

Reconsideration Request by Brice Trail, LLC

*Regarding Board Action Taken Without Consideration of Proffered Material Information,
and Staff Action Contrary to Established ICANN Policies,
Pertaining to Application by Brice Trail, LLC for .DOCTOR gTLD*

Introductory Summary

i. Brice Trail, LLC, applicant for the .DOCTOR gTLD, brings this Request to give the Board an opportunity to correct actions that it and staff have taken in excess of established (and sound) policy and without considering material information. Staff has created, and the Board has approved, a requirement that Brice Trail agree *now* to “ensure that the domains in the TLD are ascribed *exclusively* to legitimate *medical practitioners*.” Such a severe limitation on expressive activity in domains has no historical precedent or basis, and singles this domain out for treatment widely disparate from that given *all other* similarly situated TLDs. Moreover, it violates ICANN policy and GAC advice against discrimination. ICANN’s reconsideration accountability measure exists precisely to rectify such actions taken without adequate regard for the relevant facts and policy implications.

ii. The staff and Board actions derive ultimately from a framework suggested by the GAC that does not appropriately lead to the result reached. In April 2013, the GAC identified what it deemed “sensitive” strings needing “safeguards” to protect consumers. It began at that time to distinguish such TLDs between “regulated” and “highly regulated” market sectors. After ICANN staff had originally classified .DOCTOR as “regulated,” the GAC recommended redesignating it to place it on par with .LAWYER and other new gTLDs similarly describing “highly regulated” sectors.

iii. The GAC did not at that or any other time suggest creating a third, “ultra-highly” sensitive category to which .DOCTOR alone would belong. To the contrary, it explicitly rejects “undue preference or discrimination against domain name registrants.”

iv. This Board has consistently followed the same two-tiered approach. Early in 2014, its NGPC moved .DOCTOR to join gTLDs in other “highly regulated” sectors,

and undertook to implement the GAC recommendations by a resolution that included a set of public interest commitments (PICs) for *all* registries in that category to follow. These go only so far as “requiring a representation that the Registrant possesses any necessary authorisations, charters, licenses and/or other related credentials for participation in the sector associated with the Registry TLD string.” The committee did not present any additional or different PICs for .DOCTOR or any other single TLD.

v. Since then, ICANN has delegated and entered into registry agreements for a number TLDs in “highly regulated” areas. Those registries have operated with only the PICs called for by the resolution, without otherwise limiting access to the TLDs.

vi. Notwithstanding this history (on which Brice Trail has relied), the Board and staff have gone far beyond any prior limitations on “highly regulated” TLDs, and demanded an additional written PIC, *for .DOCTOR alone*, that its operator “will ensure that the domains in the TLD are ascribed exclusively to legitimate medical practitioners.” This aberration violates express, long-standing ICANN policy prohibiting discrimination and promoting competition and free expression in the namespace, and fails to take into account the foregoing material facts that Brice Trail expected would result in consistent treatment. This committee of the Board can now rectify that isolated error in this unique situation that would have a meaningful impact on, but not beyond, this single TLD.

1. Requestor Information

Name: Donuts Inc. and its applicant Brice Trail, LLC (“Brice Trail” or “Applicant”)

Address: Contact Information Redacted

Email: Contact Information Redacted

Counsel: John M. Genga, Don C. Moody
The IP and Technology Legal Group, P.C.
dba New gTLD Disputes

Address: Contact Information Redacted

Email: Contact Information Redacted

2. Request for Reconsideration of:

- Board action/inaction, reflected in **Annex A** hereto (“Board Decision”)
 Staff action/inaction, imposing PIC 3.m (“New PIC”) in **Annex B** hereto
 (“Staff Action”)

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

Applicant seeks reconsideration of the recent determination by the ICANN staff and Board to restrict .DOCTOR domain names exclusively to “legitimate medical practitioners,” thereby discriminating against many other potential legitimate registrants, and against Brice Trail compared to applicants for other “highly regulated” TLDs.

4. Date of action:

12 February 2015 NGPC meeting.

5. On what date did you become aware of the action?

Notice given 25 February 2015; meeting minutes announced 4 March 2015.

