

**THE INTERNATIONAL CENTRE FOR EXPERTISE OF THE  
INTERNATIONAL CHAMBER OF COMMERCE**

CASE No. EXP/429/ICANN/46

BUNDESVERBAND DER DEUTSCHEN TOURISMUSWIRTSCHAFT E.V.

(GERMANY)

vs/

NEW CYPRESS, LLC

(USA)

This document is a copy of original of the Expert Determination rendered in conformity with the New gTLD Dispute Resolution Procedure as provided in Module 3 of the gTLD Applicant Guidebook from ICANN and the ICC Rules for Expertise.

INTERNATIONAL CENTRE FOR EXPERTISE  
of the  
INTERNATIONAL CHAMBER OF COMMERCE  
ICC CASE N°: EXP/429/ICANN/46

BETWEEN

BUNDESVERBAND DER DEUTSCHEN TOURISMUSWIRTSCHAFT (BTW) E.V.

(Objector)

AND

NEW CYPRESS, LLC

(Applicant)

**EXPERT DETERMINATION**

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## Abbreviations

International Centre for Expertise of the International Chamber of Commerce	<b>Centre</b>
Bundesverband der Deutschen Tourismuswirtschaft (BTW) e. V.	<b>Objector</b>
New Cypress, LLC	<b>Applicant</b>
The Objector and the Applicant jointly	<b>Parties</b>
Objector's Community Objection dated March 13, 2013	<b>Objection</b>
Applicant's response to the Objection dated May 15, 2013	<b>Response</b>
Internet Corporation for Assigned Names and Numbers	<b>ICANN</b>
Generic top-level domain	<b>gTLD</b>
ICANN's gTLD Applicant Guidebook	<b>Guidebook</b>
Module 3 of the Guidebook	<b>Module 3</b>
Attachment to Module 3 entitled 'New gTLD Dispute Resolution Procedure'	<b>Procedure</b>
2003 Rules for Expertise of the International Chamber of Commerce	<b>Rules</b>
Applicant's document addressed to ICANN's Government Advisory Committee entitled 'Reply to the Governments of Germany, Switzerland and Austria'	<b>GAC Reply</b>

1. This is an Expert Determination issued pursuant to ICANN's gTLD Applicant Guidebook ("*Guidebook*"), Module 3 of the Guidebook ("*Module 3*"), the Attachment to Module 3 entitled 'New gTLD Dispute Resolution Procedure' ("*Procedure*"), and the 2003 Rules for Expertise of the International Chamber of Commerce ("*Rules*") supplemented by the ICC Practice Note on the Administration of Cases under the new gTLD Dispute Resolution Procedure.

**I. IDENTIFICATION OF THE PARTIES, THEIR REPRESENTATIVES AND THE EXPERT**

2. The Objector is: **Bundesverband der Deutschen Tourismuswirtschaft (BTW) e.V.** a German corporation domiciled at Am Weidendamm 1A, 10117, Berlin, Germany (the "*Objector*").
3. The Objector is represented in this dispute by Ms. Katrin Ohlmer, DOTZON GmbH, Akazienstr. 2, 10823 Berlin, Germany (Tel.: +49 30 49892722; Email: [katrin@dotzon.com](mailto:katrin@dotzon.com))
4. The Applicant is: **New Cypress, LLC** a Delaware corporation domiciled at 155 108<sup>th</sup> Avenue NE, Suite 510, Bellevue, WA, 98004, United States of America (the "*Applicant*").
5. The Applicant is represented in this dispute by Mr. John M. Genga and Mr. Don. C. Moody, The IP & Technology Legal Group, P.C., dba New gTLD Disputes, 15260 Ventura Blvd., Suite 1810, Sherman Oaks, CA 91403, United States of America (Tel.: + 1 888 402 7706; + 1 818 444 4582; Email: [john@mewgtlddisputes.com](mailto:john@mewgtlddisputes.com) / [don@newgtlddisputes.com](mailto:don@newgtlddisputes.com)).
6. The Objector and the Applicant are jointly referred to as the "*Parties*".
7. The Expert is: **David JA Cairns** of B. Cremades y Asociados, Goya 18, planta 2, 28001 Madrid, Spain; (Tel.:+ 34 91 423 7200; Email: [d.cairns@beremades.com](mailto:d.cairns@beremades.com)).

