceases to be a close corporation, except that if the agreement so provides it shall continue to the extent it is enforceable apart from this subdivision. This subdivision does not apply to an agreement authorized by subdivision (a) of Section 706.

(c) No agreement entered into pursuant to subdivision (b) may alter or waive any of the provisions of Sections 158, 417, 418, 500, 501, and 1111, subdivision (e) of Section 1201, Sections 2009, 2010, and 2011, or of Chapters 15 (commencing with Section 1500), 16 (commencing with Section 1600), 18 (commencing with Section 1800), and 22 (commencing with Section 2200). All other provisions of this division may be altered or waived as between the parties thereto in a shareholders' agreement, except the required filing of any document with the Secretary of State.

(d) An agreement of the type referred to in subdivision (b) shall, to the extent and so long as the discretion or powers of the board in its management of corporate affairs is controlled by such agreement, impose upon each shareholder who is a party thereto liability for managerial acts performed or omitted by such person pursuant thereto that is otherwise imposed by this division upon directors, and the directors shall be relieved to that extent from such liability.

(e) The failure of a close corporation to observe corporate formalities relating to meetings of directors or shareholders in connection with the management of its affairs, pursuant to an agreement authorized by subdivision (b), shall not be considered a factor tending to establish that the shareholders have personal liability for corporate obligations.

HISTORY:

Added Stats 1975 ch 682 § 7, effective January 1, 1977. Amended Stats 1976 ch 641 § 7, effective January 1, 1977; Stats 1978 ch 370 § 3; Stats 1983 ch 1223 § 3.

NOTES:

Amendments:

1976 Amendment:

(1) Deleted "and the bylaws" after "articles" in the first sentence of subd (a); (2) amended subd (b) by adding (a) the third sentence; and (b) ", except that if the agreement so provides it shall continue to the extent it is enforceable apart from this subdivision" at the end of the sixth sentence; and (3) amended subd (c) by (a) substituting "and 1111, subdivision (e) of Section 1201, Sections 2009, 2010, and 2011, or of Chapters 15 (commencing with Section 1500), 16 (commencing with Section 1600), 18 (commencing with Section 1800), and 22 (commencing with Section 2200)" for "1111 and 1201(e) or Chapters 15, 16, 17, 18 and 22" in the first sentence; and (b) deleting "as between the parties thereto in a shareholders' agreement" after "waived" in the second sentence.

1978 Amendment:

Added "417, 418," in subd (c).

1983 Amendment:

Added "or by a less than majority vote of a class or series of preferred shares (Section 402.5)," in subd (a).

Historical Derivation:

(a) Former Corp C § 800, as added Stats 1947 ch 1038.

(b) Former CC § 305, as added Stats 1931 ch 862 § 2, amended Stats 1933 ch 533 § 13.

(c) Former CC § 290, as amended Code Amdts 1873-74 ch 612 § 58, Code Amdts 1875-76 ch 490 § 1, Code Amdts 1880 ch 90 § 1, Stats 1891 ch 207 § 1, Stats 1901 ch 147 § 1, Stats 1905 ch 392 § 2, Stats 1907 ch 278 § 1, Stats 1915 ch 743 § 1, Stats 1929 ch 711 § 3.

(d) Former CC § 305, as amended Code Admts 1875-76 ch 17 § 1, Stats 1901 ch 145 § 1, Stats 1905 ch 392 § 4, Stats 1929 ch 711 § 10.

(e) Stats 1862 ch 187 § 6.

(f) Stats 1861 ch 503 §§ 2, 3, as amended Stats 1867-68 ch 424 §§ 1, 2.

(g) Stats 1853 ch 121 §§ 4, 5, 7, 8.

(h) Stats 1850 ch 128 § 159.

Legislative Committee Comments:

(a) Source: Cal. § 800; ABA § 35 (Proposed Revision). Active involvement by the board in day-to-day affairs of the corporation does not accord with the realities of contemporary business practices, other than perhaps in a relatively closely held corporation. The role of the board in this context is the formulation of major management policies rather than direct involvement in day-to-day management. Accordingly, this subdivision provides that the business and affairs of the corporation shall be managed (and all corporate powers shall be exercised) by or *under the direction* of the board. Any ambiguity as to whether the board may delegate the day-to-day operation of the corporation is eliminated by express language to that effect.

The board exercises its power subject to the provisions of this division and any limitations in the articles and bylaws relating to action required to be approved by the shareholders or the outstanding shares. If the operation of the business of the corporation is delegated, the board must retain the ultimate authority and responsibility with respect to management of the corporation.

