Exhibit 1

September 30, 2019 Global Support Portal:

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Thank you for providing the joint postponement request of the 23 October 2019 Auction for the .MERCK contention set. Unfortunately, ICANN cannot accommodate a subsequent postponement of the Auction Date as the .MERCK contention set had been previously postponed on 29 May 2019 from the original 17 June 2019 Auction Date (based on the mutual request of each member in the contention set).

The MERCK contention set will be confirmed tomorrow, 1 October, for Auction on 23 October. Please note, there is still time to pursue and complete the self-resolution of the contention set. Members of the contention set may continue efforts to self-resolve the set prior to the Auction, subject to compliance with the anti-collusion provisions of the Auction Rules and Bidder Agreement up until the Deposit Deadline for the Auction (7 days prior to the Auction). All withdrawals as a result of self-resolution must be completed with ICANN no later than 16 October 2019.

Please let me know if you have any additional questions or concerns.

Best Regards,
Justin Ho
New gTLD Operations

Exhibit 2

From: Global Support Center <newgtld@icann.org>
Sent: Friday May 3, 2019 00:13
To: rashi_rai@merck.com
Subject: A New Case Has Been Created - Case 00923952

EXTERNAL EMAIL – Use caution with any links or file attachments.

One World, One Internet

Dear Rashi

This message serves to inform you that Case 00923952 has been created for you.

Please click the following link to view the case details.

https://portal.icann.org/namingservices/5004M00000Xac5n

Case Information:

Account: Merck Registry Holdings, Inc. - 1-1702-73085

Subject: Intent to Auction Notification for 1-1702-73085

Description: Dear Rashi Rai,

Your application for MERCK: App ID #1-1702-73085 is currently in a string Contention Set with at least one other application and meets the eligibility requirements to receive this notice of Intent to Auction to resolve string contention. As stated in section 4.3 of the Applicant Guidebook, Auctions are the Mechanism of Last Resort to resolve string contention.

This case serves as your notice to participate in an Auction to resolve string contention for your application.

This application is anticipated to participate in an Auction to resolve string contention preliminarily scheduled on 17 July 2019 (time TBD). For additional detail regarding Auction scheduling, please see the Auction Schedule (pending update) available on the

Auction Resources section of the New gTLD Auction landing page: http://newgtlds.icann.org/en/applicants/auctions#resources.

To ensure this application is ready to participate in the Auction, the completion of the three (3) forms listed below is required. The execution of the New gTLD Auction Bidder Agreement, Bidder Form, and Bidder Designation Form are required within twenty-eight (28) days of this notice.

The forms (attached to this case) below are fillable, and we kindly request you to type the required information and then physically sign. You may then scan the forms and reattach to the case.

1) New gTLD Auction Bidder Agreement
2) Bidder Form
3) Bidder Designation Form
4) Auction Date Advancement/Postponement Form

Completion of the forms does not prohibit the members of the Contention Set from continuing efforts to self-resolve the set prior to the Auction, subject to compliance with the anti-collusion provisions of the Auction Rules and Bidder Agreement.

The forms will provide the opportunity to request a postponement to the Auction. Completion of the forms by the deadline specified above is required even if requesting a postponement, to ensure that if postponement is not granted the applicant is prepared for an Auction should it be necessary.

Failure to return the specified forms within twenty-eight (28) days of this Intent to Auction notification may result in the rejection of your application. ICANN reserves the right not to delegate a gTLD if none of the applications in an active Contention Set completes the forms necessary to participate in the Auction by such deadline.

If you have questions, please respond by adding a post to this case.

Best regards,
Justin Ho
New gTLD Operations

Kind regards,

ICANN Global Support Center

globalsupport@icann.org

********** Please Do Not Delete **********

Thread ID: ref:_00D616tJk._5004MXac5n:ref

Include the text above in replies to this email. Thank you.

********** Please Do Not Delete **********

Exhibit 3

Agreement to request the Postponement of the ICANN Auction to resolve String Contention for .MERCK

Whereas

1. Merck KGaA. submitted an application for the new gTLD .MERCK (Application ID #1-980-7217);
2. Merck Registry Holdings, Inc., a subsidiary of Merck & Co, Inc., submitted both a community application (Application ID #1-1702-73085) and a standard (meaning, not community-based) application (Application ID #1-1702-28003) for the new gTLD .MERCK;
3. Merck & Co., Inc. fully controls Merck Registry Holdings, Inc. and is acting on Merck Registry Holdings, Inc.'s behalf;
4. All three applications have been placed by ICANN into a String Contention Set;
5. Merck KGaA and Merck Registry Holdings Inc. were invited to participate in an auction to resolve string contention. The auction was preliminarily scheduled on 17 July 2019;
6. Merck KGaA and Merck & Co. Inc. intend to resolve string contention in an agreement among themselves. Settlement negotiations are planned for July 2019

Now therefore Merck KGaA and Merck & Co., Inc. hereby enter the following agreement:

1. Both parties will timely, in any case not later than May 29, 2019, request ICANN to postpone the auction scheduled on July 17, 2019 to after October 1, 2019.
2. Both parties agree to notify the other party by submitting a copy of their request to ICANN by May 29, 2019.
3. Both parties agree to notify the other party as soon as they become aware of any reaction from ICANN to their submissions.

For Merck KGaA

ppa. J. Mölle

Name: Jonas Mölle

Title: General Counsel Trademarks

Date: May 29, 2019

ppa. F. Rotsch

DR. FRIEDERIKE ROTSCH

GROUP GENERAL COUNSEL

For Merck & Co., Inc. (on behalf of Merck Registry Holdings; Inc.)

Will Smart

Name: William Krovatin

Title: SVP & Asst. General Counsel

Date: May 28, 2019

Exhibit 4

From: Justin Ho <justin.ho@icann.org>
Sent: jeudi 6 juin 2019 23:02
To: Taylor, David; Rai, Rashi
Cc: Raudkivi, Thomas; Rozylo, Maria
Subject: Re: [Ext] RE: ICANN Confirmation of Receipt: Postponement Request for .MERCK Auction [ref:_00D616tJk._5004MXac5n:ref]
Signed By: justin.ho@icann.org

Dear Rashi and David,

Thank you for your email and for adhering to our deadline. I confirm receipt of the Bidder Designation Form, Bidder Form, and Bidder Agreement. We will review the submitted documents and revert to you on any potential issues or next steps.

Additionally, we have not selected a new auction date at this time. I will inform you through the customer portal once a new date has been chosen.

Please let me know if you have any other questions or concerns.

Best regards,
Justin Ho
New gTLD Operations

Exhibit 5

From: Global Support Center [mailto:no-reply@icann.org]
Sent: lundi 10 juin 2019 22:49
To: Taylor, David; rashi_rai@merck.com
Cc: Taylor, David
Subject: MERCK TLD: New Preliminary Auction Date [ref:_00D616tJk._5004MXac5n:ref]

Dear Rashi Rai,

Thank you again for providing the bidder documents. As previously mentioned, ICANN will accommodate the consensus driven postponement request. The new preliminary Auction Date is **Wednesday, 23 October 2019**. The Auction Date will be updated on the Contention Set Status page (https://gtldresult.icann.org/application-result/applicationstatus/stringcontentionstatus) later this week and on the next version of the Auction Schedule when it is published.

Confirmation of the Auction Date will be issued by ICANN through a case in the Customer Portal at least 21 days in advance of the Auction.

Should you have any additional questions, please submit a new case via the customer portal. If ICANN or Power Auctions, the Auction Manager, requires any additional information, ICANN will contact you via a case.

Best Regards,
Justin Ho

New gTLD Operations

Exhibit 6

Re: Postponement of the ICANN Auction to resolve String Contention for .MERCK

Dear ICANN,

Merck KGaA and Merck Registry Holding, both applicants for the .merck contention set, hereby unanimously request the deferment of the Auction for .merck currently scheduled for October 23, 2019.

Merck KGaA submitted an application for the new gTLD .MERCK (Application ID #1-980- 7217). Merck Registry Holdings, Inc., a subsidiary of Merck & Co, Inc., submitted both a community application (Application ID #1-1702-73085) and a standard application for the new gTLD .MERCK (Application ID #1-1702-28003). All three applications have been placed by ICANN into a String Contention Set. Both parties are currently negotiating a settlement for the string contention set.