**II. PROCEDURAL HISTORY**

8. The Applicant has applied for the gTLD string <reisen>. The Application was submitted electronically and publicly posted by ICANN on June 13, 2012.



9. At a date not identified in the record, ICANN's Government Advisory Committee referred certain questions of the governments of Germany, Austria and Switzerland regarding the <reisen> application to the Applicant. The Applicant responded in a document entitled 'Reply to the Governments of Germany, Switzerland and Austria' (the "*GAC Reply*").
10. The Objector submitted a Community Objection dated March 13, 2013 (the "*Objection*") to the International Centre for Expertise of the International Chamber of Commerce (the "*Centre*") pursuant to the Procedure.
11. Pursuant to Article 11 of the Procedure the Applicant submitted a response to the Objection dated May 15, 2013 (the "*Response*").
12. On June 19, 2013 the Centre notified the Parties that pursuant to Article 13 of the Procedure and Article 9(5)(d) of the Rules that the Centre had appointed David JA Cairns as Expert Panel in this proceeding.
13. On July 18, 2013, the Centre confirmed the Parties had paid the estimated costs, confirmed the full constitution of the Expert Panel, and transferred the file to the Expert Panel. Accordingly, the Expert Panel was constituted and the 45-day time limit for the submission of the draft Expert Determination to the Centre for scrutiny started as from that date.
14. Pursuant to Article 12(2) of the Rules and after consulting with the Parties the Expert Panel on July 25, 2013 issued a provisional timetable for the conduct of the proceedings.
15. Pursuant to the provisional timetable the Objector provided an Additional Submission dated July 30, 2013 on the sole question of the representative role of the Objector and its significance for the standing requirements. The Applicant provided an Additional Submission with an accompanying declaration on the same sole question on August 2, 2013.
16. Pursuant to Article 5 of the Procedure the language of the proceedings is English. The Objector submitted some supporting evidence with its Objection in German. The Expert Panel requested a translation into English of this material that was duly provided on August 2, 2013.
17. In accordance with Article 6 of the Procedure all communications by the Parties, the Expert Panel and the Centre were submitted electronically. There was no oral hearing during the proceedings.



### III. SUMMARY OF THE PARTIES' POSITIONS

#### A. *The Application*

18. The Applicant's Application contains the following statements regarding the Applicant, its parent company (Donuts Inc) and the purposes, benefits and use of the <reisen> gTLD string:

*"18(a). Describe the mission/purpose of your proposed gTLD.*

#### *ABOUT DONUTS*

*Donuts Inc. is the parent applicant for this and multiple other TLDs. The company intends to increase competition and consumer choice at the top level. It will operate these carefully selected TLDs safely and securely in a shared resources business model.....*

#### *THE .REISEN TLD*

*This TLD is attractive and useful to end-users as it better facilitates search, self-expression, information sharing and the provision of legitimate goods and services. Along with the other TLDs in the Donuts family, this TLD will provide Internet users with opportunities for online identities and expression that do not currently exist. In doing so, the TLD will introduce significant consumer choice and competition to the Internet namespace – the very purpose of ICANN's new TLD program.*

*This TLD is a generic term and its second level names will be attractive to a variety of Internet users.....*

*The .REISEN TLD will be of interest to the millions of individuals and organizations involved in the business or enjoyment of travel. This very large and diverse group includes those involved in transportation, accommodation and lodging, dining, entertainment, sightseeing and exploration, travel education, adventure travel, travel writing, and other commercial and non-commercial pursuits. The TLD also is useful to the many worldwide who elect to comment on travel providers, destinations, tours, etc., or who simply wish to catalogue their travel experiences or otherwise have a forum for self-expression. This widely inclusive TLD would be operated in a secure and legitimate manner on behalf of all registrants.*

#### *DONUTS' APPROACH TO PROTECTIONS*

*No entity, or group of entities, has exclusive rights to own or register second level names in this TLD. There are superior ways to minimize the potential abuse of second level names, and in this application Donuts will describe and commit to an extensive array of protections against abuse, including protections against the abuse of trademark rights.*

