

## **Reconsideration Request Form**

Pursuant to Article IV, Section 2 of the Bylaws for Internet Corporation for Assigned Names and Numbers (“ICANN”) (the “ICANN Bylaws”), the Union of Orthodox Jewish Congregations of America (“OU Kosher”), objector to the application of Kosher Marketing Assets, LLC (“KMA” or “Applicant”) for new gTLD .kosher, together with supporting requestors STAR-K Kosher Certification, Inc. (“STAR-K”), Kosher Supervision Service, Inc. (“KOF-K”), Chicago Rabbinical Council (“cRc”), and The Kashruth Council of Canada (“COR”) (together, “Requestors”) respectfully submits this Request for Reconsideration of certain staff actions dated 14 January 2014. This submission is timely in accordance with Article IV, Section 2.5(b) of the ICANN Bylaws.

This Request for Reconsideration relates to a failure by the International Chamber of Commerce (and ICANN staff in adopting the expert determination) to follow ICANN policies and/or processes as expressed in Sections 3.5 and 3.5.4 of the gTLD Applicant Guidebook (“Guidebook” or “AGB”) by determining that non-public, non-binding statements made during an objection proceeding may supersede contrary language in the gTLD application at issue and by ignoring the plain meaning of Specification 11 of the gTLD Registry Agreement so as to errantly conclude that Specification 11 would prevent operation of the gTLD in a detrimental manner. If not remedied, the significant loopholes in the gTLD objection process created by the errant ICC ruling will render the objection process meaningless.

OU Kosher hereby requests an opportunity to be heard in accordance with Article IV, Section 2.12 of the ICANN Bylaws.

**1. Requester Information**

**Name:** Union of Orthodox Jewish Congregations of America (OU Kosher)

c/o

**Name:** David E. Weslow, Wiley Rein LLP

**Address:** Contact Information Redacted

**Email:** Contact Information Redacted

**Phone Number (optional):** Contact Information Redacted

**2. Request for Reconsideration of:**

Staff action/inaction

**3. Description of specific action you are seeking to have reconsidered.**

Requesters respectfully seek reconsideration of ICANN's acceptance of the expert determination in *Union of Orthodox Jewish Congregations of America vs. Kosher Marketing Assets LLC*, EXP/424/ICANN/41 (the ".Kosher Expert Determination"). A copy of the .Kosher Expert Determination is attached hereto as **Annex A**.

**4. Date of action/inaction:**

Although the .Kosher Expert Determination is dated 14 January 2014, the International Chamber of Commerce ("ICC") did not release this determination to the parties until 16 January 2014.

**5. On what date did you become aware of the action or that action would not be taken?**

Requesters became aware of the .Kosher Expert Determination on 16 January 2014.

**6. Describe how you believe you are materially affected by the action or inaction:**

ICANN's adoption of the .Kosher Expert Determination will allow the .kosher Applicant to advance to contracting and delegation of .kosher with restricted and unduly discriminatory eligibility criteria for registration of .kosher domain names, as set forth in the .kosher Application. This will allow the .kosher Applicant to "limit registration of domains . . . for its exclusive use or for use by closely affiliated organizations," as expressly contemplated in the

.kosher Application, or, at the very least, impose the Applicant's subjective kosher certification criteria as a condition of eligibility for .kosher domain name registrations, thereby allowing the .kosher Applicant to utilize its control of the .kosher TLD to change the current state of the marketplace with regard to the designation of products and entities as being "kosher."

**7. Describe how others may be adversely affected by the action or inaction, if you believe that this is a concern.**

The .Kosher Expert Determination is explicitly premised on incorrect interpretations of: (1) the relevance of non-binding statements made by an applicant during an objection proceeding in determining whether the application creates a likelihood of material detriment; and (2) the requirements of Specification 11 of the Revised New gTLD Registry Agreement ("Specification 11"). Each of these incorrect interpretations of ICANN policies will adversely affect Internet users, the global kosher community, and participants in the new gTLD process.

*First*, if the .Kosher Expert Determination is allowed to stand, the efficacy of the entire gTLD objection process will be mooted because applicants will be permitted to assert non-public, non-binding statements and theories so as to traverse gTLD community objections without being required to contractually implement and comply with such statements and theories. Applicants will be able to exploit this disconnect between the application process and the objection process to implement policies that uniquely benefit the applicant, to the detriment of Internet users and other members of the effected community. The issue of whether an applicant can materially change positions during the course of adversarial objection proceedings has arisen in other objection proceedings,<sup>1</sup> but unlike those cases, the Applicant here has not

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<sup>1</sup> See, e.g., DotMusic Request for Reconsideration, Request No. 13-22, at 9-10; 19-20 (22 Dec. 2013), attached hereto as **Annex B** ("The Affected Parties suffered a breach of due process in the proceedings because in the middle of the proceeding the Applicant was allowed to seemingly materially change (make a 180-degree shift) their Application from applying to run an exclusive-access registry to accepting GAC Advice on Category 2 Advice to intentionally open its registries.").

submitted an application amendment in response to GAC Advice or a Public Interest Commitment and the .kosher Application is not the subject of an NGPC Resolution. Thus, even if ICANN determines that an applicant may materially change its application during the course of an adversarial objection proceeding, allowing the .Kosher Expert Determination to stand when the determination is explicitly based on non-binding, non-public statements that conflict with the actual gTLD application would undermine the gTLD objection process.

*Second*, if the .Kosher Expert Determination is allowed to stand, it will promote an incorrect understanding of the illusory protections offered by Specification 11 in relation to a restricted registry model such as proposed by the .kosher Applicant. The Expert’s conclusion that Specification 11 prohibits any possible discriminatory practices is contrary to a plain reading of Specification 11 and concerns raised by the GAC.

Each of these issues impacts the legitimacy of the entire gTLD program by potentially rendering meaningless the objection process.