(b) Source: North Carolina Business Corporation Act, §§ 55-73(b) and (c). Shareholders of a close corporation often desire to structure corporate management in a manner similar to that of a partnership. Since modifying the traditional pattern of corporate control through shareholders' agreements necessarily infringes upon the discretion of the board, such agreements may, in the absence of statutory validation, be invalidated as inconsistent with statutory provisions conferring management powers on the directors or on the ground that shareholders may not manage the corporation and regulate their relations among themselves as though they were partners.

This subdivision expressly provides statutory validation of shareholders' agreements which may govern almost any phase of the affairs of a close corporation including the management of its business, the division of profits and the distribution of assets on liquidation. However, agreements entered into pursuant to this subdivision may not alter or waive provisions of this division concerning restrictions upon distributions to shareholders, involuntary dissolution

proceedings, records and reports, rights of inspection, crimes and penalties, required filings with the Secretary of State and the definition of close corporation status. This subdivision by its terms does not apply to a voting agreement among shareholders of a close corporation pursuant to subdivision (a) of § 706.

Cross References:

"Close corporation": *Corp C § 158*.

Adoption, amendment or repeal of bylaws: *Corp C § 211*.

Power of corporation to constitute or reconstitute its board of directors under statute governing reorganization: *Corp C § 1400*.

Liability of officers, directors, etc., for making false statements or entries, or for tampering with entries: *Corp C § 1507*.

"Shareholder" as including beneficial owner of shares who has entered into an agreement under this Section: *Corp C § 2000*.

Criminal liability of director, officer or agent: *Corp C §§ 2254, 2255*.

Governor's requiring investigation into corporate affairs or management: *Gov C § 12014*.

Legislative Power to alter or repeal laws concerning corporations: Const Art XX § 5.

Collateral References:

Cal. Forms Pleading & Practice (Matthew Bender(R)) ch 15 "Affidavits, Certificates, And Declarations".

Cal. Forms Pleading & Practice (Matthew Bender(R)) ch 160 "Corporations" II, VII.

Cal. Forms Pleading & Practice (Matthew Bender(R)) ch 161 "Corporations: Alter Ego Liability."

Cal. Forms Pleading & Practice (Matthew Bender(R)) ch 167 "Corporations: Directors and Management."

Cal. Legal Forms, (Matthew Bender) § 1B.30[1].

Cal. Legal Forms, (Matthew Bender) § 1B.30[2].

Cal. Legal Forms, (Matthew Bender) § 1B.31[1].

Cal. Legal Forms, (Matthew Bender) § 1B.31[3].

Cal. Legal Forms, (Matthew Bender) § 1B.41[5].

Cal. Legal Forms, (Matthew Bender) § 1B.42[6].

Cal. Legal Forms, (Matthew Bender) § 1B.43[6].

Cal. Legal Forms, (Matthew Bender) § 1B.100.

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Cal. Legal Forms, (Matthew Bender) § 2.112.

Cal. Legal Forms, (Matthew Bender) § 2.250[2].

Cal. Legal Forms, (Matthew Bender) § 3.130.

Cal. Legal Forms, (Matthew Bender) § 3.202[1].

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Cal. Legal Forms, (Matthew Bender) § 4.11.

Cal. Legal Forms, (Matthew Bender) § 4.200[1].

Cal. Legal Forms, (Matthew Bender) § 4.200[2].

Cal. Legal Forms, (Matthew Bender) § 4.201[2].

Cal. Legal Forms, (Matthew Bender) § 4.216[1].

Cal. Legal Forms, (Matthew Bender) § 4.216[2].

Cal. Legal Forms, (Matthew Bender) § 5.10[1].

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Cal. Legal Forms, (Matthew Bender) § 5.15[2].

Cal. Legal Forms, (Matthew Bender) § 5.32[1].

Cal. Legal Forms, (Matthew Bender) § 5.32[6].

Cal. Legal Forms, (Matthew Bender) § 5.32[9].

Cal. Legal Forms, (Matthew Bender) § 5.121.

Cal. Legal Forms, (Matthew Bender) § 6I.241[1].

Cal. Legal Forms, (Matthew Bender) § 6I.251[1].

Cal. Legal Forms, (Matthew Bender) § 7.10[3].

Cal. Legal Forms, (Matthew Bender) § 7.31[1].

Cal. Legal Forms, (Matthew Bender) § 7.123[1].

Cal. Legal Forms, (Matthew Bender) § 7.200[1].