In order to be able to continue their negotiations to resolve the conflict amicably, both parties hereby request a deferment of the auction for nine month.

Sincerely,

For Merck KGaA

Name: Jonas Kölle
Title: General Counsel Trademarks
Date: August 29th, 2019

For Merck & Co., Inc. (on behalf of Merck Registry Holdings, Inc.)

Name: William Krovatin
Title: SVP & Asst. Gen. Counsel
Date: Sept. 5, 2019

Exhibit 7

September 6, 2019 Global Support Portal

Dear Dr. Bettinger,
Thank you for providing the postponement request of the 23 October 2019 Auction for the .MERCK contention set. Unfortunately, ICANN cannot accommodate a subsequent postponement of the Auction Date as the .MERCK contention set had been previously postponed on 29 May 2019 from the original 17 June 2019 Auction Date (based on the mutual request of each member in the contention set). The MERCK contention set remains scheduled for Auction on 23 October 2019. Please note, there is still time to pursue and complete the self-resolution of the contention set. Members of the contention set may continue efforts to self-resolve the set prior to the Auction, subject to compliance with the anti-collusion provisions of the Auction Rules and Bidder Agreement up until the Deposit Deadline for the Auction (7 days prior to the Auction). All withdrawals as a result of self-resolution must be completed with ICANN no later than 16 October 2019. Please let me know if you have any additional questions or concerns.

Best Regards,

Justin

Exhibit 8

Re: Unanimous Request by Merck KGaA and Merck Registry Holding Inc. to defer the Auction scheduled on October 23, 2019

Dear ICANN

Thank you for your response to our request filed on 5 September 2019 through ICANN's Customer Portal to postpone the ICANN auction scheduled October 23, 2019.

We, Merck KGaA, and Merck Registry Holding (acting on behalf of its parent company Merck Sharp & Dohme Corp.), both brand owners and applicants for the <.merck> gTLD, have jointly requested the deferment of the Auction for the new gTLD <.merck>, re-scheduled on October 23, 2019.

We understand that our mutual request has been denied by ICANN on the grounds that the Auction Date had been previously postponed on 29 May 2019 from the original 17 June 2019 Auction Date to 23 October 2019.

We wish to underline the state of the current situation with regard to <.merck> as this was perhaps not fully set out in our original mutual request of 5 September. Both parties are involved in multi-jurisdictional litigation which is ongoing and is addressing what are extremely complex issues in law. Several judgements are due in the coming months, and the outcome of the litigation will ultimately have an impact on which of us will operate the <.merck> new gTLD and how. The applicants are in the process of ongoing settlement discussions, actively looking for a solution and are hopeful that they will be able to reach a global settlement agreement soon and therefore resolve the issues between us and the contention concerning the <.merck> gTLD. The result of the upcoming deadline materially affects the parties and their ability to discuss and negotiate effectively. We believe that ICANN shares the view that an auction should be the last resort and that the better course would be a negotiated solution.

In order to be able to continue their negotiations to resolve the conflict amicably, we would re-iterate our request for a 9 month postponement; if 9 months is not possible then please can you revert with another suggested date?

Apart from the applicants, no other applicant has applied for the gTLD <. merck>. Therefore, there are no third parties affected by our requested deferment of the auction.

Under these circumstances, we believe that deferment of the auction would be the solution that most closely aligns with ICANN's core values and commitments, pursuant to which settlement at any stage is encouraged, whereas auctions are considered to be a mechanism of last resort where parties are otherwise unable to resolve their differences by voluntary agreement.

Sincerely,

For Merck KGaA

Name: Jonas Kölle
Title: General Counsel Trademarks
Date: September 24th, 2019

For Merck & Co., Inc. (on behalf of Merck Registry Holdings; Inc.)

Name: Emily K. Sauter, IP Litigation Counsel, on behalf of William Kravatin, Senior Vice President and Assistant General Counsel
Title:
Date: September 24, 2019

Exhibit 9

Approved Resolutions | Meeting of the New gTLD (generic Top Level Domain) Program Committee

This page is available in:
English |
العربية (http://www.icann.org/resources/board-material/resolutions-new-gtld-2013-07-13-ar) |
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中文 (http://www.icann.org/resources/board-material/resolutions-new-gtld-2013-07-13-zh)

13 Jul 2013

1. **Main Agenda**
   a. Funding Objections
      Rationale for Resolution 2013.07.13.NG01

   b. Ombudsman Letters to Board
      Rationale for Resolutions 2013.07.13.NG02 – 2013.07.13.NG04

   c. IGO (Intergovernmental Organization) Protections and Category 1 Safeguard Advice

1. Main Agenda:

a. Funding Objections

Whereas, ICANN (Internet Corporation for Assigned Names and Numbers) committed to fund certain objections by the Independent Objector, governments, and ALAC (At-Large Advisory Committee).

Whereas a total of 27 objections that ICANN (Internet Corporation for Assigned Names and Numbers) committed to fund were filed by the Independent Objector, governments, and ALAC (At-Large Advisory Committee).

Whereas the Centre for Expertise of the International Chamber of Commerce (ICC (International Chamber of Commerce)) has accepted these objections, estimated the advance payment of costs, and invoiced ICANN (Internet Corporation for Assigned Names and Numbers).

Whereas, ICANN (Internet Corporation for Assigned Names and Numbers) budgeted the amount needed to fund such objections.

Whereas, the Board Finance Committee recommended that this resolution be passed.

Resolved (2013.07.13.NG01), the New gTLD (generic Top Level Domain) Program Committee authorizes the President, Generic Domains Division, to disburse all fees necessary to the ICC (International Chamber of Commerce) for the objection proceedings that ICANN (Internet Corporation for Assigned Names and Numbers) committed to fund, which have been filed by the Independent Objector, governments and the ALAC (At-Large Advisory Committee).

Rationale for Resolution 2013.07.13.NG01

As part of the new gTLD (generic Top Level Domain) Program, ICANN (Internet Corporation for Assigned Names and Numbers) made a commitment, as set out in the applicant guidebook, to fund objections on behalf of the Independent Objector, governments (one per government), and ALAC (At-Large Advisory Committee). Twenty-seven objections that ICANN (Internet Corporation for Assigned Names and Numbers) committed to fund have been filed. Given that all of these objections were filed with the same dispute resolution service provider, the Centre for Expertise of the International Chamber of Commerce ("ICC (International Chamber of Commerce)"), the ICC (International Chamber of Commerce) has requested advance payment of fees to administer the proceedings and to pay expert panel members for their time in adjudicating the objections.

ICANN (Internet Corporation for Assigned Names and Numbers) must now fulfill its commitment and make a disbursement to the ICC (International Chamber of Commerce) to fund all 27 objections. Given that the amount is over $500,000, in accordance with ICANN (Internet Corporation for Assigned Names and Numbers) Contracting and Disbursement Policy, the Board must approve the disbursement.

This decision will have a fiscal impact on ICANN (Internet Corporation for Assigned Names and Numbers), but that impact was anticipated and budgeted for. This decision will not have any impact on the security, stability or resiliency of domain name system.

This is an Organizational Administrative Function that does not require public comment at this time. Although it is noted that ICANN (Internet Corporation for Assigned Names and Numbers)'s commitment to fund these above-referenced objections has been subjected to public comment on more than one occasion.

b. Ombudsman Letters to Board

Whereas, the Ombudsman has issued two reports to the ICANN (Internet Corporation for Assigned Names and Numbers) Board relating to deadlines found in the New gTLD (generic Top Level Domain) Dispute Resolution Procedures and set out facts based on his investigations and made specific recommendations in each report.

Whereas, given the subject matters of the reports, the New gTLD (generic Top Level Domain) Program Committee (NGPC) has reviewed those reports.

Whereas, the two issues relating to deadlines addressed by the Ombudsman's reports to the Board are not the only inquiries about whether the Dispute Resolution Service Providers (DRSPs) must strictly adhere to the deadlines set forth in the New gTLD (generic Top Level Domain) Program Dispute Resolution Procedures in all circumstances.