## **8. Detail of Board or Staff Action – Required Information**

It is now established 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.”<sup>2</sup> Although the reconsideration process does not provide for a substantive review of DRSP panel decisions, it does provide “for the consideration of process- or policy-related complaints.”<sup>3</sup> Thus, “to the

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<sup>2</sup> See, e.g., Recommendation of the Board Governance Committee, Reconsideration Request 13-20, at 7 (21 Jan. 2014 (citing BGC Recommendation on Reconsideration Request 13.5), attached hereto as **Annex C** (“bank Reconsideration Recommendation”).

<sup>3</sup> See Recommendation of the Board Governance Committee, Reconsideration Request 13-9, at 10-11 (10 Oct. 13), attached hereto as **Annex D** (“shop Reconsideration Request”).

extent an expert panel applied an incorrect standard in evaluating and determining a community objection . . . the reconsideration process is a proper mechanism for challenging such a decision.”<sup>4</sup>

Under the New gTLD Program, parties may object to an application on one of four grounds. As applicable in the instant request for reconsideration, a community objection considers whether 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.”<sup>5</sup> Objections are resolved according to the policies and procedures set forth in the AGB and the New gTLD Resolution Procedure (the “Procedure”).<sup>6</sup> ICANN does not itself administer gTLD objection proceedings, but rather delegates such administration to DRSPs.<sup>7</sup> Community objections are administered by the International Centre for Expertise of the International Chamber of Commerce (“ICC”).<sup>8</sup> However, the findings by DRSP panels do not themselves affect any applications; rather, they “will be considered an expert determination and advice that ICANN will accept within the dispute resolution process.”<sup>9</sup> Thus, ICANN staff must ultimately determine whether to accept DRSP expert determinations.

### **The Facts As Provided To The ICC And The Expert**

1. Kosher Marketing Assets, LLC is the applicant for the new gTLD .kosher. ICANN published the .kosher Application on 13 June 2012, which described KMA’s planned operation of the TLD as follows:

- “The mission of the .KOSHER TLD is to promote Kosher food certification in

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<sup>4</sup> .bank Reconsideration Recommendation at 7.

<sup>5</sup> AGB § 3.2.1; New gTLD Dispute Resolution Procedure (“Procedure”), Art. 2(e).

<sup>6</sup> Procedure, Art. 20(a).

<sup>7</sup> See generally AGB § 3.4 (describing the objection process).

<sup>8</sup> Procedure, Art. 3(a).

<sup>9</sup> AGB § 3.4.6.

general, and **OK Kosher Certification and its clients in particular**. All registrations in .KOSHER will be managed by Kosher Marketing Assets, LLC on behalf of OK Kosher Certification. **Only those clients who pass rigorous certification will be granted use of domains under this TLD**. Given existing data on certification and a conservative forecast for adoption of .KOSHER domains, we forecast having approximately 636 Domains Under Management (DUMs) by the third year of operation.”<sup>10</sup>

- “Kosher Marketing Assets, LLC will promote awareness of the TLD through press releases and **direct communications with customers of OK Kosher Certification**.”<sup>11</sup>
- “.KOSHER TLD aspires to become the premiere reliable source of information on the Internet about everything to do with Kosher certification. **Domains under this TLD will only be made available to companies that have been personally visited, inspected, and are known to be using the domain to promote Kosher Certification**. Kosher Marketing Assets, LLC will also create several informative websites explaining this and the details of Kosher certification, building confidence among end users about the accuracy and reliability of information available under the TLD. Thus, end-users will have confidence the information they view in a .KOSHER website or emails from the respective domain are about legitimate, verified Kosher products and establishments.”<sup>12</sup>
- “**All domains under this TLD will be managed by Kosher Marketing Assets LLC on behalf of OK Kosher Certification, so they will only be made available to companies that have been personally visited, inspected, and are known to intend to use a domain to promote Kosher Certification. The mission and purpose of this TLD is to enhance and complement existing brand strategies of Kosher Marketing Assets and present the organization in a consistent manner**. As such, Kosher Marketing Assets intends to **limit registration of domains either for its exclusive use or for use by closely affiliated organizations** in a manner that contributes to the purpose of this TLD. Kosher Marketing Assets also intends to govern the domain names registered to limit confusion and enhance user experience. To accomplish these objectives, **Kosher Marketing Assets may be the sole registrant of domains in the TLD**.”<sup>13</sup>

As of this writing, KMA has not amended any of the substantive sections of its application, including the statements identified above.

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<sup>10</sup> Kosher Marketing Assets LLC, gTLD Application No. 1-1013-67544, KOSHER § 18(a) (“kosher Application”), attached hereto as **Annex E** (emphasis added).

<sup>11</sup> *Id.* § 18(b)(i) (emphasis added).

<sup>12</sup> *Id.* § 18(b)(iii) (emphasis added).

<sup>13</sup> *Id.* § 18(b)(iv) (emphasis added).

2. On 13 March 2013, OU Kosher submitted to the ICC its community objection to the .kosher Application (the “Objection”). As summarized in the .Kosher Expert Determination, the Objection explained as to the likelihood of material detriment that:

The Application makes it apparent that the “.kosher” domain is intended to be operated in a manner that is not in the interests of that community, since the Applicant intends to *“promote [...] OK Kosher Certification and its clients in particular”*. The closed nature of the registry indicates that the Application would not promote kosher food certification in general and that only KMA and OK Kosher would be able to declare a food manufacturer kosher. This would preclude the use of the “.kosher” domain by companies that meet the rigorous standards of Jewish law simply because they are not *“personally visited and inspected”* by the Applicant. The restrictive use of “.kosher” would interfere with the core activity of the community of [kosher certification organizations (“KCOs”)], which is providing guidance to kosher consumers. By proposing to operate the “.kosher” gTLD as a closed registry, the Application would run counter to the expectation of consumers that the domain would be a central repository for information about kosher needs. The granting of the Application would *“usurp the communal word ‘kosher’, such that it will become exclusively associated with KMA and OK Kosher in the minds of food manufacturers and consumers”*. Moreover, *“the concept of a single entity determining what is kosher is antithetical to the community nature of kosher certification”*.<sup>14</sup>