*We recognize some applicants seek to address harms by constraining access to the registration of second level names. However, we believe attempts to limit abuse by limiting registrant eligibility is unnecessarily restrictive and harms users by denying access to many legitimate registrants. Restrictions on second level domain eligibility would prevent law-abiding individuals and organizations from participating in a space to which they are legitimately connected, and would inhibit the sort of positive innovation we intend to see in*

*this TLD. As detailed throughout this application, we have struck the correct balance between consumer and business safety, and open access to second level names.*

*By applying our array of protection mechanisms, Donuts will make this TLD a place for Internet users that is far safer than existing TLDs. Donuts will strive to operate this TLD with fewer incidences of fraud and abuse than occur in incumbent TLDs. In addition, Donuts commits to work toward a downward trend in such incidents.*

#### *OUR PROTECTIONS*

*Donuts has consulted with and evaluated the ideas of international law enforcement, consumer privacy advocacy organizations, intellectual property interests and other Internet industry groups to create a set of protections that far exceed those in existing TLDs, and bring to the Internet namespace nearly two dozen new rights and protection mechanisms to raise user safety and protection to a new level.*

*These include eight, innovative and forceful mechanisms and resources that far exceed the already powerful protections in the applicant guidebook. These are:*

- 1. Periodic audit of WhoIs data for accuracy;*
- 2. Remediation of inaccurate Whois data, including takedown, if warranted;*
- 3. A new Domain Protected Marks List (DPML) product for trademark protection;*
- 4. A new Claims Plus product for trademark protection;*
- 5. Terms of use that prohibit illegal or abusive activity;*
- 6. Limitations on domain proxy and privacy service;*
- 7. Published policies and procedures that define abusive activity; and*
- 8. Proper resourcing for all of the functions above.*

*They also include fourteen new measures that were developed specifically by ICANN for the new TLD process. These are:*

- 1. Controls to ensure proper access to domain management functions;*
- 2. 24/7/365 abuse point of contact at registry;*
- 3. Procedures for handling complaints of illegal or abusive activity, including remediation and takedown processes;*
- 4. Thick WhoIs;*
- 5. Use of the Trademark Clearinghouse;*
- 6. A Sunrise process;*
- 7. A Trademark Claims process;*
- 8. Adherence to the Uniform Rapid Suspension system;*
- 9. Adherence to the Uniform Domain Name Dispute Resolution Policy;*
- 10. Adherence to the Post Delegation Dispute Resolution Policy;*
- 11. Detailed security policies and procedures;*
- 12. Strong security controls for access, threat analysis and audit;*
- 13. Implementation DNSSEC; and*
- 14. Measures for the prevention of orphan glue records.*

*.....*

**18(b). How do you expect that your proposed gTLD will benefit registrants, Internet users, and others?**

....

**THE GOAL OF THIS TLD**

*This and other Donuts TLDs represent discrete segments of commerce and human interest, and will give Internet users a better vehicle for reaching audiences. In reviewing potential strings, we deeply researched discrete industries and sectors of human activity and consulted extensive data sources relevant to the online experience. Our methodology resulted in the selection of this TLD – one that offers a very high level of user utility, precision in content delivery, and ability to contribute positively to economic growth.*

...

**INNOVATION**

....

*Donuts will not limit eligibility or otherwise exclude legitimate registrants in second level names. Our primary focus will be the behavior of registrants, not their identity.*

*Donuts will specifically adhere to ICANN-required registration policies and will comply with all requirements of the Registry Agreement and associated specifications regarding registration policies. Further, Donuts will not tolerate abuse or illegal activity in this TLD, and will have strict registration policies that provide for remediation and takedown as necessary.*

*Donuts TLDs will comply with all applicable laws and regulations regarding privacy and data protection. Donuts will provide a highly secure registry environment for registrant and user data (detailed information on measures to protect data is available in our technical response).*

*Donuts will permit the use of proxy and privacy services for registrations in this TLD, as there are important, legitimate uses for such services (including free speech rights and the avoidance of spam). Donuts will limit how such proxy and privacy services are offered (details on these limitations are provided in our technical response). Our approach balances the needs of legitimate and responsible registrants with the need to identify registrants who illegally use second level domains.*

.....