Resolved (2013.07.13.NG02), the New gTLD (generic Top Level Domain) Program Committee directs the President, Generic Domains Division, or his designee, to forward to the World Intellectual Property Organization Arbitration and Mediation Center (WIPO (World Intellectual Property Organization)) the Ombudsman's report about the applicant's response to the objection that WIPO (World Intellectual Property Organization) is administering relating to .AXIS and ask WIPO (World Intellectual Property Organization) to reconsider its stance with regard to the rejection of the applicant's response in light of the facts and analysis stated in the Ombudsman's report.

Resolved (2013.07.13.NG03), the New gTLD (generic Top Level Domain) Program Committee directs the President, Generic Domains Division, or his designee, to forward to the ICC (International Chamber of Commerce) the Ombudsman's report about GOProud's objection to a .GAY application and ask the Centre for Expertise of the International Chamber of Commerce to revisit its decision in light of the facts and analysis stated in the Ombudsman's report.

Resolved (2013.07.13.NG04), in the interests of fairness and reasonableness, notwithstanding the deadlines set out in the Applicant Guidebook, in the future, the DRSPs are permitted and encouraged to use their discretion, in light of the facts and circumstances of each matter, and in cases where it is shown that the affected party is making a good faith effort to comply with the deadlines, as to whether to grant extensions, or deviate from the deadlines set forth in the Applicant Guidebook.

Rationale for Resolutions 2013.07.13.NG02 – 2013.07.13.NG04

The ICANN (Internet Corporation for Assigned Names and Numbers) Ombudsman reports directly to the ICANN (Internet Corporation for Assigned Names and Numbers) Board. The purpose of the Ombudsman is to ensure that the members of the ICANN (Internet Corporation for Assigned Names and Numbers) community have been treated fairly. The Ombudsman acts as an impartial officer in attempting to resolve complaints about unfair treatment by ICANN (Internet Corporation for Assigned Names and Numbers) using ADR (Alternative Dispute Resolution) techniques. Where, in the conduct of an investigation of a complaint, the Ombudsman forms an opinion that there has been a serious breach of administrative fairness or maladministration, the Ombudsman may notify the Board of Directors of the circumstances.

The Ombudsman has issued two reports to the Board (through the NGPC) regarding decisions made by two Dispute Resolution Service Providers ("DRSPs"') in the New gTLD (generic Top Level Domain) Program. In one instance, the Ombudsman has requested the NGPC ask the applicable

DRSP to reconsider its stance of strictly adhering to the deadlines set forth in the Applicant Guidebook. In the other instance, although the Ombudsman does not request specific action from the Board, he thinks the matter should be revisited. Both reports and respective requests therein are presented in the spirit of fairness and reasonableness to the affected parties. Beyond the two Ombudsman reports, ICANN (Internet Corporation for Assigned Names and Numbers) has received several other inquiries from objectors, applicants, and the DRSPs about issues related to late filing and whether the DRSPs have the discretion to deviate from the specific deadlines set forth in the Applicant Guidebook.

In the interest of fairness and reasonableness, and after a review of the Ombudsman reports, the NGPC has determined that it is appropriate for the NGPC to ask the DRSPs, in light of the circumstances presented by the Ombudsman, to reconsider their strict adherence to the deadlines set forth in the Applicant Guidebook and apply reasonable judgment in such matters. Taking this action will have a positive impact on ICANN (Internet Corporation for Assigned Names and Numbers)'s accountability to the community, as it is appropriate to review of all applicable circumstances when taking decisions that have significant impact on participants within ICANN (Internet Corporation for Assigned Names and Numbers).

This decision will not have direct fiscal impact on ICANN (Internet Corporation for Assigned Names and Numbers). There is potential financial impact to the filing parties to the Objection proceedings, although ICANN (Internet Corporation for Assigned Names and Numbers) cannot infer the magnitude of such and the impact is dependent upon the DRSP response to the NGPC directive. This decision will not have any impact on the security, stability or resiliency of domain name system.

This is an Organizational Administrative Function that does not require public comment.

c. IGO (Intergovernmental Organization) Protections and Category 1 Safeguard Advice

No resolution taken.

Published on 14 July 2013

Exhibit 10

Approved Resolutions | Meeting of the New gTLD (generic Top Level Domain) Program Committee

This page is available in:
English |
العربية (http://www.icann.org/resources/board-material/resolutions-new-gtld-2013-11-05-ar) |
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中文 (http://www.icann.org/resources/board-material/resolutions-new-gtld-2013-11-05-zh)

05 Nov 2013

1. **Main Agenda**
   a. Reconsideration Request 13-6, Hotel Top Level Domain S.a.r.l
      Rationale for Resolution 2013.11.05.NG01

   b. Reconsideration Request 13-7, DISH DBS Corp
      Rationale for Resolution 2013.11.05.NG02

   c. Reconsideration Request 13-8, Merck KGaA
      Rationale for Resolution 2013.11.05.NG03

   d. Reconsideration Request 13-9, Amazon EU S.á.r.l

   e. Reconsideration Request 13-10, Commercial Connect, LLC

1. Main Agenda:

a. Reconsideration Request 13-6, Hotel Top Level Domain S.a.r.l.

Whereas, Hotel Top-Level-Domain S.a.r.l's ("dotHotel") Reconsideration Request, Request 13-6, sought reconsideration of the 8 August 2013 Expert Determination from a dispute resolution panel established by the

International Centre for Dispute Resolution dismissing dotHotel's objection to the new gTLD (generic Top Level Domain) application for .HOTELS.

Whereas, the Board Governance Committee ("BGC") considered the issues raised in Request 13-6.

Whereas, the BGC recommended that Request 13-6 be denied because dotHotel has not stated proper grounds for reconsideration and the New gTLD (generic Top Level Domain) Program Committee agrees.

Whereas, the NGPC reviewed and considered the material that was submitted by dotHotel after the BGC issued its recommendation on Request 13-6 and concluded that said material does not change the recommendation of the BGC.

Resolved (2013.11.05.NG01), the New gTLD (generic Top Level Domain) Program Committee adopts the BGC Recommendation on Reconsideration Request 13-6, which can be found at http://www.icann.org/en/groups/board/governance/reconsideration/recommendation-hotel-25sep13-en.pdf (/en/groups/board/governance/reconsideration/recommendation-hotel-25sep13-en.pdf) [PDF, 121 KB].

Rationale for Resolution 2013.11.05.NG01

ICANN (Internet Corporation for Assigned Names and Numbers)'s Bylaws call for the BGC to evaluate and make recommendations to the Board with respect to Reconsideration Requests. See Article IV, Section 2 of the Bylaws. The New gTLD (generic Top Level Domain) Program Committee ("NGPC"), bestowed with the powers of the Board in this instance, has reviewed and thoroughly considered the BGC Recommendation on Request 13-6 and finds the analysis sound.

Having a reconsideration process whereby the BGC reviews and, if it chooses, makes a recommendation to the Board/NGPC for approval positively affects ICANN (Internet Corporation for Assigned Names and Numbers)'s transparency and accountability. It provides an avenue for the community to ensure that staff and the Board are acting

in accordance with ICANN (Internet Corporation for Assigned Names and Numbers)'s policies, procedures, Bylaws, and Articles of Incorporation.

Request 13-6 asks that ICANN (Internet Corporation for Assigned Names and Numbers) disregard the Panel's expert determination of dotHotel's string confusion objection to Booking.com's new gTLD (generic Top Level Domain) application for .HOTELS and requests that a different panel be appointed to "rehear" dotHotel's objection on a de novo basis. DotHotel also requests that ICANN (Internet Corporation for Assigned Names and Numbers) institute "appropriate Quality Control provisions within the String Similarity Objection process to ensure the consistency of decisions of panelists." (Request, Section 9.)

The Request calls into consideration: (1) whether the Panel violated any policy or process in conducting its visual similarity review of dotHotel's objection; and (2) whether ICANN (Internet Corporation for Assigned Names and Numbers)'s alleged failure to incorporate suitable "quality control" mechanisms in the New gTLD (generic Top Level Domain) dispute objection and dispute resolution process constitutes a material failure of process. (Request, Sections 6-8 & 10.)