3. On 13 May 2013, KMA submitted its response to the Objection (the “Response”). As summarized in the .Kosher Expert Determination, the Response argued as to the likelihood of material detriment that:

There is also no indication that the Applicant will not act in accordance with the interests of KCOs, consumers and other users. Furthermore, the gTLD will not be closed and will not interfere with the core activities of KCOs. The eligibility requirement is not limited to verification by the Applicant, which has a long history of inclusive online practices and will continue to promote kosher certification and encourage demand by including those who certify, manufacture and sell kosher food, to the benefit of all industry players. Such restrictions as the Applicant proposes to apply in the registration of “.kosher” domain names are necessary to provide user confidence that the information provided on the domains is about legitimate and verified products and establishments. There is also no basis for the assertion that the Objector would be precluded from a “.kosher” domain registration, since it would *“obviously”* be allowed to register

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<sup>14</sup> .Kosher Expert Determination ¶ 69.

such a domain.<sup>15</sup>

4. On 1 August 2013, the Expert released his Expert Mission, which called for the Parties to submit a second round of written submissions.

5. On 14 August 2013, OU Kosher submitted its supplemental pleading (“Objector’s Supplemental Pleading”), which explained, as summarized in the .Kosher Expert Determination, that:

The Applicant’s argument that it would not be the sole centralized source for kosher certification is contradicted by the Application’s statements that the gTLD “*aspires to become the premiere reliable source of information on the internet about everything to do with Kosher certification*” and that the gTLD at issue “*will only be available to companies that have been personally visited, inspected and are known to be using the domain to promote Kosher Certification*”. Regardless of the Applicant’s stated intentions as to how it will act in attributing “.kosher” domain names, the Applicant’s “*monopoly status*” over such domain names would allow it to engage in “*exclusionary practices*” to the detriment of the community.<sup>16</sup>

The Objector’s Supplemental Pleading also stated that “the recently amended Specification 11 (‘Specification 11’) of the draft Registry Agreement between registry operators and ICANN (the ‘RA’) would not limit the Applicant’s ability to apply its own subjective standards to exclude the Objector and its clients or to contradict the Objector’s certification standards, so long as it did so openly and equally.”<sup>17</sup>

6. On 27 August 2013, KMA submitted its response (the “Applicant’s Supplemental Response”) to the Objector’s Supplemental Pleading, which argued, as summarized in the .Kosher Expert Determination, that “the Applicant’s original intention was to sublicense domain names to certified second level registrants and to develop close affiliations with other [kosher certification organizations] and that it never intended exclusive control of the TLD.” KMA

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<sup>15</sup> *Id.* ¶ 72.

<sup>16</sup> *Id.* ¶ 70.

<sup>17</sup> *Id.*



further contended that: “The Application is in no way closed and does not allow for exclusive control of the domain, particularly because the Applicant will be subject to Specification 11 requiring registry operators to abide by fair and transparent registration and nondiscriminatory policies.”<sup>18</sup>

7. On 2 September 2013, the Expert sent to the Parties, by electronic mail, the following request:

The Applicant is kindly requested to explain the statement in § 18(b)(iv), second paragraph of its Application for the “.kosher” gTLD, that “*Kosher Marketing Assets intends to limit registration of domains either for its exclusive use or for use by closely affiliated organizations*”. In particular it would be helpful if the explanation could focus on the compatibility of that statement with the arguments contained in the Applicant’s written submissions concerning the “material detriment” factor and specifically the non-discrimination and other obligations to which it contends it would be subject under Specification 11.<sup>19</sup>

8. The Expert subsequently added the following request:

I would also be grateful if in the reply to my request of earlier today the Applicant would clarify the conditions under which domains under the “.kosher” gTLD “will only be made available to companies that have been personally visited, inspected, and are known to be using the domain to promote Kosher Certification” as stated in § 18(b)(iii) of the Application, and specifically who will be in charge of personally visiting the companies who seek to register the domains.<sup>20</sup>

9. On 4 September 2013, KMA responded to the Expert’s request for clarification, contradicting the statements in the .kosher Application (including that it may limit registration of domains “for its exclusive use or for use by closely affiliated organizations”), and instead stating, as summarized in the .Kosher Expert Determination:

In reply to the Expert’s request for clarifications the Applicant confirmed that the verification of the eligibility requirements for registration of the domains will not

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<sup>18</sup> *Id.* ¶ 73.

<sup>19</sup> See E-mail from Luca G. Radicati di Brozolo, ICC Expert, to Brian J. Winterfeldt, counsel for Applicant (2 Sept. 2013, 10:29 a.m. EST), attached hereto as **Annex F**.

<sup>20</sup> See E-mail from Luca G. Radicati di Brozolo, ICC Expert, to Brian J. Winterfeldt, counsel for Applicant (2 Sept. 2013, 12:21 p.m. EST), attached hereto as **Annex G**.

be limited to the Applicant, and that “[a] prospective registrant’s own kosher certification organization will be responsible for personally visiting companies seeking to register a domain name”. It also clarified the statement in the Application about the intended limits to the registration of domains. It explained that . . . its initial intentions were superseded by the recent guidance from the ICANN Board requiring compliance with Specification 11, “*which entirely obviates Objector’s concerns*”..<sup>21</sup>

10. On 9 September 2013, the Objector submitted its permitted response, which stated, as summarized in the .Kosher Expert Determination:

In the Supplemental Pleading the Objector pleads that the Applicant cannot “*escape the actual language of its Application*” and failed to respond to the Expert’s inquiry into who will “*personally*” visit the registrants of the domains. Allowing the language of the Application to be supplanted by arguments in an adversarial proceeding would render moot the ICANN objection process. The Application’s ills are not cured by Specification 11, Article 2 of which does not permit the incorporation into the RA of counsel’s statements in these proceedings, in particular the one about who will visit prospective registrants. Furthermore, the Applicant does not address how the “*inspection*” and “*known to be using*” criteria may be satisfied by third parties. It will “*maintain authority to determine all standards for ‘visitation, inspection and certification’*” and will “*maintain complete discretion*” as to the standards it will apply. The Applicant’s clarification contradicts its expressed mission to use “.kosher” to promote its certification and clients. In any event, Specification 11 could not curtail the Applicant’s ability to operate “.kosher” in a manner that will cause detriment. Notably, Article 3(c) and (d) of Specification 11 impose no meaningful restrictions on how the Applicant can operate “.kosher”, and in particular would not prevent it from subjectively determining registrant eligibility criteria and, ultimately, unilaterally controlling access to the “.kosher” registry.<sup>22</sup>