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

6.1. The restriction of the .DOCTOR gTLD to “legitimate medical practitioners” prevents Brice Trail from making registrations available to other registrants rightfully identified with the term “doctor” or who otherwise can lawfully use the term and express themselves in a domain so named without confusion or harm to users.

6.2. Applicant has applied for the TLD in reliance on its right to make .DOCTOR domains more widely available than the Board Decision and Staff Action make possible. Applicant has expended resources to establish a .DOCTOR registry that would operate openly and more broadly.

6.3. The Board Decision and Staff Action discriminate against Brice Trail as compared to applicants for all other domains in the “highly regulated” category. No other gTLD in that category has heretofore been made subject to the conditions that would be imposed upon .DOCTOR, which has been improperly singled out for disparate treatment in violation of established policy.

6.4. Applicant will become unable to compete for the .DOCTOR domain unless it accepts the improper New PIC.

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

Appropriate potential registrants of .DOCTOR domains – such as professors, doctors of law and other credentialed parties, those who perform repairs or have “doctor” in their business name (e.g., “Rug Doctor,” “Computer Doctor”) and directories, review sites, commentators and services that provide information about medical and other types of doctors – are adversely impacted by limiting registration solely to “legitimate medical practitioners.” Such otherwise qualified and valid potential users are precluded by the Board Decision and Staff Action from registering any .DOCTOR domain, contrary to ICANN’s long-established non-discrimination policy. This will also affect end users looking for such proper uses of the term “doctor” and unable to find them in a .DOCTOR domain where they would be most likely to expect such uses.

8. Detail of Board or Staff Action – Required Information

Staff Action: The Staff Action purports to require that Brice Trail and other applicants for .DOCTOR “ensure that the domains in the TLD are ascribed exclusively to legitimate medical practitioners,” contrary to established ICANN policy regarding non-discrimination and freedom of expression.

Board action: When Applicant brought the foregoing to the Board’s attention, the Board acted without consideration of all material information, and adopted the Staff Action requiring the foregoing unprecedented restriction.

Provide the Required Detailed Explanation here:

8.1. The NGPC met on 12 February 2015 to address Applicant’s “concerns ... about staff’s proposed implementation” of a year-earlier NGPC resolution by way of “an additional safeguard for the .DOCTOR TLD.” See **Annex A** at 3. At that meeting, the Board committee decided “for staff to continue to move forward” with requiring the

additional safeguard – *i.e.*, the New PIC – in the “implementation” of the prior NGPC resolution. *Id.* at 4. As explained in greater detail in Section 10, *infra*, that Board Decision was made “without consideration of material information” presented by Applicant, subjecting it to reconsideration under Bylaws Art. IV § 2.2.b.

8.2. The action with which the Board instructed staff “to continue to move forward” itself “contradict[s] established ICANN policy” so as to be subject to reconsideration pursuant to Bylaws Art. IV § 2.2.a. Specifically, staff purported to require that Applicant agree to a set of PICs containing the New PIC appearing in **Annex B** hereto and never before (or since) required from any registry. As shown further in Section 10, *infra*, the New PIC transgresses ICANN policies, expressed in both the Bylaws and the New gTLD Applicant Guidebook (“Guidebook” or “AGB”), prohibiting discriminatory treatment and promoting free expression and competition.

9. What are you asking ICANN to do now?

9.1 Applicant respectfully requests that the BGC remove the New PIC from the set of PICs that ICANN will require for the .DOCTOR gTLD, and treat the domain in the same manner as all other TLDs listed in “highly regulated” sectors by the GAC.

9.2 At minimum, Applicant asks that the Board consider a compromise solution, namely to require a registrant to demonstrate “legitimate medical practitioner” status only if the registrant holds itself out as a medical practitioner. An obstetrician applying for OBSTRETICS.DOCTOR, for example, would have to demonstrate his or her qualification to practice medicine. This would help protect against abuse of medical uses of the domain by non-practitioners (the very conduct the GAC seeks to prevent), and at the same time avoid potential discrimination against other legitimate, non-medical uses of the domain (conduct also opposed by the GAC).