In consideration of the first issue, the BGC reviewed the grounds stated in the Request, including the attachment, and concluded that dotHotel failed to adequately state a Request for Reconsideration of Staff action because they failed to identify any policy or process that was violated by Staff. Contrary to dotHotel's suggestion that the Panel improperly relied on result of the String Similarity Review finding that the .HOTEL and .HOTELS strings were not similar, there does not appear to be anything in the Applicant Guidebook or the New gTLD (generic Top Level Domain) Dispute Resolution Procedure (the "Procedure") that restricts the Panel's ability to refer to or rely upon previously conducted reviews or evaluations of the strings at issue. DotHotel does not cite to or otherwise reference any such provision to support its assertions. The BGC noted that the Procedure makes clear that, in addition to applying the standards that have been defined by ICANN (Internet Corporation for Assigned Names and Numbers), 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).) Moreover, the BGC noted that Panel indicated that the String Similarity score was put before the Panel for review by Booking.com in its Response to dotHotel's Objection as evidence that the two strings are not visually similar. The BGC determined that there is nothing in the Applicant Guidebook or the Procedure that would preclude a panel from referencing or relying upon evidence presented, even when that evidence may have also been supportive of the results of the earlier String Similarity Review. There is no requirement that the earlier outcomes of the String Similarity Review should be disregarded when determining a subsequent string confusion objection.

In the context of the New gTLD (generic Top Level Domain) Program, the Reconsideration process is not intended for the BGC, or the NGPC, to perform a substantive review of DRSP panel decisions, but it is for the consideration of failure of process- or policy-related complaints. No policy or process has been violated. Therefore, while dotHotel may disagree with the Panel's findings, Reconsideration is not available as a mechanism to re-try the determinations of DRSP panels.

The BGC further concluded that dotHotel's contention that the dispute resolution proceedings are designed to "take a second look at" the results of the String Similarity Review is unsupportable. Rather, the String Similarity Review that occurs at the outset of the evaluation process "is intended to augment the objection and dispute resolution process … that addresses all types of similarity." (Applicant Guidebook, Section 2.2.1.1.1.)

In consideration of the second issue, the BGC concluded, and the NGPC agrees, that dotHotel does not identify any established policy or process that required ICANN (Internet Corporation for Assigned Names and Numbers) to take action. While dotHotel suggests that ICANN (Internet Corporation for Assigned Names and Numbers)'s failure to incorporate suitable "quality control" provisions into the objection and dispute resolution process constitutes a material failure of process and that such failures have led to flawed Dispute Resolution Service Provider ("DRSP") panel decisions and "inherently inconsistent results", dotHotel does

not appear to be suggesting that the dispute resolution procedures set out in Module 3 of the Applicant Guidebook, or the Procedure, were not followed. Rather, DotHotel appears to be seeking reconsideration of an alleged inaction – i.e., ICANN (Internet Corporation for Assigned Names and Numbers)'s purported failure to act to implement appropriate quality controls. DotHotel suggests only that because other aspects of the New gTLD (generic Top Level Domain) Program include quality control mechanisms, the objection and dispute resolution process should also include such mechanisms. (Request, Section 8.)

The NGPC notes that dotHotel submitted a survey regarding dis-similar String Confusion Objections results after the BGC issued its Recommendation. (See Attachment G to Reference Materials.) Due to the timing of this submission, the BGC did not have the opportunity to consider the survey before issuing its Recommendation. The survey has since been reviewed and considered. The NGPC has determined that the survey does not alter the BGC's Recommendation or the rationale contained in that Recommendation.

In addition to the above, the NGPC had opportunity to consider all of the materials submitted by the requestor, as well as all of the letters summited that relate to Request 13-6. Following consideration of all relevant information provided, the NGPC reviewed and has adopted the BGC's Recommendation on 13-6, the full text of which can be found at http://www.icann.org/en/groups/board/governance/reconsideration/recommendation-hotel-25sep13-en.pdf (/en/groups/board/governance/reconsideration/recommendation-hotel-25sep13-en.pdf) [PDF, 121 KB] and is attached to the Reference Materials to the NGPC Submission on this matter. The BGC's Recommendation on Reconsideration Request 13-6 shall also be deemed a part of this Rationale.

In terms of timing of the BGC's Recommendation, Section 2.16 of Article IV of the Bylaws provides that the BGC shall make a final determination or recommendation to the Board [or NGPC as appropriate] with respect to a Reconsideration Request within thirty days following receipt of the request, unless practical. See Article IV, Section 2.16 of the Bylaws. To satisfy the thirty-day deadline, the BGC would have to

have acted on Request 13-6 by 22 September 2013. When Request 13-6 was submitted, the BGC's next meeting was already expected to take place during ICANN (Internet Corporation for Assigned Names and Numbers)'s Board workshop, scheduled for 26-28 September 2013. Because the preparations for this meeting had already taken place, and given the travel necessary prior to the workshop, the first practical opportunity for the BGC to take action on this Request was during the workshop; it was impractical for the BGC to consider Request 13-6 sooner. Upon making that determination, staff notified the requestor of the BGC's anticipated timing for review of Request 13-6.

Adopting the BGC's recommendation has no financial impact on ICANN (Internet Corporation for Assigned Names and Numbers) and will not negatively impact the systemic security, stability and resiliency of the domain name system.

This decision is an Organizational Administrative Function that does not require public comment.

b. Reconsideration Request 13-7, DISH DBS Corp.

Whereas, Dish DBS Corporation's ("Dish") Reconsideration Request, Request 13-7, sought reconsideration the 29 July 2013 Expert Determination from a dispute resolution panel established by the Arbitration and Mediation Center of the World Intellectual Property Organization sustaining The DirecTV Group, Inc.'s objection to Dish's application for .DIRECT.

Whereas, the Board Governance Committee ("BGC") considered the issues raised in Request 13-7.

Whereas, the BGC recommended that Request 13-7 be denied because Dish has not stated proper grounds for reconsideration and the New gTLD (generic Top Level Domain) Program Committee agrees.

Resolved (2013.11.05.NG02), the New gTLD (generic Top Level Domain) Program Committee adopts the BGC Recommendation on Reconsideration Request 13-7, which can be found at

http://www.icann.org/en/groups/board/governance/reconsideration/recommendation-dish-dbs-25sep13-en.pdf (/en/groups/board/governance/reconsideration/recommendation-dish-dbs-25sep13-en.pdf) [PDF, 120 KB].

Rationale for Resolution 2013.11.05.NG02

ICANN (Internet Corporation for Assigned Names and Numbers)'s Bylaws call for the BGC to evaluate and make recommendations to the Board with respect to Reconsideration Requests. See Article IV, Section 2 of the Bylaws. The New gTLD (generic Top Level Domain) Program Committee ("NGPC"), bestowed with the powers of the Board in this instance, has reviewed and thoroughly considered the BGC Recommendation on Request 13-7 and finds the analysis sound.

Having a reconsideration process whereby the BGC reviews and, if it chooses, makes a recommendation to the Board/NGPC for approval positively affects ICANN (Internet Corporation for Assigned Names and Numbers)'s transparency and accountability. It provides an avenue for the community to ensure that staff and the Board are acting in accordance with ICANN (Internet Corporation for Assigned Names and Numbers)'s policies, procedures, Bylaws, and Articles of Incorporation.

Request 13-7 is about trademark rights. The requestor asks ICANN (Internet Corporation for Assigned Names and Numbers) to disregard the Panel's decision to sustain DirecTV's objection to Dish's application for the .DIRECT new gTLD (generic Top Level Domain) and requests that the decision be reviewed by a new expert panel. Dish also requests that ICANN (Internet Corporation for Assigned Names and Numbers) provide applicants of "inconsistent or erroneous DRSP panel determinations with an avenue of redress that is consistent with ICANN (Internet Corporation for Assigned Names and Numbers)'s mandate to act with fairness." In the event that ICANN (Internet Corporation for Assigned Names and Numbers) will not immediately reverse the decision, Dish requests that it be provided an opportunity to respond to the BGC, before the BGC makes a final recommendation. (Request, Section 9.) Dish also requests a hearing. (Request, Page 11.)