### **Policies With Which The .Kosher Expert Determination Was Inconsistent**

In resolving a community objection, “the Panel shall apply the standards that have been defined by ICANN” in the Guidebook.<sup>23</sup> For community objections, the Guidebook establishes that an objector will prevail if it proves the following four items: (1) the community invoked by the objector is a clearly delineated community; (2) community opposition to the application is

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<sup>21</sup> .Kosher Expert Determination ¶ 74.

<sup>22</sup> *Id.* ¶ 71.

<sup>23</sup> Procedure, Art. 20(a).

substantial; (3) there is a strong association between the community invoked and the applied-for gTLD string; and (4) the application creates a likelihood of material detriment to the rights or legitimate interests of a significant portion of the community to which the string may be explicitly or implicitly targeted.<sup>24</sup> In the .Kosher Expert Determination, the Expert found that the Objector satisfied the first and third factors and declined to conclusively resolve the second factor. Instead, the Expert based his denial of the Objection solely and erroneously on the fourth factor: material detriment.

The .Kosher Expert Determination involved two fundamental failures to comply with ICANN policies and/or processes. *First*, the Expert based his finding of no material detriment not on the application at issue, as required by the AGB, but instead on non-public, non-binding statements made by the Applicant during the course of the adversarial proceeding. The statements on which the Expert relied cannot be reconciled with those in the .kosher Application. It was both improper and inconsistent with ICANN policy for the Expert to disregard the unambiguous intent of the Applicant, as stated in the application itself, in favor of non-binding, non-public statements that are inconsistent with the application. *Second*, the Expert relied on a plainly incorrect interpretation of Specification 11 in finding that Specification 11 would conclusively prevent the material detriment alleged in the Objection. While conceding that his interpretation of Article 3(c) was not “formalistic,” the Expert nevertheless concluded that ICANN would apply this provision in a manner that would sufficiently eliminate any material detriment to the community. In effect, the Expert found “ultimately dispositive” that ICANN would not possibly allow an applicant to operate a TLD for its own benefit as stated in the gTLD application at issue, to the material detriment of the community, notwithstanding the fact that

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<sup>24</sup> AGB § 3.5.4.

ICANN established the community objection process as the procedural safeguard to prevent such material detriment to a community. The Expert's improper applications of ICANN's policies and procedures were material to the determination and constitute proper grounds for reconsideration.

**9. What are you asking ICANN to do now?**

ICANN should reverse or refuse to accept the .Kosher Expert Determination on the basis of the failure by the ICC, through its expert, to properly apply ICANN's policies and procedures.

Specifically, ICANN should find that: (1) reliance by a DRSP on non-binding statements made by an applicant during the objection proceeding is inconsistent with ICANN policy when such non-binding and non-public statements are not reflected in the actual gTLD application at issue; and (2) the plain language of Specification 11 does not prohibit any and all manner of discriminatory practices by a registry operator and therefore cannot, on its own, eliminate a material detriment that derives from a registry operator favoring itself and/or its own constituents. The .Kosher Expert Determination should be remanded to the ICC for further consideration in light of these clarifications.

**10. Please state specifically the grounds under which you have the standing and the right to assert this Request for Reconsideration, and the grounds or justifications that support your request.**

**Standing:** As stated above, the Requesters have standing and the right to assert this Request for Reconsideration. Article IV, Section 2.2 of the ICANN Bylaws states that:

[a]ny person or entity may submit a request for reconsideration or review of an ICANN . . . action or inaction . . . to the extent that he, she, or it have been adversely affected by:

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

ICANN's Board Governance Committee repeatedly has recognized 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.”<sup>25</sup> Although the reconsideration process does not provide for a substantive review of DRSP panel decisions, it does provide “for the consideration of process- or policy-related complaints.”<sup>26</sup> Thus, “to the extent an expert panel applied an incorrect standard in evaluating and determining a community objection . . . the reconsideration process is a proper mechanism for challenging such a decision.”<sup>27</sup>

Here, the ICC, as the DRSP responsible for administration of community objections, failed to follow established policies or processes through its delegated expert in the .kosher objection proceeding. Moreover, the acceptance by ICANN staff of the .Kosher Expert Determination will require the staff to blatantly disregard ICANN’s policies and procedures.

Requestors have been adversely affected by this failure to comply with ICANN policies and procedures. The Expert’s improper application of these policies and procedures was “ultimately dispositive” in the Expert’s finding that the Objector failed to satisfy the material detriment prong of the community objection test and therefore that the Objection should be denied. As a result, the Applicant is positioned to receive an ICANN-sanctioned monopoly over allocation of all .kosher domain names on the Internet and to operate .kosher to promote its affiliate OK Kosher Certification (“OK Kosher”), its clients, and its interests, all to the material detriment of kosher consumers and the community of kosher certification organizations.

**Grounds for Request:** The .Kosher Expert Determination involved two fundamental failures to comply with ICANN policies or processes. *First*, the Expert explicitly based his

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<sup>25</sup> .bank Reconsideration Recommendation at 7.

<sup>26</sup> .shop Reconsideration Request at 10-11.

<sup>27</sup> .bank Reconsideration Recommendation at 7.

finding of no material detriment not on the gTLD application at issue, as required by the AGB, but instead on non-public, non-binding statements made by the Applicant during the course of the adversarial proceeding. *Second*, the Expert relied on a plainly incorrect interpretation of Specification 11 in finding that Specification 11 would prevent the material detriment alleged in the Objection. These improper applications of ICANN’s policies and procedures were material to the Expert’s determination and constitute proper grounds for reconsideration.