9.3 Applicant also requests a stay of the pending ICANN auction for .DOCTOR until thirty (30) days after the BGC rules on the merits of this Request.

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.

10.1. Brice Trail has been adversely affected by both the Board Decision and Staff Action in purporting to require the New PIC for a .DOCTOR gTLD. It has both procedural standing to make this Request and the substantive right to have it granted.

a) Applicant has standing to make this Request.

10.2. Applicant has been “adversely affected by ... actions of the ICANN Board that have been taken ... without consideration of material information,” as provided in Bylaws Art. IV § 2.2.b.¹ Furthermore, the Board Decision accepts the Staff Action that itself “contradict[s] established ICANN policy,” Bylaws Art. IV § 2.2.a, by allowing the New PIC to stand notwithstanding its discriminatory nature and suppression of free speech and competition. These circumstances give Applicant standing within the meaning of Bylaws Art. IV §§ 2.2.a, b.

10.3. According to the form reconsideration request used here, a requestor must “demonstrate material harm and adverse impact” by the following measures:

10.3.1. *A loss or injury, financial or non-financial.* Brice Trail has described this in Section 6, *supra*, thus satisfying this element of standing.

10.3.2. *A direct and causal connection between the loss or injury and the action or inaction that is the basis of the Request.* The loss or injury to Brice Trail – its inability to make .DOCTOR domains available to all with a legitimate interest in the term, and the discrimination it has suffered in comparison to applicants for other “highly regulated” TLDs (none of whom have had such a restriction imposed on them) – flows directly from the requirement that Brice Trail agree to the New PIC.

¹ The BGC may reconsider such Board action “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.” *Id.* The exception does not come into play here, since Brice Trail provided the Board with all of the information that this Request contends the Board failed to consider.

10.3.3. *The relief requested must be capable of reversing the harm alleged.* Brice Trail seeks exactly that here, asking that the BGC reverse the challenged actions and cause the New PIC to be removed or, alternatively, require verification of “legitimate medical practitioner” status only for registrants so holding themselves out.

b) The Board has acted “without consideration of material information” presented to it by Brice Trail.

10.4. The Board Decision essentially accepted staff’s proposed implementation of the February 2014 NGPC resolution (“Resolution”), without considering information offered by Brice Trail regarding that Resolution and events post-dating it. The NGPC had issued the Resolution specifically to address prior statements by the GAC concerning strings that it viewed as involving “regulated” and “highly regulated” market sectors. The most recent Board Decision, however, overlooks that key information concerning the Resolution and pronouncements of the GAC subsequent to it.

10.5. Specifically, the set of PICs proffered by the NGPC to implement its Resolution – and used for every “highly regulated” TLD since that time – does not include the New PIC. Further, since the Resolution, the GAC has reaffirmed its stance against discrimination in domain name registration, and made clear that it seeks protections for gTLDs *only* in *two* “sectors” – which it terms “regulated” and “highly regulated” – and *not* in any *third*, “ultra-highly” sensitive category. The Board Decision fails to consider this most critical and recent information in the sequence of events.

(1) The GAC Beijing Communiqué proposes safeguards for a variety of new gTLDs, including .DOCTOR.

10.6. In its “Beijing Communiqué” of April 2013,² the Governmental Advisory Council (“GAC”) identified TLDs “linked to regulated or professional sectors” that it found “likely to invoke a level of implied trust from consumers,” and recommended at least five “safeguards [that] should apply to strings ... related to these sectors.” Beijing

² <https://www.icann.org/en/system/files/correspondence/gac-to-board-18apr13-en.pdf>.

Communiqué at 8-9. The GAC there identified .DOCTOR among what it denoted as these “Category 1” strings. *Id.* at 9.