The Request calls into consideration: (1) whether the Panel's alleged influence by media accounts constitutes a process violation; and (2) whether ICANN (Internet Corporation for Assigned Names and Numbers)'s automatic accept of Dispute Resolution Service Provider ("DRSP") panel decision is contrary to ICANN (Internet Corporation for Assigned Names and Numbers)'s mandate to act transparently and fairly.

In consideration of the first issue, the BGC reviewed the grounds stated in the Request, including the attachment, and concluded that Dish failed to adequately state a Request for Reconsideration of staff action because they failed to identify any policy or process that was violated by staff. (BGC Recommendation, Pgs. 8-9, 13-13.) The NGPC agrees. Dish claims that the Panel, in reaching its conclusion that Dish's application for .DIRECT was not a "bona fide application," failed to accord proper weight to a declaration presented, and instead, was improperly influenced by Dish advertisements that were not part of the record. (Request, Section 10.) The BGC determined that, contrary to Dish's contention, there is no provision in the New gTLD (generic Top Level Domain) Dispute Resolution Procedures (the "Procedure") that restricts a panel's ability to refer to or rely upon media advertisements. (BGC Recommendation, Pg. 7.)

The BGC noted that the relevant standard for evaluating a Legal Rights Objection is set out in Section 3.5.2 of the Applicant Guidebook ("Guidebook"). Section 3.5.2. sets forth eight non-exclusive factors that a panel will need to consider in cases where the objection is based on trademark rights. (Guidebook, Section 3.5.2.) The Procedure also makes clear that, in addition to applying the standards that have been defined by ICANN (Internet Corporation for Assigned Names and Numbers), 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).) The BGC found that the Panel applied the eight non-exclusive factors to Dish's LRO as required by the Guidebook and determined that the balance of factors favored DirecTV. (Determination, Pages 5-8.)

The BGC found that Dish misstated the alleged influence of media "accounts" on the Panel in rendering its determination.

The Panel referenced television advertisements to illustrate the fact that Dish and DirecTV are direct competitors in the satellite television industry. (Recommendation, Pg. 7; Determination, Pgs. 4-5.) The BGC noted that Dish does not dispute the fact that the two are competitors, and both parties acknowledge that they provide satellite television services. (Recommendation, Pg. 7; Determination, Pgs. 2-3.) Thus, even if the Panel's reference to television advertisements was somehow improper, there does not appear to be any prejudice to Dish. The BGC also noted that the "media accounts" at issue are advertisements produced by the parties to the objection proceedings, and not statements of journalists, so Dish's opposition to the decision because of these "media accounts" seems misplaced in any event. (BGC Recommendation, Pg. 7.)

In consideration of the second issue, the BGC concluded, and the NGPC agrees, that Dish's attempt to claim that the procedures set forth in the Guidebook, which followed years of inclusive policy development and implementation planning, are inconsistent with ICANN (Internet Corporation for Assigned Names and Numbers)'s Articles of Incorporation and Bylaws (or the recommendations of the GNSO (Generic Names Supporting Organization)) is not supported. The Guidebook sets out the standards used to evaluate and resolve objections. The Expert Determination shows that the Panel followed the evaluation standards. ICANN (Internet Corporation for Assigned Names and Numbers)'s acceptance of that Expert Determination as advice to ICANN (Internet Corporation for Assigned Names and Numbers) is also in accordance with the established process. (Guidebook, Section 3.4.6.) Dish's disagreement as to whether the standards should have resulted in a finding in favor of DirecTV's objection does not mean that ICANN (Internet Corporation for Assigned Names and Numbers) (or the Panel) violated any policy or process in reaching the decision (nor does it support a conclusion that the decision was actually wrong).

Moreover, the BGC found that Dish does not suggest that that the dispute resolution procedures set out in Module 3 of the Applicant Guidebook, or under the Procedure, were not followed. In its Request, Dish contends that ICANN (Internet Corporation for Assigned Names and Numbers)'s automatic

acceptance of DRSP panel decisions, including those that are "erroneous or inconsistent," is contrary to ICANN (Internet Corporation for Assigned Names and Numbers)'s mandate to act transparently and fairly. (Request, Section 8, Page 4.) The BGC concluded that Dish's assertions are not accurate and do not support Reconsideration.

For the same reasons, the BGC found that ICANN (Internet Corporation for Assigned Names and Numbers)'s purported inaction in implementing new controls does not demonstrate a violation of any ICANN (Internet Corporation for Assigned Names and Numbers) policy or process.

While parties to a dispute resolution proceeding may not always be satisfied with the determinations of the DRSP panels – and there may be divergence in the conclusions reached between the various panels – the Reconsideration process is not intended to reexamine the established dispute resolution process. Dish's belief that the objection and dispute resolution procedures should be changed does not constitute a policy or process violation that supports reconsideration. Rather, the Request challenges the Panel's substantive determination. In the context of the New gTLD (generic Top Level Domain) Program, Reconsideration is not a mechanism for direct, de novo appeal of panel decisions with which the requester disagrees, and seeking such relief is, in fact, in contravention of the established processes within ICANN (Internet Corporation for Assigned Names and Numbers).

The NGPC had the opportunity to consider all of the materials submitted by the requestor, and all letters submitted that relate to Request 13-7. Following consideration of all relevant information provided, the NGPC reviewed and has adopted the BGC's Recommendation on Request 13-7, the full text of which can be found at http://www.icann.org/en/groups/board/governance/reconsideration/recommendation-dish-dbs-25sep13-en.pdf (/en/groups/board/governance/reconsideration/recommendation-dish-dbs-25sep13-en.pdf) [PDF, 120 KB] and that is attached to the Reference Materials to the NGPC Submission on this matter. The BGC's Recommendation on Reconsideration Request 13-7 shall also be deemed a part of this Rationale.

In terms of timing of the BGC's Recommendation, Section 2.16 of Article IV of the Bylaws provides that the BGC shall make a final determination or recommendation to the Board [or NGPC as appropriate] with respect to a Reconsideration Request within thirty days following receipt of the request, unless practical. See Article IV, Section 2.16 of the Bylaws. To satisfy the thirty-day deadline, the BGC needed to act by 22 September 2013. When Request 13-7 was submitted, the BGC's next meeting was already expected to take place during ICANN (Internet Corporation for Assigned Names and Numbers)'s Board workshop, scheduled for 26-28 September 2013. Because the preparations for this meeting had already taken place, and given the travel necessary prior to the workshop, the first practical opportunity for the BGC to take action on this Request was during the workshop; it was impractical for the BGC to consider Request 13-7 sooner. Upon making that determination, staff notified the requestor of the BGC's anticipated timing for review of Request 13-7.

Adopting the BGC's recommendation has no financial impact on ICANN (Internet Corporation for Assigned Names and Numbers) and will not negatively impact the systemic security, stability and resiliency of the domain name system.

This decision is an Organizational Administrative Function that does not require public comment.

c. Reconsideration Request 13-8, Merck KGaA

Whereas, Merck KGaA's Reconsideration Request, Request 13-8, sought reconsideration the 13 July 2013 resolution of the New gTLD (generic Top Level Domain) Program Committee ("NGPC") that permitted and encouraged dispute resolution panels to use discretion in enforcing the deadlines set forth in the New gTLD (generic Top Level Domain) Applicant Guidebook.

Whereas, Request 13-8 challenges the NGPC resolution as it relates to Merck & Co. Inc.'s community objection to Merck KGaA's application for .MERCK, which was rejected by the Dispute Resolution Service Provider for being filed after the published closing deadline set forth in the Applicant Guidebook.

Whereas, the Board Governance Committee ("BGC") considered the issues raised in Request 13-8.

Whereas, the BGC recommended that Request 13-8 be denied because Merck KGaA has not stated proper grounds for reconsideration.