**A. *The Expert’s Improper Consideration Of Commitments Made Outside Of The Application***

In finding that the Objector failed to satisfy the fourth factor of a community Objection, the Expert improperly relied on non-public, non-binding statements made by the Applicant outside of the application. In resolving a community objection, it is ICANN’s policy that a DRSP must “apply the standards that have been defined by ICANN” in the Guidebook.<sup>28</sup> As relevant here, the AGB instructs the expert panel to determine whether “the application creates a likelihood of material detriment to the rights or legitimate interests of a significant portion of the community to which the string may be explicitly or implicitly targeted.”<sup>29</sup> The word “application” is critical, as it establishes a baseline both for affected communities to determine whether to invoke the community objection process and for the expert to evaluate the effect that the application will have on the community.<sup>30</sup> If an applicant could simply state one thing in its application and then state something entirely different when challenged by an objection, applicants would have no incentive to file gTLD applications consistent with ICANN’s core values of promoting competition in the public interest and remaining accountable to the Internet

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<sup>28</sup> Procedure, Art. 20(a).

<sup>29</sup> *Id.* (emphasis added).

<sup>30</sup> The decision to invoke the community objection process is not insignificant. The Objector has paid filing fees alone in excess of \$70,000 in this matter.

community, and each application would remain a moving target throughout the objection process.<sup>31</sup> Unfortunately, this is exactly the result of the .Kosher Expert Determination.

The statements contained in KMA's .kosher Application cannot be reconciled with the non-public, non-binding statements made by the Applicant during the course of the adversarial proceeding and accepted by the Expert. Section 18(a) of the .kosher Application describes the mission/purpose of the proposed gTLD as follows:

The mission of the .KOSHER TLD is to promote Kosher food certification in general, **and OK Kosher Certification and its clients in particular.** All registrations in .KOSHER will be managed by Kosher Marketing Assets, LLC on behalf of OK Kosher Certification. **Only those clients who pass rigorous certification will be granted use of domains under this TLD. Given existing data on certification and a conservative forecast for adoption of .KOSHER domains, we forecast having approximately 636 Domains Under Management (DUMs) by the third year of operation.**

This mission statement includes at least three separate expressions of the Applicant's intent to restrict the use of the .kosher TLD to clients of its affiliate, OK Kosher. First, the statement identifies as a core mission of the TLD promoting "OK Kosher Certification and its clients in particular." Second, the statement explains that use of domains in the TLD will be limited to "only those clients who pass rigorous certification." In this context, "clients" clearly refers to those same clients of OK Kosher that the Applicant commits in the first sentence to using the .kosher TLD to promote. Third, the Applicant projects having just 636 domains under management by the third year of operation – a figure consistent with limiting the issuance of second-level domain names to clients of OK Kosher.

KMA further explains in Section 18(b) of .kosher Application that it will promote awareness of the TLD through "customers of OK Kosher Certification" and that "[d]omains under this TLD will only be made available to companies that have been

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<sup>31</sup> See ICANN Bylaws, § 2.6 & 2.9.

personally visited, inspected.” The original application did not contemplate visitation, inspection, and .kosher domain registrant eligibility certification by any entity other than KMA and its affiliate OK Kosher, the .kosher Application has not been amended to revise the registrant eligibility restrictions, and no Public Interest Commitment was submitted to revise the registrant eligibility restrictions.

And lest there be any doubt that KMA intends to operate the TLD for its own benefit, to the exclusion of even other members of the community of kosher certification organizations, KMA brazenly states, under the heading “Registry policies” that:

All domains under this TLD will be managed by Kosher Marketing Assets LLC on behalf of OK Kosher Certification, so they will only be made available to companies that have been personally visited, inspected, and are known to intend to use a domain to promote Kosher Certification.

**The mission and purpose of this TLD is to enhance and complement existing brand strategies of Kosher Marketing Assets and present the organization in a consistent manner. As such, Kosher Marketing Assets intends to limit registration of domains either for its exclusive use or for use by closely affiliated organizations in a manner that contributes to the purpose of this TLD.** Kosher Marketing Assets also intends to govern the domain names registered to limit confusion and enhance user experience. To accomplish these objectives, Kosher Marketing Assets may be the sole registrant of domains in the TLD.

In reliance on the clearly discriminatory statements in the .kosher Application, the Objector concluded that the application would allow the Applicant to utilize its control of the .kosher TLD to change the current state of the marketplace with regard to who may designate products or entities as being “kosher,” thereby causing a material detriment to the legitimate interests of kosher consumers and members of the community of kosher certification organizations.

Notwithstanding the clear statements in the .kosher Application about how the Applicant will operate the TLD, the Expert instead based his determination on non-public, non-binding statements made by the Applicant during the course of the adversarial proceeding that cannot be



reconciled with the statements in the .kosher Application. A particularly illustrative section of the .Kosher Expert Determination states:

While the statement in the Application that the Applicant “*intends to promote OK Kosher certification and its clients in particular*” might give the impression that the Applicant intends to operate the domain in a self-serving manner and as a closed gTLD, the likelihood of that happening is not established. . . . Indeed, in response to the Expert’s request, the Applicant explicitly stated that responsibility for the verification will lie with the “*prospective registrant’s own kosher certification organization.*” This seems evidence enough of the lack of ground to the Objector’s claim that only the Applicant will verify eligibility and will be able to determine arbitrarily what registrants will have access to “.kosher” domains. On the other hand, the fact that registration will be subject to some form of third party verification of the conformity of objective standards provides precisely reassurance that the “.kosher” gTLD will only be available to registrants who use the domain for legitimate uses, in line with concerns raised by the objector.<sup>32</sup>

The Expert went on to note that “the Applicant’s intention to take the broader interests of the community into consideration is borne out by its offers to cooperate with the Objector in the operation of the domain and to give them an equal partnership.”<sup>33</sup>

Importantly, the Expert did not identify any statements in the application itself that disabuse the notion that KMA intends to operate the .kosher TLD for its own benefit and based upon imposition of OK Kosher’s subjective kosher certification criteria. Thus, instead of applying the AGB standard – whether “[t]he application creates a likelihood of material detriment” – the Expert applied his own standard – whether, based on all of the statements made in the objection proceeding, the Applicant is likely to operate the TLD in a manner that creates a material detriment.<sup>34</sup> This is not the standard approved by the ICANN Board after input from the community, as evidenced by numerous gTLD objection panels that have correctly held, in

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<sup>32</sup> .Kosher Expert Determination ¶¶ 78-79.