10.7. The GAC further suggested that some of these new gTLDs “may require further targeted safeguards” because of their “associat[ion] with market sectors which have clear and/or regulated entry requirements.” *Id.* at 10. For those, the GAC recommended as many as three additional measures (for a total of up to eight) that it perceived should apply to such TLDs. *Id.* These included implementing means to “validate the registrants’ authorisations, charters, licenses and/or other related credentials for participation in that sector” *Id.*

(2) The GAC Buenos Aires Communiqué suggests moving .DOCTOR to the “highly regulated” category.

10.8. At the ICANN Buenos Aires meeting in November 2013, the NGPC conferred with the GAC over whether and to what extent ICANN should implement the GAC’s Beijing recommendations. The GAC specifically considered reclassifying the .DOCTOR domain from “regulated” to “highly regulated” in Beijing “Category 1” terms.

10.9. Meeting participants discussed the wide use of the generic term “doctor” beyond the medical field, including Board and NGPC member Chris Disspain, who pointed out:

[I]n many, many countries, the term ‘doctor’ is used as a name of businesses. A computer doctor.... It’s a term that is used in business names, in company names for people who fix things. And there is no prohibition on the use of that term.³

³ <https://buenosaires48.icann.org/en/schedule/sun-gac-ngpc/transcript-gac-ngpc-17nov13-en>. The Panel will find the entire transcript of that meeting instructive, as it makes clear that the discussion centered around moving the TLD from “regulated,” where ICANN had placed it for reasons such as those quoted above, to “highly regulated,” but never suggested an even more stringent third category, or that placing it in the second should also include limiting registration solely to “medical practitioners.”

Nevertheless, the GAC advised in its Buenos Aires Communiqué that the ICANN Board “re-categorise the string .doctor as falling within Category 1 safeguard advice addressing highly regulated sectors,” and went on to recommend providing the domain “exclusively to legitimate medical practitioners.”⁴

(3) The NGPC February 2014 Resolution establishes uniform standards for all gTLDs in “highly regulated” sectors.

10.10. Having on its agenda, among other things, the topic “Remaining Items from Beijing, Durban and Buenos Aires GAC Advice,” the NGPC met on 5 February 2014 and issued the Resolution copied in **Annex C** hereto.⁵ The Resolution adopts the GAC “Category 1” safeguards to the extent set forth in Annexes 1 and 2 thereto, which appear, respectively, in **Annex C-1** and **Annex C-2** hereto.⁶

10.11. **Annex C-1**, at page 5, refers to the GAC “Category 1” safeguards, “accepts the advice” and “adopts the implementation framework” set forth in **Annex C-2**. The “implementation framework” provides uniform PICs for all “highly regulated” TLDs, except for those identified as requiring “special safeguards” (.DOCTOR not among them). See **Annex C-2**.

(4) The Resolution does not provide for any different or additional PICs for .DOCTOR.

10.12. Both the GAC Buenos Aires Communiqué and the reference to it at page 5 of **Annex C-1** contain language about “ascribing” .DOCTOR domains “exclusively to legitimate medical practitioners.” Yet, the “implementation framework” adopted by the NGPC in **Annex C-2** does not so single out .DOCTOR for such disparate treatment.

⁴ See <https://www.icann.org/en/system/files/correspondence/gac-to-board-20nov13-en.pdf> at 2.

⁵ Also available at <https://www.icann.org/resources/board-material/resolutions-new-gtld-2014-02-05-en>.

⁶ Available at <https://www.icann.org/en/system/files/files/resolutions-new-gtld-annex-1-05feb14-en.pdf> and <http://www.icann.org/en/groups/board/documents/resolutions-new-gtld-annex-2-05feb14-en.pdf>, respectively.

10.12.1. Resolution Annex 2 includes a chart of “regulated” and “highly regulated” Category 1 sectors. The chart reflects that Category 1 safeguards 1 through 3 apply to the TLDs appearing in the “regulated” column, and that protections 1 through 8 govern those listed in the “highly regulated” column, where .DOCTOR appears. It also identifies a few other TLDs, which do not include .DOCTOR, requiring additional protective measures as set forth in items 9 and 10. See **Annex C-2** at 1-2.