Cal. Legal Forms, (Matthew Bender) § 8A.11[2].

Cal. Legal Forms, (Matthew Bender) § 8A.201[1].

Cal. Legal Forms, (Matthew Bender) § 8C.10.

Cal. Legal Forms, (Matthew Bender) § 8C.12.

Cal. Legal Forms, (Matthew Bender) § 8C.13[3].

Cal. Legal Forms, (Matthew Bender) § 8C.14[1].

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Cal. Legal Forms, (Matthew Bender) § 8C.19.

Cal. Legal Forms, (Matthew Bender) § 8C.21[2].

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Cal. Legal Forms, (Matthew Bender) § 8C.200[1].

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Cal. Legal Forms, (Matthew Bender) § 12A.17.

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Cal. Legal Forms, (Matthew Bender) § 27.220[1].

Cal. Legal Forms, (Matthew Bender) § 27.281[1].

Cal. Legal Forms, (Matthew Bender) § 27A.101.

Cal. Legal Forms, (Matthew Bender) § 34A.10[1].

Cal. Legal Forms, (Matthew Bender) § 34B.15[2].

Cal. Legal Forms, (Matthew Bender) § 49.380[2].

Cal. Legal Forms, (Matthew Bender) § 121.284[1].

Cal. Points & Authorities (Matthew Bender(R)) ch 52 "Corporations," § 52.67.

Cal. Points & Authorities (Matthew Bender(R)) ch 182 "Principal And Agent," § 182.42.

Ballantine & Sterling, Cal Corp Laws, Ch. 5, "Management: Functions of Directors, Officers, and Committees," *Ch. 6, "Management: Duties and Liabilities of Directors and Controlling Shareholders*".

Wood, Cal Small Business Guide, Ch. 4A, "Corporate Governance".

9 Witkin Summary (10th ed) Corporations §§ 5, 32, 86, 89, 97, 215, 422.

Cal Jur 3d (Rev) Corporations §§ 25, 26, 27, 28, 256, 257.

Pertinent administrative rules and regulations: 10 Cal Adm Code § 260.140.8.

Cal Corp Manual (2d Ed) §§ 130, 132, 186, 188, 311, 523.

Operating Problems of California Corporations (CEB, 1978) §§ 1.5-6.22.

The California statutory close corporation revisited: Different, problematic, but sometimes useful entities. CEB Bus L Practitioner Vol. 7 No. 4 p 185.

Court upholds shareholder voting agreement for non-statutory close corporation. CEB Bus L Rep Vol. 14 No. 4 p 125.

Rutter Cal Prac Guide, Corporations §§ 3:236 et seq.

Forms:

See forms set out below, following Notes of Decisions.

Law Review Articles:

Corporate pooling agreements and restriction-of-directors agreements. 10 Anglo-American LR 73.

Diligence of directors in management of corporation. *3 CLR 21.*

Fiduciary duty of directors to shareholders. *29 CLR 67.*

Corporate responsibility for litigation expenses of management. *40 CLR 104.*

Trading in corporate control. *44 CLR 1.*

Application of doctrine of corporate opportunity. *45 CLR 183.*

Corporate standards and legal rules. *50 CLR 408.*

Boards of directors new standards of care. 9 Loyola U of LA LR 820.

Comparative assessment of the California close corporation. 9 Loyola U of LA LR 865.

Symposium on California's New General Corporation Law. *7 Pacific LJ 585.*

Review of Selected 1983 Legislation. 15 Pacific LJ 479.

Protection of shareholder interests in California closely held and statutory close corporations: A practioner's guide. *20 Pacific LJ 1127.*

Stock purchase warrants and "rights". *4 SCLR 268.*

Constitutional liability of directors. *5 SCLR 429.*

Shareholders, managers, and corporate social responsibility. *21 Stan LR 248.*

Standards of management conduct in closed corporations. *33 Stan LR 1140.*

The custodian remedy for deadlocks in close corporation. *13 UCD LR 498 (1980).*

The general standard of care imposed on directors under the new California General Corporation Law. *23 UCLA LR 1269.*

Comment: Piercing the Veil in California LLCs: Adding Surprise to the Venture Capitalist Equation. *45 Santa Clara LR 1009.*

Hierarchy Notes:

Corp Code Note

Tit. 1, Div. 1 Note

Tit. 1, Div. 1, Ch. 3 Note

NOTES OF DECISIONS 1. Generally 2. Status and Authority of Directors 3. Delegation of Authority 4. Authorization or Ratification by Stockholders 5. Manner of Exercising Authority 6. Judicial Control or Interference 7. Attack by Minority Stockholders 8. Particular Powers, Exercise of 9. Borrowing Money; Levying Assessments 10. Purchasing or Giving Away Property; Mortgage 11. Books and Records 12. Prosecution of Claims, and Settlement of Pending Action 13. Employment of Attorney 14. Authority of Officers 15. Actions and Proceedings 16. Evidence 17. Pleadings

1. Generally

Where two individuals promote corporation and own practically all stock and dominate its affairs and, together with their attorney, hold principal offices of corporation, their conduct, actions, and promises bind corporation, and corporation will be deemed to have knowledge of their conduct and contracts. *McCormick Saeltzer Co. v. Grizzly Creek Lumber Co. (1925, Cal App) 74 Cal App 278, 240 P 32, 1925 Cal App LEXIS 181.*

Officer of corporation is not criminally answerable for act of corporation in which he is not personally a participant. *People v. Lieber (1956, Cal App Dep't Super Ct) 146 Cal App 2d Supp 910, 304 P2d 869, 1956 Cal App LEXIS 1559.*

One may not divorce responsibilities of a director from statutory duties and powers of that office by accepting office of director as accommodation with understanding that none of duties of director will be exercised. *Bellerue v. Business Files Institute, Inc. (1963, Cal App 2d Dist) 215 Cal App 2d 383, 30 Cal Rptr 232, 1963 Cal App LEXIS 2513.*

2. Status and Authority of Directors

Directors of corporation are its chosen representatives and constitute corporation to all purposes in dealing with others; what they do within scope of objects and purposes of corporation, corporation does; if they do injury to another, though it necessarily involves in its commission malicious intent, corporation must be deemed, by imputation, to be guilty of wrong and answerable for it as individual would be in such case. *Maynard v. Fireman's Fund Ins. Co. (1867) 34 Cal 48, 1867 Cal LEXIS 212.*

Directors of corporation are deemed to be mind and soul of corporate entity, and what they do as representative of corporation, corporation itself is deemed to do; manifested motives and intentions of directors when material fact is in issue are to be imputed to corporation. *Maynard v. Fireman's Fund Ins. Co. (1867) 34 Cal 48, 1867 Cal LEXIS 212.*

Under the statute the directors are the only persons by whom the corporate powers, business and property of the corporation are to be exercised, conducted and controlled. *Wickersham v. Brittan, 93 Cal. 34, 28 P. 792, 1892 Cal. LEXIS 515, 15 L R.A. 106* . See also *Mining Co. v. Anglo-Californian Bank (1881) 104 US 192, 26 L Ed 707, 1881 US LEXIS 1989; Granite Gold Mining Co. v. Maginness (1897) 118 Cal 131, 50 P 269, 1897 Cal LEXIS 746.*

The power and authority to manage the affairs of a corporation is vested in the board of directors as a board, and not as individual members. *Scott v. Los Angeles Mountain Park Co. (1928, Cal App) 92 Cal App 258, 267 P 914, 1928 Cal App LEXIS 770.*

Law clearly contemplates that corporation shall be governed by its board of directors, unless otherwise authorized by statute. *Pierce v. Hill (1932, Cal App) 119 Cal App 742, 7 P2d 201, 1932 Cal App LEXIS 138.*

Authority to perform acts which may be controlled by bylaws is vested in board of directors, in absence of adoption of bylaws. *Canal Oil Co. v. National Oil Co. (1937, Cal App) 19 Cal App 2d 524, 66 P2d 197, 1937 Cal App LEXIS 470.*

Person may not divorce responsibility of director of corporation from statutory duties and powers of that office by accepting office as "accommodation" with understanding that he would not exercise any of duties of director. *Minton v.*

Cavaney (1961) 56 Cal 2d 576, 15 Cal Rptr 641, 364 P2d 473, 1961 Cal LEXIS 320, limited, *Pearson v. Norton (1964, Cal App 4th Dist) 230 Cal App 2d 1, 40 Cal Rptr 634, 1964 Cal App LEXIS 837.*

3. Delegation of Authority

Contract of corporation employing individual for period of one year to manage, take charge of, and conduct business of corporation along such lines as such individual might deem expedient, did not have effect of divesting board of directors of its authority to manage and control corporate affairs. Oliphant v "Home Builders" Oliphant v. "Home Builders" (1917, Cal App) *34 Cal App 720, 168 P 700, 1917 Cal App LEXIS 198.*