<sup>33</sup> *Id.* ¶ 81.

<sup>34</sup> Although the AGB allows the expert to consider “evidence that the applicant is not acting or does not intend to act in accordance with the interest of the community or of users more widely,” AGB § 3.5.4, the AGB does not suggest that the expert may consider extrinsic evidence that the applicant intends to act in a manner inconsistent with its application.

conflict with this ruling, that the determination must be based on the application at issue.<sup>35</sup> The Expert’s disregard for the AGB standard constitutes a failure of process that is a proper basis for reconsideration.

Even if it were proper for the Expert to consider the Applicant’s commitments made extrinsic to the application, the Expert misapplied ICANN’s policies and procedures in finding that these statements eliminated the likelihood of material detriment. In dismissing the Objector’s explicitly stated concerns that any purported commitments made by the Applicant in the course of the objection proceeding are non-binding, the Expert wrote:

The assurances given on behalf of the Applicant in these proceedings appear convincing and made in good faith. More importantly, they have been given in the context of adversarial proceedings, the outcome of which will be public, in response to specific concerns of the Objector and with a view to achieving rejection of the Objection. The general principles of good faith and the prohibition of inconsistent behavior, which are clearly applicable to the relationships at issue, would prevent the Applicant from renegeing on the assurances given in these proceedings. In the event that an access dispute were submitted to the PICDRP in relation to the use of the “.kosher” gTLD, such assurances would certainly have to be taken into consideration to interpret and supplement the commitments.<sup>36</sup>

There are several substantial fallacies in the Expert’s analysis. As an initial matter, the Expert manufactured a “general principle of good faith and prohibition of inconsistent behavior” to find that the Applicant’s statements in the objection proceeding were binding when no such ICANN rule exists or applies in this context. Even the suggestion of such a standard runs contrary to the Expert’s recognition of the Applicant’s true motive in making these statements –

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<sup>35</sup> See, e.g., *SportAccord v. dot Sport Limited*, EXP/471/ICANN/88 ¶ 159 (23 Oct.2013), attached hereto as **Annex H** (finding that adherence to acceptable use policies “cannot be warranted by Applicant . . . in the event that the application for the ‘.sport’ gTLD is approved by ICANN”); *Prof. Alain Pellet, Independent Objector v. Steel Hill, LLC*, EXP/407/ICANN 24 ¶ 85 (21 Nov. 2013), attached hereto as **Annex I** (considering “the intended use of the gTLD as evidenced in the Application” in determining that the application would create a likelihood of material detriment); *Int’l Banking Fed. v. Dotsecure Inc.*, EXP/389/ICANN/6 ¶ 150 (26 Nov. 2013), attached hereto as **Annex J** (relying on the applicant’s “express statements in its Application” to ascertain the applicant’s intent).

<sup>36</sup> *Id.* ¶ 87.

“achieving rejection of the Objection.” The Expert’s application of a non-existent rule to resolve the dispute rather than any rule established by ICANN in the AGB equates to applying “an incorrect standard.”

The Expert also incorrectly assumed that statements made by the Applicant during the proceeding would be subject to the public interest commitments dispute resolution procedure (“PICDRP”). In fact, the PICDRP only applies to “a registry operator’s act or omission in connection of its gTLD that is non-compliant with its PICs.”<sup>37</sup> Not only has the Applicant not filed a PIC, but nothing in the PICDRP calls for consideration, much less enforcement, of non-public statements made during an objection proceeding.<sup>38</sup> Accordingly, contrary to the Expert’s suggestion, the PICDRP does not provide a forum for enforcing the Applicant’s statements in an adversarial proceeding.

Finally, the assurances provided by the Applicant to the Expert in the adversarial proceeding, which the Expert found to be dispositive, were non-public and in fact cannot be disclosed by the ICC pursuant to the ICC’s Expertise Rules.<sup>39</sup> It is unclear, then, how the global Internet community would know what specific statements and assurances were made by the Applicant to determine whether or not the gTLD is being operated in accordance with the Applicant’s non-public statements. Such private statements also are inconsistent with the AGB’s allowance for public comments on posted application materials<sup>40</sup> and with ICANN’s established procedures for publication of proposed changes to applications and to the operation of delegated

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<sup>37</sup> PICDRP § B, ¶ 1.1 (emphasis added).

<sup>38</sup> As explained in Section 10.B, *infra*, a highly restrictive use of the TLD by the applicant does not violate Specification 11 and thus would not provide sufficient justification to invoke the PICDRP process.

<sup>39</sup> See International Chamber of Commerce, International Centre for ADR, *Expertise Rules*, Art. 12, ¶ 5, attached hereto as **Annex K** (“Any information given to the expert by the Centre or any party during the course of the expertise shall be used by the expert only for the purposes of the expertise and shall be treated by the expert as confidential.”). Although the expert’s recitation of these assurances in the expert determination may be public, the underlying statements by the Applicant are not.

<sup>40</sup> See AGB § 1.1.2.3.

gTLDs, both of which mandate an opportunity for public comment.<sup>41</sup> To allow such non-public, non-binding statements to be determinative therefore violates numerous ICANN principles of openness, neutrality, and integrity.