Resolved (2013.11.05.NG03), the New gTLD (generic Top Level Domain) Program Committee adopts the BGC Recommendation on Reconsideration Request 13-8, which can be found at http://www.icann.org/en/groups/board/governance/reconsideration/recommendation-merck-10oct13-en.pdf (/en/groups/board/governance/reconsideration/recommendation-merck-10oct13-en.pdf) [PDF, 106 KB].

Rationale for Resolution 2013.11.05.NG03

ICANN (Internet Corporation for Assigned Names and Numbers)'s Bylaws call for the BGC to evaluate and make recommendations to the Board with respect to Reconsideration Requests. See Article IV, Section 2 of the Bylaws. The New gTLD (generic Top Level Domain) Program Committee ("NGPC"), bestowed with the powers of the Board in this instance, has reviewed and thoroughly considered the BGC Recommendation on Request 13-8 and finds the analysis sound.

Having a reconsideration process whereby the BGC reviews and, if it chooses, makes a recommendation to the Board/NGPC for approval positively affects ICANN (Internet Corporation for Assigned Names and Numbers)'s transparency and accountability. It provides an avenue for the community to ensure that staff and the Board are acting in accordance with ICANN (Internet Corporation for Assigned Names and Numbers)'s policies, Bylaws, and Articles of Incorporation.

Request 13-8 seeks reconsideration of the Resolution that permitted and encouraged dispute resolution panels to use discretion in enforcing the deadlines set forth in the New gTLD (generic Top Level Domain) Applicant Guidebook. Specifically, the Request challenges the NGPC resolution as it relates to the Objector's community objection to Merck

KGaA's application for .MERCK, which was rejected by the Dispute Resolution Service Provider (DRSP) for being filed after the published closing deadline.

The Request calls into consideration: (1) whether the NGPC failed to consider material information in adopting the challenged Resolution; (2) whether the NGPC lacks the jurisdiction to "oversee, appeal or challenge" the procedural decisions of the DRSPs; and (3) whether the NGPC's actions constitute breaches of ICANN (Internet Corporation for Assigned Names and Numbers)'s Core Values, including the requirement to make "decisions by applying documented policies neutrally and objectively, with integrity and fairness," and the requirement to employ "open and transparent policy development mechanisms that … ensure that those entities most affected can assist in the policy development process".

In consideration of the first issue, the BGC reviewed the grounds stated in the Request, including the attachment, and concluded that Merck KGaA's failed to adequately state a Request for Reconsideration. Specifically, the BGC found that there is no support for Merck KGaA's claim that the NGPC failed to consider material information because the Resolution was based on "incomplete, and improperly compiled, reports by the ICANN (Internet Corporation for Assigned Names and Numbers) Ombudsman." (Request, Pg. 16.) Contrary to Merck KGaA's claims that the Ombudsman denied Merck KGaA's right to be heard and issued its recommendations to the NGPC on the basis of unilateral communications with only the Objector's position being presented (Request, Pg. 5), the BGC noted that the reports from the Ombudsman that were considered by the NGPC did not address, nor were they intended to address, the Objector's complaint to the Ombudsman regarding the ICC (International Chamber of Commerce)'s rejection of the objection to .MERCK. (NPGC Briefing Material.)

The Ombudsman issued only two reports to the Board relating to purportedly missed deadlines. The first report addressed an objection from Axis Communication AB to the Saudi Telecom Company's application for .AXIS (the ".AXIS Report"). (NGPC Briefing Materials 2, http://www.icann.org/en/groups/board/documents/briefing-materials-2-13jul13-en.pdf

(/en/groups/board/documents/briefing-materials-2-13jul13-en.pdf) [PDF, 1.36 MB].) The second report addressed an objection to .GAY by GOProud (the ".GAY Report"). (NPGC Briefing Material, Pg. 10-11.) The BGC noted that based on the .AXIS Report and the .GAY Report, the NGPC adopted two very specific resolutions asking the respective DRSPs to reconsider/revisit their decisions relating to the relevant filings. In addition to the two specific resolutions, the NGPC adopted a resolution that generally permits and encourages DRSPs to exercise discretion in enforcing the deadlines set forth in the Applicant Guidebook. This more general resolution is not directed towards any one specific DRSP or any one specific dispute resolution proceeding or Ombudsman's complaint, including the complaint relating to the .MERCK objection.

The BGC found that because neither report addressed the Objector's complaint to the Ombudsman – or, otherwise reflected a recommendation to the NGPC on how to resolve the Objector's complaint – there is no support for Merck KGaA's assertion that the NGPC failed to consider material information relating to the Objector's complaint. The NGPC agrees.

Moreover, the BGC noted that, in its published rationale for the Resolution, the NGPC acknowledged that, beyond the two Ombudsman reports, ICANN (Internet Corporation for Assigned Names and Numbers) received several other inquiries from objectors, applicants, and the DRSPs about issues related to late filings and whether the DRSPs have the discretion to deviate from the specific deadlines set forth in the Applicant Guidebook. The NGPC concluded, in the interests of fairness and reasonableness, that it is appropriate for the DRSPs to exercise discretion, given the circumstances of each situation, in enforcing dispute resolution deadlines. (13 July 2013 Resolutions.) This grant of discretion is just that, it does not direct any DRSP to reverse any specific decision to accept or reject a late filing. Rather, the Resolution is intended to provide further guidance to the DRSPs on the issue of late submissions.

In consideration of the second issue, the BGC concluded, and the NGPC agrees, that the stated grounds do not constitute a proper basis for Reconsideration under ICANN

(Internet Corporation for Assigned Names and Numbers)'s Bylaws. However, even if these were proper bases for Reconsideration, the above-stated grounds do not support reconsideration. The BGC noted that Article 23(a) of the New gTLD (generic Top Level Domain) Dispute Resolution Procedure (the "Procedures") clearly provides ICANN (Internet Corporation for Assigned Names and Numbers) with the jurisdiction to modify the procedures governing the dispute resolution process. (Procedures, Art. 23(a).) Thus, even if the challenged Resolution was considered a modification to the Procedures, the NGPC has the authority to make such modifications, provided the modifications are in accordance with ICANN (Internet Corporation for Assigned Names and Numbers)'s Bylaws.

In consideration of the third issue, the BGC determined, and the NGPC agrees, that Merck KGaA's assertions are unsupported and do not constitute a proper basis for Reconsideration under ICANN (Internet Corporation for Assigned Names and Numbers)'s Bylaws. As discussed above, the .MERCK complaint to the Ombudsman was not before the NGPC. The NGPC adopted two resolutions specifically addressing issues surrounding objections to the applied-for .AXIS and .GAY strings, and adopted a third resolution generally permitting and encouraging DRSPs to exercise discretion in enforcing dispute resolution procedure deadlines. (13 July 2013 Resolutions.) This general grant of discretion is to be applied neutrally and objectively. Both the .AXIS Report and .GAY Report are publicly posted, and the NGPC clearly stated and published its rationale for the Resolutions (13 July 2013 Resolutions). The NGPC's actions – both the evaluation of the issues and its ultimate resolutions – were at all times open, transparent, and in good faith. Accordingly, there is no support for Merck KGaA's claim that the NGPC's actions were somehow inconsistent with ICANN (Internet Corporation for Assigned Names and Numbers)'s Core Values.

In addition to the above, the NGPC had opportunity to consider all of the materials submitted by the requestor, as well as all of the letters summited that relate to Request 13-8. Following consideration of all relevant information provided, the NGPC reviewed and has adopted the BGC's Recommendation on Request 13-8, the full text of which can

be found at http://www.icann.org/en/groups/board/governance/reconsideration/recommendation-merck-10oct13-en.pdf (/en/groups/board/governance/reconsideration/recommendation-merck-10oct13-en.pdf) [PDF, 106 KB] and is attached to the Reference Materials to the NGPC Submission on this matter. The BGC's Recommendation on Reconsideration Request 13-8 shall also be deemed a part of this Rationale.

In terms of timing of the BGC's Recommendation, Section 2.16 of Article IV of the Bylaws provides that the BGC shall make a final determination or recommendation to the Board [or NGPC as appropriate] with respect to a Reconsideration Request within thirty days following receipt of the request, unless practical. See Article IV, Section 2.16 of the Bylaws. To satisfy the thirty-day deadline, the BGC needed to act by 29 September 2013. Due to the volume of Reconsideration Requests received within recent weeks, the first practical opportunity for the BGC to take action on this Request was on 10 October 2013; 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 13-8.