An agreement that a finance committee should be empowered to take control of the finances of a corporation, to raise funds either by sale of stock or a bond issue and to conduct the corporation's affairs until the indebtedness is discharged violates provision that the corporate powers must be exercised and controlled by a board of directors. *Smith v. California Thorn Cordage, Inc. (1933, Cal App) 129 Cal App 93, 18 P2d 393, 1933 Cal App LEXIS 1005.*

Board of directors of corporation cannot delegate its function to govern; as long as corporation exists, its affairs must be managed by duly elected board, and contract delegating such function to others is void. *Kennerson v. Burbank Amusement Co. (1953, Cal App) 120 Cal App 2d 157, 260 P2d 823, 1953 Cal App LEXIS 1910.*

Contract with organizer and director of amusement company, whereby its board of directors attempt to confer on him practical control and management of substantially all corporate powers with reference to theater business, including all control over bookings, personnel, admission prices, salaries, expenses, and even fiscal policies, is void and unenforceable as being contrary to rule prohibiting directors from delegating control over corporate affairs to others. *Kennerson v. Burbank Amusement Co. (1953, Cal App) 120 Cal App 2d 157, 260 P2d 823, 1953 Cal App LEXIS 1910.*

4. Authorization or Ratification by Stockholders

Resolution of members of beneficial association directing larger amounts to be paid to certain nominees than amount of respective assessments collected for their benefit was inoperative in absence of adoption or ratification by directors where bylaw of association provided that no money could be drawn or appropriated from treasury without order of directors. *In re Application of La Solidarite Mut. Beneficial Asso. (1886) 68 Cal 392, 9 P 453, 1886 Cal LEXIS 446.*

Stockholders have no authority to ratify attempted transaction which is invalid by reason of want of authorization of board of directors. *Curtin v. Salmon River Hydraulic Gold Mining & Ditch Co. (1900) 130 Cal 345, 62 P 552, 1900 Cal LEXIS 842.*

Prerequisite consent of stockholders to execution of instrument cannot be presumed from mere fact that instrument is under corporate seal; such consent may be given in due form after execution thereof, and is not necessarily or presumptively involved in such execution, whether under corporate seal or not. *Bennett v. Red Cloud Mining Co. (1910, Cal App) 14 Cal App 728, 113 P 119, 1910 Cal App LEXIS 50.*

Since this section requires declaration, authorization or ratification of dividends and withdrawals by board of directors, a withdrawal without such authorization is prima facie unlawful and no exception is made in code for closed corporations. *Gray v. Sutherland (1954, Cal App 1st Dist) 124 Cal App 2d 280, 268 P2d 754, 1954 Cal App LEXIS 1731.*

5. Manner of Exercising Authority

Corporate powers can be exercised by directors only when duly assembled and acting as a board. *Gashwiler v. Willis (1867) 33 Cal 11, 1867 Cal LEXIS 116,.*

Notwithstanding vacancy in board of directors of corporation organized under laws of California, vote of majority of full board of directors is valid as corporate act to sanction execution of mortgage upon property conveyed to corporation by mortgagee. *Porter v. Lassen County Land & Cattle Co. (1899) 127 Cal 261, 59 P 563, 1899 Cal LEXIS 637.*

Resolution of board of directors of corporation declaring dividend, even though unlawful in its inception for lack of duly held meeting, can be ratified by board of directors, and such ratification does not require holding of regular meeting of board or passing of resolution declaring ratification. *Meyers v. El Tejon Oil & Refining Co. (1946) 29 Cal 2d 184, 174 P2d 1, 1946 Cal LEXIS 288.*

Directors must ordinarily act on advice of corporate officers and other persons who have expert knowledge. *Pacific Mut. Life Ins. Co. v. McConnell (1955) 44 Cal 2d 715, 285 P2d 636, 1955 Cal LEXIS 273.*

Although corporation ordinarily acts by resolution adopted at formal meetings of its board of directors and entered in its minutes, decisions reached by all directors and stockholders of closed corporation at informal conferences are binding on corporation when, by custom and with consent of all concerned, corporate formalities have been dispensed with and corporate affairs have been carried on through such informal conferences. *Armstrong Manors v. Burris (1961, Cal App 4th Dist) 193 Cal App 2d 447, 14 Cal Rptr 338, 1961 Cal App LEXIS 1721.*