***B. The Expert’s Incorrect Interpretation Of Specification 11 As A Remedy For Any Material Detriment Caused By the Application***

In addition to relying on extrinsic statements of the Applicant during the adversarial proceeding, the Expert also premised his determination of no likelihood of material detriment on an interpretation of Specification 11 that is not supported by the plain language of the specification. In the .Kosher Expert Determination, the Expert wrote: “[w]hat is . . . ultimately dispositive . . . is that the ICANN mechanism for operating TLDs provides significant safeguards against any type of abuse.”<sup>42</sup> Although ICANN has implemented mechanisms to enforce certain obligations and commitments by applicants, the breadth that the Expert assigned to the specific language of Specification 11 is misplaced and suggests that no objector could establish a likelihood of material detriment.

ICANN adopted Article 3(c) of Specification 11, upon which the Expert relied, in response to the GAC’s Beijing Communiqué Advice regarding restricted access registries.<sup>43</sup> This provision states: “Registry Operator will operate the TLD in a transparent manner consistent with general principles of openness and non-discrimination **by** establishing, publishing and adhering to clear registration policies.”<sup>44</sup> Thus, by its plain language, Article 3(c)

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<sup>41</sup> See ICANN, New gTLD Application Change Request Process and Criteria, <http://newgtlds.icann.org/en/applicants/customer-service/change-requests>, attached hereto as **Annex L** (“Amended applications will be held for at least 30 days before passing on to the next phase in evaluation process to allow for public comment on that revised application”); ICANN Registry Agreement (approved 20 Nov. 2013), Art. 7, § 7.6, attached hereto as **Annex M** (the “RA”).

<sup>42</sup> .Kosher Expert Determination ¶82.

<sup>43</sup> See ICANN, Approved Resolutions, Meeting of the New gTLD Program Committee (June 25, 2013), attached hereto as **Annex N**.

<sup>44</sup> RA, Specification 11 (emphasis added).

is about transparency. What Article 3(c) does not do is impose limitations upon the operation of a gTLD as long as those operations are consistent with “clear registration policies.”

This interpretation of the limited effect and unintended consequences of Specification 11 is shared by the GAC, which voiced concern in its Buenos Aires Communiqué that Specification 11 may not satisfy the Beijing Communiqué due to the very limited nature of the language.<sup>45</sup> To date, ICANN has not responded to the GAC’s request for a briefing addressing the implications of the specific language of Article 3(c) of Specification 11. The GAC’s concerns with the language of Article 3(c) of Specification 11 are particularly telling given that Article 3(c) was created in response to GAC Advice. Such concerns from the GAC are further evidence of the Expert’s error in failing to accord the language its plain meaning.

In both its supplemental pleading and in response to a request from the Expert, the Objector specifically advised the Expert of the limitations of the plain language of Specification 11, explaining that: “Section 3(c) will not restrict KMA’s ability to subjectively determine the .kosher registrant eligibility criteria so long as KMA publishes such criteria and even-handedly applies the criteria” and that “[n]othing in this section prevents KMA from using the registry: (1) ‘for use by closely affiliated organizations’; or (2) to promote ‘OK Kosher Certification and its clients,’ as it has specifically stated in the application.”<sup>46</sup> The lengths that the Expert took to avoid the natural meaning of Specification 11 are astonishing. Specifically, the Expert stated that he:

cannot accept the argument that the openness and non-discrimination obligations

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<sup>45</sup> See GAC, Buenos Aires Communiqué (21 Nov. 2013), attached hereto as **Annex O**.

<sup>46</sup> In the .Kosher Expert Determination, the Expert minimized the distinction between operational requirements and transparency requirements, reducing Objector’s argument to: “Notably, Article 3(c) and (d) of Specification 11 impose no meaningful restrictions on how the Applicant can operate ‘.kosher’, and in particular would not prevent it from subjectively determining registrant eligibility criteria and, ultimately, unilaterally controlling access to the ‘kosher’ registry.” .Kosher Expert Determination ¶ 21.

laid down in [Article 3(c)] would not prevent the Applicant from resorting to restrictive criteria, if it applied them openly and even-handedly. That argument presupposes an interpretation of Article 3(c) that would render it completely meaningless and is therefore untenable. Article 3(c) is a fundamental provision in the overall system, and it must be assumed that it will be interpreted constructively and not in a formalistic manner.<sup>47</sup>

The “formalistic” reading of Section 3(c) that the Expert rejects is, in fact, its plain meaning. As ICANN itself has argued, it is without precedent for a court or arbitration body such as the ICC to simply ignore the meaning of unambiguous language. *See* ICANN’s Opposition to Plaintiff’s Motion for Preliminary Injunction, *Dotster v. ICANN*, Case No. CV03-5045 (D.D.C. 15 Sept. 2003) (rejecting an interpretation of the Registrar Accreditation Agreements that “is contrary to the RAA’s plain meaning”), attached hereto as **Annex P**.<sup>48</sup>

Although the Expert may find the plain meaning of the Article 3(c) unsatisfactory, it is not the Expert’s place to rewrite Specification 11 (and the Expert’s personal opinion about how Article 3(c) should be read is of no precedential value). By the Expert’s own admission, his assumption about how ICANN will apply Specification 11 – one that he found “ultimately dispositive” to the Objection – is inconsistent with its plain meaning. Thus, although the Expert believed that Specification 11 should operate to prevent the implementation of the policies contemplated in the .kosher Application (which would allow that Applicant to favor its affiliate OK Kosher, its clients, and its interests, all to the material detriment of kosher consumers and the community of kosher certification organizations), the plain language of Specification 11 does not prevent such policies. The Expert’s improper interpretation and application of ICANN’s policies has resulted in a continued likelihood of material detriment and constitutes a proper basis for

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<sup>47</sup> .Kosher Expert Determination ¶ 83.

<sup>48</sup> *See also Jimenez v. Quarterman*, 555 U.S. 113, 118 (2009) (“It is well established that, when statutory language is plain, we must enforce it according to its terms.”), attached hereto as **Annex Q**; *Storey v. Cello Holdings, L.L.C.*, 347 F.3d 370, 380 (2d Cir. 2003) (“As the UDRP provides no definition for ‘court of competent jurisdiction’ as a term of art, we give the term its plain meaning, namely a court that has jurisdiction to hear the claim brought before it.”), attached hereto as **Annex R**.

reconsideration.