10.12.2. Resolution Annex 2 goes on to list the numbered safeguards 1 through 8, then 9 and 10. It identifies these measures as PICs to be incorporated into Specification 11 of New gTLD Registry Agreements for the listed TLD. *Id.* at 3-4.

10.12.3. More specifically, Resolution Annex 2 does not provide for a PIC ascribing .DOCTOR domains “exclusively to legitimate medical practitioners.” The PICs go only so far as drafted to require that operators of “highly regulated” registries:

... include a provision in their Registry-Registrar Agreements that requires Registrars to include in their Registration Agreements a provision requiring a representation that the Registrant possesses any necessary authorisations, charters, licenses and/or other related credentials for participation in the sector associated with the Registry TLD string.

Id. at 3 ¶ 6. Thus, for example, a registrant for a .LAWYER domain name would have to represent in the registration agreement whatever qualification necessary to participate in that sector, such as a bar license, employment by a licensed attorney, or the provision of some product or service to, or commentary on, the legal profession (*e.g.*, court reporters, lawyer directories, legal publications, etc.). Applicants for .DOCTOR domains would need to represent themselves similarly – *e.g.*, as licensed doctors or nurses, those with a doctoral degree, those who “doctor” things in need of repair, or providers of products or services to the foregoing (medical devices, dissertation services, lessors of work space to medical or other “doctors,” etc.).

10.13. The “implementation framework” of Resolution Annex 2 follows the GAC’s identification of two types of “Category 1” strings – “regulated” and “highly regulated.” The GAC had identified .DOCTOR in its Beijing Communiqué as part of a “regulated” sector, and simply “re-categorize[d]” it in the Buenos Aires Communiqué as “highly regulated.” It did not recommend a *third* class of *extremely* highly regulated activity – to which only a .DOCTOR gTLD would belong and face restrictions imposed on no other. **Annex C-2**, therefore, similarly does not provide for such a third, ultra-sensitive category in implementing the GAC communiqués.

(5) The GAC reaffirms its non-discrimination stance and takes no further action.

10.14. After the NGPC issued its Resolution, the GAC published further advice from the London meeting of ICANN in June 2014. The London Communiqué, submitted herewith as **Annex D**, continues to refer only to two types of “Category 1” TLDs – those representing “sectors” that are “regulated” and “highly regulated.”

10.15. The London Communiqué also addresses “strings representing generic terms.” It makes clear the GAC’s position that registration policies for such TLDs “should not provide undue preference or discrimination against domain name registrants.” **Annex D** at 8.

10.16. At the most recent ICANN meeting in Singapore, the GAC announced that it essentially would “rest” from further active involvement with new gTLD safeguards:

The GAC considers the Singapore 52 meeting an important milestone in confirming the record to date of the NGPC’s adoption and implementation of GAC advice, as well as in setting the stage for subsequent GAC work related to the monitoring of ICANN’s compliance and enforcement activities.

GAC 2015 Singapore Communiqué at 4 (**Annex E** hereto). The GAC thus confirms the manner in which the NGPC has implemented its advice regarding new gTLDs in

“regulated” and “highly regulated” areas – which does not provide for the New PIC or single .DOCTOR out for it – and will henceforward assume more of a “monitoring” role.

(6) The Board Decision fails to consider information clarifying the non-discriminatory application of the Resolution.

10.17. The Board Decision accepts the Staff Action and *dicta* from the GAC and NGPC while overlooking what these bodies actually *did* before, at the time of and since the Resolution. Specifically:

10.17.1. The GAC Beijing Communiqué suggests safeguards for TLDs in two and only two market “sectors” – “regulated” and “highly regulated.”

10.17.2. The GAC maintains these (and only these) two categories in its Buenos Aires Communiqué. There, it simply “re-categorizes” .DOCTOR from “regulated” to “highly regulated.” It does not create a third classification for even more acutely policed activity to which .DOCTOR alone, and none other, would belong.

10.17.3. The Resolution remains consistent with the GAC’s two-tiered approach, and implements that concept with a PIC structure that does not distinguish the .DOCTOR gTLD from those representing any other “highly regulated” sector.