Trustee-in-bankruptcy's interpretation of former Corp C §§ 800, 814 and 820 as invalidating possibly irregular purchase by interested corporate directors, which had been authorized by board of directors at meeting from which two dummy members were absent and which was subsequently ratified by general resolution at the shareholder's annual meeting, rejected. *Bass v. American Ins. Co. (1974, 9th Cir Cal) 493 F2d 590, 1974 US App LEXIS 9735.*

6. Judicial Control or Interference

The courts are without authority to appoint a receiver for the business and assets of a corporation, which under the statute is exclusively controlled by its directors and consent of the corporation to such an appointment does not validate it. *Elliott v. Superior Court, 168 Cal. 727, 145 P. 101, 1914 Cal. LEXIS 396.*

If a corporation has suffered no forfeiture or if it has not been dissolved, the courts may not through a receiver take possession of its property, sell it and distribute the proceeds since under the law all those powers are placed in the hands of the directors. *Lyon v. Carpenters' Hall Asso. (1924, Cal App) 66 Cal App 550, 226 P 942, 1924 Cal App LEXIS 495.*

Order of probate court authorizing special administrator to act in reference to affairs of corporation, entire stock of which was owned by decedent, was erroneous where acts authorized were such as to require corporate action by board of directors and where corporation was not alter ego of decedent; special administrator who asked court to authorize him to abandon office of corporation of which decedent owned all stock and move it to office of administrator, to fix terms of sale of corporate property, to lease corporate property, and to compromise corporate debt, could not successfully claim that he was merely asking for instructions as to how to vote corporate stock, since all matters sought to be done were within power and control of board of directors and not of owners of stock. *Estate of Winder (1950, Cal App) 99 Cal App 2d 83, 221 P2d 193, 1950 Cal App LEXIS 1659.*

A court will not intermeddle in internal affairs of corporation in absence of fraudulent conduct by those entrusted with its management. *Levin v. Martin C. Levin Inv. Co. (1954, Cal App) 123 Cal App 2d 158, 266 P2d 552, 1954 Cal App LEXIS 1158.*

Court will not substitute its judgment for business judgment of board of directors made in good faith. *Marble v. Latchford Glass Co. (1962, Cal App 2d Dist) 205 Cal App 2d 171, 22 Cal Rptr 789, 1962 Cal App LEXIS 2118.*

7. Attack by Minority Stockholders

Conduct of directors in management of corporate affairs is not subject to attack by minority stockholders, in absence of fraud, breach of trust or transactions which are ultra vires, where such acts are discretionary and are performed in good faith, reasonably believing them to be for best interest of corporation. *Fornaseri v. Cosmosart Realty & Bldg. Corp. (1929, Cal App) 96 Cal App 549, 274 P 597, 1929 Cal App LEXIS 937.*

Transaction between two corporations having common directors, which is not ultra vires, cannot be prevented or avoided by minority stockholder except he be able to prove actual or constructive fraud, injury or damage. *Buck v. Tuxedo Land Co. (1930, Cal App) 109 Cal App 453, 293 P 122, 1930 Cal App LEXIS 435.*

California has long recognized the "business judgment rule," holding that directors decisions in the day to day management of the corporation may not be attacked by shareholders so long as the directors exercised their best "business judgment" in making those decisions. Neither the court nor minority shareholders can substitute their judgment for that of the corporation "where its board had acted in good faith and used its best business judgment in behalf of the corporation." The business judgment rule applies to all discretionary decisions by the board, including the decision not to pursue a cause of action. *Lewis v. Anderson (1979, 9th Cir Cal) 615 F2d 778, 1979 US App LEXIS 10898,* cert. denied, *(1980) 449 U.S. 869, 101 S. Ct. 206, 66 L. Ed. 2d 89, 1980 U.S. LEXIS 3204.*

8. Particular Powers, Exercise of

Directors have power to accept resignation of director and elect his successor, to remove corporation president, to choose another president, and to remove office to another place in same city. *Seal of Gold Mining Co. v. Slater (1911) 161 Cal 621, 120 P 15, 1911 Cal LEXIS 471.*

9. Borrowing Money; Levying Assessments

In action by bank against another bank for money loaned and on note representing balance due, loan and balance being established, it is immaterial whether note was authorized by directors. *First Nat. Bank v. California Nat. Bank (1893) 4 Cal Unrep 403, 35 P 639.*

The power to levy assessments could be exercised by a corporation only through its board of directors. *La Plante v. Hopper (1932, Cal App) 127 Cal App 146, 15 P2d 525, 1932 Cal App LEXIS 273.*