Adopting the BGC's Recommendation has no financial impact on ICANN (Internet Corporation for Assigned Names and Numbers) and will not negatively impact the systemic security, stability and resiliency of the domain name system.

This decision is an Organizational Administrative Function that does not require public comment.

d. Reconsideration Request 13-9, Amazon EU S.á.r.l.

Discussion was carried forward to another meeting, and no resolution was taken.

e. Reconsideration Request 13-10, Commercial Connect, LLC

Discussion was carried forward to another meeting, and no resolution was taken.

Exhibit 11

RECOMMENDATION OF THE BOARD GOVERNANCE COMMITTEE (BGC)

RECONSIDERATION REQUEST 13-8

10 OCTOBER 2013

On 30 August 2013, Merck KGaA submitted a reconsideration request ("Request"). The Request asked the Board to reconsider the 13 July 2013 resolution of the New gTLD Program Committee ("NGPC") that permitted and encouraged dispute resolution panels to use discretion in enforcing the deadlines set forth in the New gTLD Applicant Guidebook. Specifically, the Request challenges the NGPC resolution as it relates to Merck & Co. Inc.'s (" the Objector") community objection to Merck KGaA's application for .MERCK, which was rejected by the International Chamber of Commerce ("ICC") for being filed after the published closing deadline.

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 the 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.

For reconsideration requests that challenge Board actions, requests must be submitted to the BGC within fifteen days after the date on which information about the challenged Board action is first published in a resolution with an accompanying rationale. Bylaws, Art. IV, § 2.5.

The Request was received on 30 August 2013. The challenged NGPC resolution was published on 14 July 2013, which would render the Request untimely under the Bylaws. However, it appears that Merck KGaA did not become "adversely affected" by the challenged resolution until 16 August 2013, when the Objector, based on the discretion afforded to the ICC under the 13 July 2013 resolution, submitted a request for rehearing of the ICC's previous rejection of its community objection to Merck KGaA's application for .MERCK. Bylaws, Art. IV, § 2.2. Because the Request was received within fifteen days of the Objector's submission of its request for rehearing, the BGC will consider the merits of Merck KGaA's Request.

II. Background

A. Filing An Objection To A New gTLD Application

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.

To initiate a dispute resolution proceeding, an objection must comply with the procedures set out in Articles 5-8 of the Procedure. This includes the requirement that objections be filed with the appropriate DRSP before the published closing date for the objection filing period. (Applicant Guidebook, Section 3.2.3; Procedure, Art. 7(a).) Before an objection will be

registered for processing, the DRSP will conduct an administrative review to verify compliance with Articles 5-8 of the Procedures and the applicable DRSP Rules. (Procedure, Art. 9(a).)

B. The Objection to Merck KGaA's Application for .MERCK

The Objector attempted to file two community objections to Merck KGaA's applications for .MERCK and .EMERCK.[1] The objections were transmitted to the ICC "ten and eleven minutes" past the 8:00 pm Eastern Standard Time filing deadline on 15 March 2013. (Request, Pg. 3 and Annex 1 to Request.) The next morning, the Objector's counsel sent an email to ICANN's Ombudsman indicating that there was an Internet outage that caused the objections to be filed late and inquiring whether there was a process for determining whether the objections were accepted by the ICC. (Annex 1 to Request.) The Objector's counsel further indicated that the filing fees for the objections were paid via wire transfer earlier in the day before the filing deadline. (Annex 1 to Request.) Counsel also inquired whether, should the ICC reject the objections, there was a process for appealing that rejection based on technical difficulties. (Annex 1 to Request.) In an email response to the Objector's counsel, ICANN's Ombudsman stated that the Objector should wait to see whether the objections are accepted by the ICC before starting an official investigation through the Ombudsman. (Annex 1 to Request). Merck KGaA was not included on the correspondence between the Ombudsman and the Objector. (Request, Pg. 7.)

[1] The Request is directed only at the objection to .MERCK. As a result, this Recommendation will only refer to the .MERCK objection. However, to the extent an analysis applies to the objection to .MERCK, it equally applies to the analysis of the objection to .EMERCK.

In the weeks that followed, the ICC requested comments from the Objector and Merck KGaA, and ultimately rejected the two community objections to .MERCK and .EMERCK for being untimely. (Request, Pg. 7.)

C. The NGPC Resolution Giving DRSPs Discretion in Enforcing Deadlines

On 13 July 2013, the NGPC adopted three resolutions relating to deadlines found in the dispute resolution procedures of the Applicant Guidebook. (http://www.icann.org/en/groups/board/documents/resolutions-new-gtld-13jul13-en.htm (hereinafter "13 July 2013 Resolutions").) The NGPC resolutions were taken following receipt of two separate reports and recommendations issued by ICANN's Ombudsman.

The Ombudsman's first report to the Board (dated 7 June 2013) addressed an objection from Axis Communication AB ("Axis") to the Saudi Telecom Company's ("STC") application for .AXIS (the ".AXIS Report"). See Meeting of the NGPC, Briefing Materials 2 ("NPGC Briefing Materials") available at http://www.icann.org/en/groups/board/documents/briefing-materials-2-13jul13-en.pdf. According to the .AXIS Report, STC filed its response to Axis' objection two days after the filing deadline and the Arbitration and Mediation Center of the World Intellectual Property Organization ("WIPO") did not accept the response.[2] (NGPC Briefing Material, Pgs. 12-13.) The Ombudsman expressed concern that, under the circumstances of that particular matter, the rejection of STC's response could be unfair, and therefore recommended that the Board (or NGPC in this case) ask WIPO to reconsider its stance

[2] Article 11(b) of the Procedures provides that an applicant must file a response to an objection within thirty days of receiving notice of the objection from the DRSP. (Procedure, Art. 11(b).) If an applicant fails to provide a response within the thirty-day period, the applicant is deemed to be in default and the objection will be sustained. (Procedure, Art. 11(g).)

with regard to the rejection of STC's response in light of the facts and analysis stated in the .AXIS Report. (NPGC Briefing Material, Pg. 15.)

The Ombudsman's second report to the Board (dated 1 July 2013) addressed an objection to .GAY by GOProud (the ".GAY Report"). (NPGC Briefing Material, Pg. 10-11.) According to the .GAY Report, GoProud's objection was timely filed but was not accepted because it was too long. The Ombudsman suggested that the notice of the rejection was sent to an email address that was not the one used to file the objection, therefore GOProud did not see it within the time permitted to amend the objection, and so the objection was rejected. (NPGC Briefing Material, Pg. 10.) Based on the facts available to him, the Ombudsman expressed concerns about the fairness of the decision to reject GOProud's objection and recommended that the Board (or NGPC in this case) ask the ICC to revisit its decision. (NPGC Briefing Material, Pg. 11.)

Upon consideration of the Ombudsman's reports, the NGPC resolved as follows:

> (i) (2013.07.13.NG02) The NGPC directs the President of the Generic Domains Division (or his designee) to forward the .AXIS Report to WIPO and ask WIPO to reconsider its stance with regard to the rejection of STC's response in view of the facts and analysis in the .AXIS Report;
>
> (ii) (2013.07.13.NG03) The NGPC directs the President of the Generic Domains Division (or his designee) to forward the .GAY Report to the ICC and ask the ICC to revisit its decision in view of the facts and analysis in the .GAY Report; and
>
> (iii) (2013.07.13.NG04) In the interests of fairness and reasonableness, notwithstanding the deadlines set out in the Applicant Guidebook, in the future, the DRSPs are permitted and encouraged to use their discretion, in light of the facts and circumstances of each matter, and in cases where it is shown that the affected party is making a good faith effort to comply with the deadlines, as to whether to grant extensions, or deviate from the deadlines set forth in the Applicant Guidebook.

(13 July 2013 Resolutions.)