10.17.4. The New gTLD Program has *never*, until .DOCTOR, required the New PIC for *any* TLD, whether or not in a “highly regulated” sector. These include domains that describe licensed professionals or health-related activities as .DOCTOR may, but without restricting registration only to such narrow constituencies – domains such as .LAWYER, .ATTORNEY, .SURGERY, .DENTIST and .DDS.⁷

10.17.5. In its London Communiqué subsequent to the Resolution, the GAC reaffirms its position, and ICANN policy, that those registering names in a particular domain should be neither preferred nor discriminated against.

⁷ See <https://gtldresult.icann.org/application-result/applicationstatus/viewstatus>.

10.17.6. The PICs used for all “highly regulated” TLD types – until .DOCTOR got singled out for disparate treatment – incorporate the non-discrimination policy established by ICANN and endorsed by the GAC.

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.

Registry Operator of a “Generic String” TLD may not impose eligibility criteria for registering names in the TLD that limit registrations exclusively to a single person or entity and/or that person’s or entity’s “Affiliates” (as defined in Section 2.9(c) of the Registry Agreement). “Generic String” means a string consisting of a word or term that denominates or *describes a general class* of goods, services, groups, organizations or things, *as opposed to distinguishing a specific brand* of goods, services, groups, organizations or things from those of others.

See **Annex B ¶¶ 3.c, d** (emphases added). To require the New PIC would contravene such non-discrimination commitments prescribed in the same PIC set.

10.17.7. In its 2015 Singapore Communiqué, the GAC “confirms” the “implementation” of its prior advice regarding TLDs in “regulated” and “highly regulated” areas – which had not singled out .DOCTOR for disparate treatment – and announces it will transition from an active to a “monitoring” role.

10.18. The Board Decision references none of the foregoing. Rather, it accepts “ascribing” .DOCTOR domains “exclusively to legitimate medical practitioners” when its own actions and those of the GAC at no time created any such third “super-category” solely for that TLD. The Board thus appears not to have “consider[ed] ... material information” in reaching its conclusion. The Board Decision, therefore, should be

reconsidered and made consistent with the two-category structure that the GAC has outlined and which the NGPC has undertaken to implement, and which neither body proposes to or does discriminate against the one TLD at issue in this proceeding.

c) The Board Decision adopts Staff Action that violates ICANN policy expressed in its Bylaws and the Guidebook.

10.19. The Board Decision affirms the Staff Action requiring the New PIC, expressing “the sense ... for staff to continue to move forward” with it. **Annex A** at 4. The unprecedented New PIC, however, singles out the .DOCTOR gTLD, and Brice Trail among its applicants, for disparate treatment as compared to others with strings in “highly regulated” sectors from whom ICANN has not required such a PIC, undermining the policy against discrimination laid out by ICANN in its Bylaws. The New PIC further frustrates the policy of promoting free expression emphasized in the Guidebook and included in its commitment to “carry[] out its activities in conformity with relevant principles of international law ... and local law.”⁸

(1) The New PIC discriminates against Brice Trail in comparison to registries for other “highly regulated” strings.

10.20. “ICANN shall not apply its standards, policies, procedures, or practices inequitably or single out any particular party for disparate treatment unless justified by substantial and reasonable cause, such as the promotion of effective competition.” Bylaws Art. II § 3. Yet, the Board Decision adopting the Staff Action does exactly that.

10.21. ICANN has entered into many registry agreements for gTLDs denoting “highly regulated” sectors identified by the GAC. None has had the type of content- and registrant-based restriction that the Staff Action, validated by the Board Decision, imposes upon Brice Trail and the other applicants for .DOCTOR. This unfairly treats Brice Trail in comparison to operators of similarly “highly sensitive” strings. Those registries can make their “space” available to a much broader and more diverse

⁸ Arts. Incorpor. § 4, <https://www.icann.org/resources/pages/governance/articles-en>.

customer base, without the administrative burden of having to police their domains as the New PIC would require Brice Trail to do.

