



February 14, 2014

ICANN Board Governance Committee
Members of the Board Governance Committee

By e-mail: reconsideration@icann.org

RE: Request for Hearing in Reconsideration Request 14-1, Medistry LLC

Dear Members of the Board Governance Committee,

The Cleveland Clinic, acting on behalf of Applicant/Reconsideration Requestor Medistry LLC, requests an in-person hearing before the Board Governance Committee in Singapore, as authorized under Art. IV, Sec. 2(12) of ICANN's Bylaws, to address the matters set forth in Reconsideration Request 14-1 currently pending before the BGC. The Cleveland Clinic, an internationally renowned non-profit, integrated and academic healthcare system, attracting patients from more than 168 countries, is a partner in Medistry LLC's application, and wishes to be heard, along with additional representative(s) for Medistry LLC. This hearing request relates to the policy/procedural violations identified in Reconsideration Request 14-1. We believe that a hearing will provide an opportunity to demonstrate the existence of numerous policy violations, which include the fact that neither the National Association of Boards of Pharmacies nor American Hospital Association ever opposed Medistry's .MED application. The Independent Objector's counterfactual position—that such opposition exists ---- was the crux of the flawed Community Objection decision against Medistry and the ignition of the series of actions and inactions that violated ICANN's policies.

Additionally, a recent telephone conversation with ICANN has raised issues with regard to the timeliness of *one* of the actions complained of in the Request for Reconsideration. As more fully explained in that Request, one of the reasons that ICANN must reconsider the determination sustaining the community objection against .MED is that Independent Objector filed the objection despite the absence of any public comments in opposition to the application, notwithstanding the policy established in the Guidebook requiring such opposition. There was discussion whether ICANN may refuse to consider the merits of the claim related to this action, on the basis that the appropriate time to seek Reconsideration was within 15 days after the Independent Objector filed the objection in early 2013.

A hearing will finally provide a full and fair opportunity for the facts and our position to be heard, and to articulate both the ICANN policy violations and to address all applicable governance documents and policies related to the recent timeliness issue presented by ICANN staff which remains ambiguous. In regard to the latter, we would like to discuss the following at the hearing:

(1) Unlike ICANN's decision that DRSP determinations can be challenged through Requests for Reconsideration (*see, e.g.,* Recommendation of the Board Governance Committee, Reconsideration Request 13-16, p. 6, 8 Jan. 2014) we are not aware that ICANN has ever set forth in writing that the IO is an "ICANN vendor" whose actions are subject to BGC reconsideration requests. Nonetheless, we were told by ICANN in this recent conversation that such is the case.

(2) At the time of the IO's filing of the Community Objection against Medistry's .MED application (March of 2013), the ICANN Board had not yet even decided that Expert Panelist's decisions

would be subject to BGC reconsideration requests, a decision that would not be published for nearly half a year after the IO's filing.

(3) Thus, even if the ability to request reconsideration of the IO's objection could somehow be inferred from ICANN's decision permitting BGC review of DRSP determinations, before that decision was made, there was no way for Medistry (or any applicant) to know that Reconsideration could be invoked for the IO's decision to file an objection.

(4) Instead, ICANN policies in the Applicant Guidebook indicate exactly the opposite: that filing a Request for Reconsideration following an IO's objection, but without completing the established dispute resolution proceedings, would be futile. For instance, the Guidebook provides procedures for the resolution of objections, including through challenges to standing. There is absolutely no indication that these same procedures were not the appropriate method for addressing the question of whether there was a public comment in opposition that would permit the IO to file an objection.

(5) More importantly, however, Module 3.2.5 of the Guidebook also explicitly prohibits ICANN from interfering with the IO's decision to file or not to file an objection, stating that "[n]either ICANN staff nor the ICANN Board of Directors has authority to direct or require the IO to file or not file any particular objection. If the IO determines that an objection should be filed, he or she will initiate and prosecute the objection in the public interest." The assertion that the propriety of an objection by the IO could only be challenged through a Request for Reconsideration asking ICANN to intervene immediately after the objection is filed, without first abiding by the procedures established for resolution of objections, is plainly contrary to Module 3.2.5.

(7) Finally, even if Medistry could have challenged the IO's filing of the objection before any further ICC review of the objection, there is no basis to conclude that the issue cannot be raised now. ICANN's decision to accept the determination of the ICC Panelist, despite the violation of ICANN policy requiring a public comment in opposition, represents a new and separate action by ICANN that can be challenged.

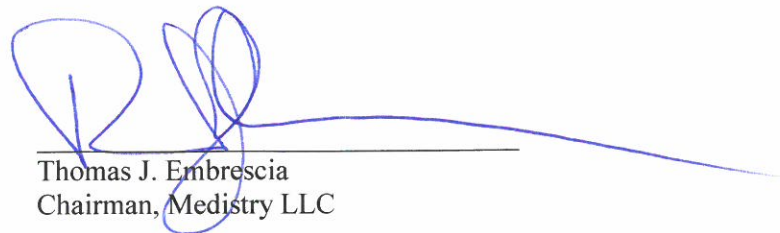
The IO's filing of the objection, and the ICC Panelist's decision sustaining that objection, and ICANN's acceptance of that decision, in the absence of any public comment in opposition, presents clear violations of ICANN's policy that has not been raised in any other Request for Reconsideration. In light of these violations, a decision by the BGC to grant the relief requested after a full and fair hearing would demonstrate to the ICANN community that ICANN is committed to compliance with its policies through the use of its accountability processes.

Despite the considerable time and expense associated with an in-person hearing, we look forward to discussing these and other relevant issues with the BGC in Singapore. We know the future of the .MED opportunity is at stake, and the spotlight on ICANN's accountability processes could not be any brighter. A full and fair opportunity to be heard and a consideration of the material facts at issue is what the circumstances no doubt require.

Sincerely,



C. Martin Harris, M.D., MBA
Chief Information Officer, Cleveland Clinic



Thomas J. Embrescia
Chairman, Medistry LLC

CC: Delos M. Cosgrove, M.D., Chief Executive Officer and President
Cherine Chalaby, Chair of NGPC