10. Purchasing or Giving Away Property; Mortgage

Since the corporate powers, business and property of all private corporations must be exercised, conducted and controlled by a board of directors, it could not be said that the purchase of mining ground by a mining corporation without the assent of the stockholders was invalid unless the evidence showed that it was "additional ground," as specified in Stats 1880, p 131, § 1. *Granite Gold Mining Co. v. Maginness (1897) 118 Cal 131, 50 P 269, 1897 Cal LEXIS 746.*

The authority of a corporation to purchase realty mortgages carries with it the right to purchase the obligations secured thereby and the question whether the purchase of a particular note and mortgage by a savings and loan corporation is "such as the purposes of the corporation required" is to be determined by its directors, and is not open to investigation by the mortgagor. *Savings Bank of San Diego County v. Barrett (1899) 126 Cal 413, 58 P 914, 1899 Cal LEXIS 732.*

Board of directors may ratify mortgage which might otherwise be challenged by requiring mortgagee to make additional advances on security of this mortgage and recognizing its validity in resolution authorizing second mortgage upon property. *Porter v. Lassen County Land & Cattle Co. (1899) 127 Cal 261, 59 P 563, 1899 Cal LEXIS 637.*

Directors of corporation have no authority to give away property of corporation, and have no more authority to abandon claim, without consent of stockholders. *Crane v. French (1940, Cal App) 39 Cal App 2d 642, 104 P2d 53,*

1940 Cal App LEXIS 450.

11. Books and Records

The directors were in control of and entitled to possession of the books and records of the corporation, including the stock and transfer books. *Anheuser-Busch Brewing Asso. v. Green (1928, Cal App) 90 Cal App 453, 265 P 1025, 1928 Cal App LEXIS 26.*

A corporation's right to inspect the books and property of another corporation whose stock it owns is a part of its rights and powers which in ordinary circumstances is vested exclusively in the board of directors, not in an individual member of that board. *Lisle v. Shipp (1929, Cal App) 96 Cal App 264, 273 P 1103, 1929 Cal App LEXIS 867.*

12. Prosecution of Claims, and Settlement of Pending Action

Directors of corporation, acting bona fide and in exercise of their best judgment, have authority to bind their stockholders by settlement of pending action, although it may subsequently appear that they failed to secure best terms to which corporation might have been entitled; if they have full knowledge of circumstances on which adverse claim is based, no fraud is practiced on them, and unless they have colluded with adverse claimant to practice fraud upon those whom they represent, it cannot be said that they are guilty of fraud on grantee of their corporation, who has agreed to assume its debts, by representing claim arising out of settlement or compromise to be valid claim. *Donohoe v. Mariposa Land & Mining Co. (1885) 66 Cal 317, 5 P 495, 1885 Cal LEXIS 423.*

Directors have the same discretion as to prosecution of claims on behalf of the corporation as they have in other business matters, and the fact that a claim may be founded in fraud does not differentiate it from others. *Findley v. Garrett (1952, Cal App) 109 Cal App 2d 166, 240 P2d 421, 1952 Cal App LEXIS 1817.*

13. Employment of Attorney

Two directors of a corporation had authority to employ an attorney in behalf of the corporation, where they owned two thirds of the stock and were in actual control of the corporation's business and where only one of two other directors actively participated in the corporate affairs. *Sattinger v. Golden State Glass Corp. (1942, Cal App) 53 Cal App 2d 130, 127 P2d 653, 1942 Cal App LEXIS 454.*

14. Authority of Officers

Neither the president nor any other officer of a California corporation has power to pledge or dispose of all of its property, since the directors exercise the powers, conduct the business and control the property, and the decisions of the board when duly assembled are valid corporate acts. *Alta Silver Mining Co. v. Alta Placer Mining Co. (1889) 78 Cal 629, 21 P 373, 1889 Cal LEXIS 652.*

The president of a bank has no ex officio authority to retain special counsel unless he is so authorized by the board of directors. *Pacific Bank v. Stone (1898) 121 Cal 202, 53 P 634, 1898 Cal LEXIS 875.*

The president of the corporation is without authority by virtue of his office to buy or sell its property or to make an executory contract binding upon it, in view of the statute that corporate powers must be exercised by the directors. *Northwestern Packing Co. v. Whitney (1907, Cal App) 5 Cal App 105, 89 P 981, 1907 Cal App LEXIS 211.*

In the advancement of corporate interests a corporation can act only through its agents, and in its ordinary course of business its president may execute contracts to bind the corporation. *Grummet v. Fresno Glazed Cement Pipe Co., 181 Cal. 509, 185 P. 388, 1919 Cal. LEXIS 385, 1919 Cal. LEXIS 616.*