10.22. The standard PIC set required for TLDs in “highly regulated” sectors has at all times placed the sole onus on the *registrant* to warrant compliance with licensing or other credentials “associated with” the “sector” represented by the TLD. The New PIC overrides the scheme uniformly applied to all similarly situated applicants.

10.23. Brice Trail has relied on the expectation of treatment equal to that given to other “highly regulated” registries. It has pursued this domain with the understanding that it could make second level names available to the same extent as others in the “highly regulated” category,⁹ and not prevented from doing so by actions contrary to the non-discrimination policy of ICANN's Bylaws. Reconsideration of the Staff Action and Board Decision are thus appropriate.

(2) The Staff Action and Board Decision infringe the free expression rights of Brice Trail and potential registrants.

10.24. ICANN expressly designed its new gTLD program to increase choice and competition in domain names and promote free expression on the Internet. See, e.g., AGB Preamble; *id.* § 1.1.2.3; *id.* Mod. 2 Attmt. at A-1; and *id.* at 3-21. Applicant would operate the .DOCTOR gTLD consistent with such goals, and make registrations in the domain open to all uses legitimately associated with the term “doctor” and the myriad meanings and uses of that common English-language word:

⁹ Brice Trail did not learn that ICANN would require the New PIC until around the beginning of this year. It expected ICANN to handle the .DOCTOR gTLD as it had all others in the “highly regulated” category, consistent with the PIC set annexed to the Resolution and with the GAC’s reiteration of non-discrimination principles in London and confirmation of the NGPC’s implementation of its “Category 1” advice in Singapore. When it learned of the Staff Action, Brice Trail engaged immediately with staff and then with the Board in an effort to have the discriminatory and onerous New PIC removed, and has filed this Request timely since getting notice of the Board Decision rejecting its entreaty. Rather than weigh down this Request with that history, Brice Trail will make evidence of the entire sequence of events available to the BGC on request to demonstrate that it has initiated this proceeding timely.

.DOCTOR will be attractive to registrants with affinity for or professional interest in the term DOCTOR. This broad and diverse group includes a wide variety of medical practitioners (including physicians, osteopaths, dentists, veterinarians, optometrists, psychiatrists, chiropractors, podiatrists, and others); academics, educators, therapists and counselors and others (who carry the educational title “doctor”); a variety of commercial businesses who specialize in expert advice for specific goods or services (e.g., car.doctor); attorneys and legal practitioners (in some cultures); and consumers who wish to offer opinion and/or directory services about the range and quality of services offered in the space.

Applic. § 18(a). The New PIC that the Staff Action and Board Decision would require imposes a severe prior restraint on the wide possible expressive uses for this TLD.¹⁰

10.25. Free speech principles form integral parts of laws in the U.S. and around the world, with which ICANN has committed to comply. Arts. Incorpor. § 4. For example, the United Nations proclaims, “Everyone has the right to freedom of opinion and expression; this right includes freedom ... to seek, receive and impart information and ideas through any media and regardless of frontiers.” Univ. Dec. Hum. Rts. Art. 19, http://www.un.org/en/documents/udhr/index.shtml/hr_law.shtml#mainnav. Also, the First Amendment to the United States Constitution prohibits “abridging the freedom of speech, or of the press ...” U.S. Const. Amend. 1. Acting as a quasi-government body overseeing the global Internet, ICANN has transgressed these legal doctrines and its own policies regarding free expression and compliance with law.

10.26. In *Sorrell v. IMS Health Inc.*, ___ U.S. ___, 131 S. Ct. 2653, 180 L. Ed. 2d 544 (2011), the U.S. Supreme Court invalidated a State of Vermont statute purporting to

¹⁰ This would result in numerous individuals and businesses having the legal right to use the term in everyday life not having the right to do so with a domain name.

prohibit health insurers, pharmacies and other entities from selling or permitting the use of data relating to doctors' prescriptions for purposes of marketing or promoting a prescription drug without the consent of the prescriber. The Court held that the Vermont law's "content- and speaker-based restrictions on" commercial speech violate the First Amendment by impermissibly burdening "disfavored speech by disfavored speakers." 131 S. Ct. at 2663. In other words, the Supreme Court viewed the Vermont statute as singling out particular speakers based on the nature of their business and the content of their speech. Due to the law's content-based restrictions, the Supreme Court strictly scrutinized the statute and – even under the less rigorous standard applicable to "commercial" vs. "creative" speech, and factoring in Vermont's argument for the need to protect healthcare consumers' privacy and ensure that doctors have the most accurate information concerning drugs they may prescribe – struck it down.