In the rationale for the three resolutions, the NGPC acknowledged that, beyond the two Ombudsman reports, ICANN has received several other inquiries from objectors, applicants, and

the DRSPs about issues related to late filing and whether the DRSPs have the discretion to deviate from the deadlines set forth in the Applicant Guidebook. (13 July 2013 Resolutions.) The NGPC concluded that notwithstanding the deadlines in the Guidebook, in the interests of fairness and reasonableness the DRSPs should have discretion to provide extensions of those deadlines, on case-by-case bases depending on the circumstances, and in cases where it is shown that the affected party is making a good faith effort to comply. (13 July 2013 Resolutions.)

D. The Objector's Request for Rehearing with ICC on Rejected Objection

On 16 August 2013, the Objector, citing the NGPC's 13 July 2013 Resolutions, submitted a request to the ICC that it rehear its previous rejection of the .MERCK objection. Both the Objector and Merck KGaA timely filed additional comments regarding the Objector's request for rehearing, and on 30 August 2013, the ICC's Standing Committee was invited to issue a decision on the issue. However, having received a copy of Merck KGaA's Reconsideration Request, the ICC has since indicated that it will not rule on the Objector's request for rehearing until after ICANN determines whether it is going to reconsider and/or revise the 13 July 2013 resolutions. See Letter from Judith Harris to the BGC, available at http://www.icann.org/en/groups/board/governance/reconsideration/harris-to-bgc-13sep13-en.pdf.[3]

[3] A letter from the Objector's counsel, Judith Harris, was received on 13 September 2013. The letter included as an attachment a letter from the ICC indicating that the ICC would not rule on the Objector's request for rehearing until after ICANN determined whether it was going to reconsider the NGPC resolution. The Objector's letter, as well as the attached letter from the ICC, have been reviewed and given appropriate consideration in connection with this Recommendation.

III. Analysis of Merck KGaA's Request for Reconsideration – The NGPC Did Not Fail To Consider Material Information In Adopting The Challenged Resolution[4]

Merck KGaA seeks reconsideration of the NGPC's 13 July 2013 resolution that generally gives DRSPs discretion in enforcing deadlines set forth in the Applicant Guidebook (hereinafter, the "Resolution").

In its Request, Merck KGaA claims that the NGPC failed to consider material information in that the challenged Resolution was based on "incomplete, and improperly compiled, reports by the ICANN Ombudsman." (Request, Pg. 16.) Specifically, Merck KGaA claims that the Ombudsman denied Merck KGaA's right to be heard and issued its recommendations to the NGPC on the basis of unilateral communications with only the Objector's position being presented. (Request, Pg. 5.) Merck KGaA's claims are not supported.

ICANN's Ombudsman issued only two reports to the Board – the .AXIS Report and the .GAY Report – relating to purportedly missed deadlines found in the dispute resolution procedures of the Applicant Guidebook. (NPGC Briefing Material.) Each report addressed a particular complaint to the Ombudsman and made a recommendation to the Board (or NGPC in this instance). Neither report addressed, nor were they intended to address, the Objector's complaint to the Ombudsman regarding the ICC's rejection of the objection to .MERCK. (NPGC Briefing Material.) Because neither report addressed the Objector's complaint to the Ombudsman – or, otherwise reflected a recommendation to the NGPC on how to resolve the

[4] To the extent that the Request purports to raise concerns about ICANN Ombudsman's performance of his duties, a review of the Ombudsman is not within the scope of the Reconsideration process. However, the Board is authorized to, and does regularly evaluate the Ombudsman's performance and whether he is following his mandate and Framework. The BGC will ask that the issues raised in this Request be taken into consideration in the Board's evaluation of the Ombudsman.

Objector's complaint – there is no support for Merck KGaA's assertion that the NGPC failed to consider material information relating to the Objector's complaint.

Based on the .AXIS Report and the .GAY Report, the NGPC adopted two very specific resolutions asking the respective DRSPs to reconsider/revisit their decisions relating to the relevant filings about those strings. In addition to the resolutions that specifically address the .AXIS and .GAY strings, the NGPC adopted a resolution that generally permits and encourages DRSPs to exercise discretion in enforcing the deadlines set forth in the Applicant Guidebook. (13 July 2013 Resolutions.) This more general resolution is not directed towards any one specific DRSP or any one specific dispute resolution proceeding or Ombudsman's complaint, including the complaint relating to the .MERCK objection.

In its published rationale for the Resolution, the NGPC acknowledged that, beyond the two Ombudsman reports, ICANN received several other inquiries from objectors, applicants, and the DRSPs about issues related to late filings and whether the DRSPs have the discretion to deviate from the specific deadlines set forth in the Applicant Guidebook. The NGPC concluded, in the interests of fairness and reasonableness, that it is appropriate for the DRSPs to exercise discretion in enforcing dispute resolution deadlines. (13 July 2013 Resolutions.) This grant of discretion is just that, it does not direct any DRSP to reverse any specific decision to accept or reject a late filing. Rather, the Resolution is intended to provide further guidance to the DRSPs on the issue of late submissions.[5]

In view of the above, there is no support for Merck KGaA's claim that the NGPC failed to consider material information at the time of adopting the challenged Resolution. The

[5] To address potential technical inconsistencies, the DRSPs had previously agreed to accept objections up to five minutes after the deadline in the Guidebook. (Annex 4 to Request.)

challenged Resolution was a general grant of discretion to the DRSPs and not specifically directed towards the .MERCK objection. Merck KGaA's suggestion that the NGPC was lacking specific information relating to the objection to Merck KGaA's application for .MERCK is not well founded and should be rejected.

IV. Merck KGaA's Other Alleged Violations of ICANN Policy and Procedure Are Not Proper Bases for Reconsideration.

A challenge of a Board action (or inaction) must be based upon the Board taking an action (or inaction) without consideration of material information or as a result of the Board's reliance on false or inaccurate material information. (Bylaws, Art. IV, § 2.)

In its Request, Merck KGaA seeks reconsideration of the challenged Resolution on the additional grounds that: (i) the NGPC lacks the jurisdiction to "oversee, appeal or challenge" the procedural decisions of the DRSPs (Request, Pg. 2.); and (ii) the NGPC's actions constitute breaches of ICANN's Core Values, including the requirement to make "decisions by applying documented policies neutrally and objectively, with integrity and fairness," and the requirement to employ "open and transparent policy development mechanisms that … ensure that those entities most affected can assist in the policy development process" (Bylaws, Art. 1, §§ 2.7 & 2.8.) (Request, Pg. 4.) Neither of the stated grounds is a proper basis for Reconsideration under ICANN's Bylaws and need not be considered.

Even if these were proper bases for Reconsideration, the above-stated grounds do not support reconsideration. On the issue of jurisdiction, Article 23(a), clearly provides ICANN with the jurisdiction to modify the procedures governing the dispute resolution process. Article 23(a) states: "ICANN may from time to time, in accordance with its Bylaws, modify this Procedure." (Procedures, Art. 23(a).) Thus, even if the challenged Resolution was considered a modification

to the Procedure, the NGPC has the authority to make such modifications, provided the modifications are in accordance with ICANN's Bylaws.

With respect to the purported violations of ICANN's Core Values, Merck KGaA's assertions are similarly unsupported. As explained above, the .MERCK complaint to the Ombudsman was not before the NGPC. The NGPC adopted two resolutions specifically addressing issues surrounding objections to the applied-for .AXIS and .GAY strings, and adopted a third resolution generally permitting and encouraging DRSPs to exercise discretion in enforcing dispute resolution procedure deadlines. (13 July 2013 Resolutions.) This general grant of discretion is to be applied neutrally and objectively. Both the .AXIS Report and.GAY Report are publicly posted, and the NGPC clearly stated and published its rationale for the Resolution (13 July 2013 Resolutions). The NGPC's actions – both the evaluation of the issues and its ultimate resolutions – were at all times open, transparent, and in good faith. Accordingly, there is no support for Merck KGaA's claim that the NGPC's actions were somehow inconsistent with ICANN's Core Values.

V. Recommendation and Conclusion

Based on the foregoing, the BGC concludes that Merck KGaA has not stated proper grounds for reconsideration. Accordingly, we recommend that Merck KGaA's Request be denied and the Request not be considered further.