Where defendant corporation's bylaws gave its president power to make and sign agreements in name and behalf of

defendant and also general and active management of its business and affairs, president was thereby authorized to take action to prevent flooding of its lands; it could not be claimed that he had no actual or ostensible authority to bind defendant, on theory that contract was for purchase of warrants and that bylaws reserved to directors the power to acquire property rights or privileges, where contract was not so much for purchase of property as for general protection of defendant's property and affairs. *Freeman v. River Farms Co. (1936) 5 Cal 2d 431, 55 P2d 199, 1936 Cal LEXIS 420.*

The president of a corporation organized to deal in properties does not require a written authorization to make sales of property or to employ an agent to do so. *Herring v. Fisher (1952, Cal App) 110 Cal App 2d 322, 242 P2d 963, 1952 Cal App LEXIS 1530.*

The executive officer of a corporation organized to deal in properties is more than an agent; he acts and speaks for the corporation in furthering its express objects and may sell all the properties since that is the very object of the corporation's authority. *Herring v. Fisher (1952, Cal App) 110 Cal App 2d 322, 242 P2d 963, 1952 Cal App LEXIS 1530.*

Corporate officer who deals fairly with corporation may lend it money and take its note. *Trieber v. Gayne (1956, Cal App 1st Dist) 143 Cal App 2d 580, 299 P2d 983, 1956 Cal App LEXIS 1640.*

In order to bind corporation, it is not necessary that all acts done by its officers be specifically authorized by board of directors, and such authorization entered in its books. *Moore v. Phillips (1959, Cal App 2d Dist) 176 Cal App 2d 702, 1 Cal Rptr 508, 1959 Cal App LEXIS 1540.*

15. Actions and Proceedings

Where corporate action through board of directors is necessary to authorized sale under deed of trust in which corporation is named as trustee, such corporate action may be implied by recitals contained in original notice and corporate seal affixed thereto. *Galusha v. Meserve (1922, Cal App) 58 Cal App 174, 208 P 348, 1922 Cal App LEXIS 315.*

Where bylaws of corporation provided for board of five directors and directors were required by law then in force to own stock in corporation, it was inferred in action to recover on stockholders' statutory liability that five persons who were owners of all issued capital stock constituted board of directors of corporation. *Tierney & Lawford, Inc. v. Wilshire Cafe Co. (1930) 209 Cal 605, 289 P 621, 1930 Cal LEXIS 520.*

16. Evidence

Refusal of court to admit in evidence articles of incorporation, offered to show number of directors, was not erroneous offer being immaterial, inasmuch as statute provided minimum number of directors for corporation. *Barrell v. Lake View Land Co. (1898) 122 Cal 129, 54 P 594, 1898 Cal LEXIS 546.*

In action against corporation for services rendered therefor at its request, finding that plaintiff was employed by corporation was against evidence where it appears without conflict that his employment was by two shareholders of corporation personally, acting in their own behalf, and not for corporation, and that they were not entitled to charge corporation therefor after they had performed services personally. *Brown v. Valley View Mining Co. (1900) 127 Cal 630, 60 P 424, 1900 Cal LEXIS 709.*

Where general manager of corporation deals with public within apparent scope of his authority, it is presumed prima facie that he acts for the corporation. *McMann v. Wadler (1961, Cal App 3d Dist) 189 Cal App 2d 124, 11 Cal Rptr 37, 1961 Cal App LEXIS 2155.*

17. Pleadings

Question of authority of directors to execute promissory notes in action thereon is not in issue where it is not pleaded and it is based on transactions which occurred subsequent to assignment of notes to plaintiff. *Merrill v. Normandie Corp. (1930, Cal App) 110 Cal App 621, 294 P 774, 1930 Cal App LEXIS 205.*

Whether directors of corporation acted collusively and fraudulently is question of fact, mere allegations to that effect not being proof. *Gagnon Co. v. Nevada Desert Inn, Inc. (1955) 45 Cal 2d 448, 289 P2d 466, 1955 Cal LEXIS 335.*

SUGGESTED FORMS

Editor's Notes-- [Caution: The following shareholders' agreement and provisions thereto are illustrative and do not necessarily encompass all factors to be considered in drafting such instruments.]

Shareholders' Agreement

Provision in Shareholders' Agreement--Election of Directors

Provision in Shareholders' Agreement--Compulsory Dividend Payments

Provision in Shareholders' Agreement--Agreement as to Employment