10.27. The New PIC has a comparable intent and effect, and should meet with the same result. The Board has effectively decided that only certain types of registrants can "speak" in a .DOCTOR domain. The New PIC would dictate the gTLD's *content*,¹¹ limiting it to medical discourse by those that the registry *operator* has the *burden* to determine constitute "legitimate medical practitioners."

10.28. Such restrictions bar from the TLD numerous participants who have valid rights and interests in, and uses for, the term "doctor." Those with doctorate degrees can have no place in the gTLD if they are not medical doctors. Nor may businesses having nothing to do with medicine but having "doctor" in their name. Similarly shut out

¹¹ This runs directly contrary to ICANN policy. As its President and CEO testified just two weeks ago before the U.S. Senate Committee on Commerce, Science & Transportation: "ICANN has nothing to do with content. We do not deal with content. Our work is very limited to the names and numbers and the protocol parameters which are way down in the plumbing of the Internet. And therefore, ... ICANN does not have a particular role in managing or enforcing at a high level IP and content around the world." Hrg. Transcr. at 13-14, <http://www.cq.com/doc/congressionaltranscripts-4632252?25>.

are those who supply products or services to, or provide information or commentary about, any of the foregoing.

10.29. Such artificial limitations lead to absurd results. A psychologist cannot register “brain.doctor,” “marriage.doctor” or any .DOCTOR domain name, but a dermatologist can. A “legitimate medical practitioner” could step outside of his or her area of expertise to register “directory.doctor” or “blog.doctor,” while information providers or publishers who do such things as their regular business could not. Medical practitioners could even acquire domain names completely outside the medical field, such as “domain.doctor” or “house.doctor,” whereas “real” domain and house “doctors” such as Steve Crocker and Bob Vila could not.

10.30. To the extent it yields such incongruous results, the New PIC creates opportunities to mislead users while intended ostensibly to protect them. This reveals the harm of limiting speech, and the value of the ICANN policy promoting it. The BGC has the authority and discretion to rectify this discrepancy and give full effect to ICANN free expression policy by eliminating or at least significantly curtailing the New PIC.

d) Conclusion

10.31. Brice Trail has standing to bring this Request as a party “adversely affected by” the Board Decision and Staff Action. The Board Decision came without giving appropriate weight to all relevant information presented by Applicant, and it and the Staff Action violate established ICANN policy, as well as GAC advice against registrant discrimination.

10.32. The Request thus satisfies the prerequisites for reconsideration. The BGC should grant the Request and order the removal of the New PIC from the proposed registry agreement for .DOCTOR, and thereby apply the PICs for TLDs in all “highly regulated” areas on a consistent, non-discriminatory basis that puts all applicants for such strings on equal footing to maximize expressive opportunities in their respective domains. In the alternative, it can adopt a compromise position that requires

verification of “legitimate medical practitioner” status only for those registrants claiming such credentials when applying for a .DOCTOR domain name.

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

Yes

No

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.

Not applicable.

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.

DATED: March 12, 2015

Respectfully submitted,

THE IP and TECHNOLOGY LEGAL GROUP
dba New gTLD Disputes

By: /jmg/
John M. Genga
Attorneys for Applicant/Requestor
BRICE TRAIL, LLC

Documents Submitted

- Annex A:** Board Decision concerning .DOCTOR
- Annex B:** PIC set containing New PIC pursuant to Staff Action
- Annex C:** NGPC Resolution 2014.02.05.NG01
- Annex C-1:** Annex 1 to NGPC Resolution
- Annex C-2:** Annex 2 to NGPC Resolution
- Annex D:** GAC London Communiqué
- Annex E:** GAC Singapore Communiqué