## **Conclusion**

Requesters appreciate that the BGC rarely has granted requests for reconsideration, but respectfully assert that the circumstances highlighted in the instant request satisfy the criteria for reconsideration. The multiple failures identified herein reflect failures of policy and/or process, not substance. Despite a clear policy requiring the Expert to focus on the application when evaluating the material detriment factor, the Expert instead focused on non-binding, non-public statements by the Applicant in the adversarial proceeding that contradict the application itself. If the Board allows this errant implementation of ICANN's policies and processes to stand, it will render the community objection process meaningless, as applicants will be free to make whatever hollow promises are necessary to overcome an objection. Moreover, the Expert's application of non-existent protective mechanisms and his incorrect interpretation of existing mechanisms, including the PICDRP and Specification 11, are inconsistent with ICANN policy and offer illusory protections against likely material detriments.

To ensure the fair and equal application of ICANN's policies and procedures now and in the future, the BGC and the ICANN Board, acting through the New gTLD Program Committee, should grant the instant request for reconsideration and refuse to accept the .Kosher Expert Determination. Alternatively, the BCG and the ICANN Board should clarify to the ICC the AGB policy for assessing material detriment and the scope of Article 3(c) of Specification 11 and remand the .Kosher Expert Determination to the ICC for further consideration in light of these clarifications.

**11. Are you bringing this Reconsideration Request on behalf of multiple persons or entities? (Check one)**

Yes

**11a. If yes, Is the causal connection between the circumstances of the Reconsideration Request and the harm the same for all of the complaining parties? Explain.**

Yes, the causal connection between the circumstances of the Reconsideration Request and the harm is the same for each of the Requesters. The Requesters include four of the “Big Five” kosher certification organizations (OK Kosher Certification, an affiliate of Applicant KMA, constitutes the fifth). If KMA is permitted to operate the .kosher registry as described in the application – to “promote . . . OK Kosher Certification and its clients” by making second level domains available “only . . . to companies that have been personally visited, inspected, and are known [by OK Kosher] to intend to use a domain to promote Kosher Certification” – it will receive an ICANN-sanctioned monopoly for allocation of .kosher domain names on the Internet. By relying on non-public, non-binding statements by the Applicant and errantly interpreting the remedial effect of Specification 11, the ICC Expert improperly overlooked the material detriment that KMA’s proposed operation of .kosher will cause to all Requesters and other members of the global community of kosher certification organizations.



**Do you have any documents you want to provide to ICANN?**

Yes, Respondents provide the following Annexes in support of this request for reconsideration:

<b>Annex</b>	<b>Description</b>
A	<i>Union of Orthodox Jewish Congregations of America vs. Kosher Marketing Assets LLC</i> , EXP/424/ICANN/41 (14 Jan. 2014)
B	DotMusic Request for Reconsideration, Request No. 13-22 (22 Dec. 2013)
C	Recommendation of the Board Governance Committee, Reconsideration Request 13-20 (21 Jan. 2014)
D	Recommendation of the Board Governance Committee, Reconsideration Request 13-9 (10 Oct. 13)
E	Kosher Marketing Assets LLC, gTLD Application No. 1-1013-67544, KOSHER
F	E-mail from Luca G. Radicati di Brozolo, ICC Expert, to Brian J. Winterfeldt, counsel for Applicant (2 Sept. 2013, 10:29 a.m. EST)
G	E-mail from Luca G. Radicati di Brozolo, ICC Expert, to Brian J. Winterfeldt, counsel for Applicant (2 Sept. 2013, 12:21 p.m. EST)
H	<i>SportAccord v. dot Sport Limited</i> , EXP/471/ICANN/88 (23 Oct. 2013)
I	<i>Prof. Alain Pellet, Independent Objector v. Steel Hill, LLC</i> , EXP/407/ICANN 24 (21 Nov. 2013)
J	<i>Int'l Banking Fed. v. Dotsecure Inc.</i> , EXP/389/ICANN/6 (26 Nov. 2013)
K	International Chamber of Commerce, International Centre for ADR, <i>Expertise Rules</i>
L	ICANN, New gTLD Application Change Request Process and Criteria, <a href="http://newgtlds.icann.org/en/applicants/customer-service/change-requests">http://newgtlds.icann.org/en/applicants/customer-service/change-requests</a>
M	ICANN Registry Agreement (approved 20 Nov. 2013)
N	ICANN, Approved Resolutions, Meeting of the New gTLD Program Committee (June 25, 2013)
O	GAC, Buenos Aires Communiqué (21 Nov. 2013)
P	ICANN's Opposition to Plaintiff's Motion for Preliminary Injunction, <i>Dotster v. ICANN</i> , Case No. CV03-5045 (D.D.C. 15 Sept. 2003)
Q	<i>Jimenez v. Quarterman</i> , 555 U.S. 113 (2009)
R	<i>Storey v. Cello Holdings, L.L.C.</i> , 347 F.3d 370 (2d Cir. 2003)

## Terms and Conditions for Submission of Reconsideration Requests

The Board Governance Committee has the ability to consolidate the consideration of Reconsideration Requests if the issues stated within are sufficiently similar.

The Board Governance Committee may dismiss Reconsideration Requests that are querulous or vexatious.

Hearings are not required in the Reconsideration Process, however Requestors may request a hearing. The BGC retains the absolute discretion to determine whether a hearing is appropriate, and to call people before it for a hearing.

The BGC may take a decision on reconsideration of requests relating to staff action/inaction without reference to the full ICANN Board. Whether recommendations will issue to the ICANN Board is within the discretion of the BGC.

The ICANN Board of Director's decision on the BGC's reconsideration recommendation is final and not subject to a reconsideration request.

/s/ David E. Weslow

Signature

January 30, 2014

Date

*Attorney for the Union of Orthodox Jewish  
Congregations of America (OU Kosher),  
STAR-K Kosher Certification, Inc. (STAR-K),  
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Kosher Supervision Service, Inc. (Kof-K), and  
The Kashruth Council of Canada (COR)*