**18(c). What operating rules will you adopt to eliminate or minimize social costs?**

*Generally, during the Sunrise phase of this TLD, Donuts will conduct an auction if there are two or more competing applications from validated trademark holders for the same second level name. Alternatively, if there is a defined trademark classification reflective of this TLD, Donuts may give preference to second-level applicants with rights in that classification of goods and services. Post-Sunrise, requests for registration will generally be on a first-come, first-served basis.*

.....





**19. Is the application for a community-based TLD?**

No

....

**29. Rights Protection Mechanisms**

**1.0. INTRODUCTION**

.....

*The legal regime for our gTLD will include all of the ICANN-mandated protections, as well as some independently developed RPMs proactively included in our Registry-Registrar Agreement. Our RPMs exceed the ICANN-required baseline. They are:*

- *Reserved names: to protect names specified by ICANN, including the necessary geographic names.*
- *A Sunrise Period: adhering to ICANN requirements, and featuring trademark validation via the Trademark Clearinghouse.*
- *A Trademark Claims Service: offered as per ICANN requirements, and active after the Sunrise period and for the required time during wider availability of the TLD.*
- *Universal Rapid Suspension (URS)*
- *Uniform Dispute Resolution Process (UDRP)*
- *Domain Protected Marks List (DPML)*
- *Claims Plus*
- *Abusive Use and Takedown Policies*

...

**3.0. PRE-SUNRISE: RESERVED AND PREMIUM NAMES**

*Our Pre-sunrise phase will include a number of key practices and procedures.*

.....

*We also will designate certain domains as “premium” domains. These will include domains based on generic words and one-character domains. These domains will not be available in Sunrise, and the registry may offer them via special means such as auctions and RFPs.*

.....”

**B. The Objection**

19. The Objection is in three parts. The first part addresses the Objector’s standing to object; the second part describes the basis of the Objection; and the third part relates to potential detriment to the community caused by the Application
20. The Objector states that it is an established institution with about forty members that represents a significant portion of the German speaking travel community. It states that it represents the interests of the entire German travel speaking community according to its Articles. It was founded in 1995.

21. The Objector states that it has an ongoing relationship with a clearly delineated community. It refers to mechanisms of participation through its corporate organs. It states that it has an institutional purpose relating to the benefit of the community as it represents the interests of the entire community according to its articles. Finally it states that it performs regular activities that benefit the community, referring to its role as a point of contact with political institutions, the provision of expert opinions and reports on legislative proposals, as well as working groups, blogs, meetings, conventions and a yearbook. It also refers to European and German regulations setting the boundaries around the community.
22. In the second part dealing with the description of the basis of the Objection, the Objector states that it is a clearly defined and structured community. It states that the community consists of more than 80,000 commercial entities, and has more than 2.9 million employees.
23. The Objector alleges that there is substantial opposition within the community referring to the number of expressions of opposition relative to the composition of the community and saying that an ‘overwhelming’ portion of the community expresses opposition through its representative organisation. It also refers to the representative nature of entities expressing opposition, their recognised stature, the distribution or diversity amongst sources of opposition, the historical defence of the community by the Objector in other contexts, and the costs incurred by the Objector in respect of the ICANN new gTLD programme.
24. As to targeting, the Objector states that the <reisen> gTLD is clearly linked to the entire community and matches the name under which stakeholders describe their business, products and services to consumers. It states that the application specifically targets the community and also refers to other indications of targeting.
25. In the third part, the Objector states that the Application does not provide protective measures for the community, with the result of considerable direct or indirect impairment of rights.
26. The Objector states that there will be damage through deception of users. It states that Applicant proposes an open registry, meaning that non-community members will be able to register domain names. However the relevant public will expect <reisen> websites to be operated by the community. The public will also expect travel services under the <reisen> gTLD will be subject to German language consumer protection and data protection legislation, as well as the self-imposed standards of the community. Further, the Applicant will allow the use of proxy or privacy services, and this will prejudice consumers, as well as obstruct the



detection of phishing activities. Consumers will also be prejudiced by falsely assuming the TLD will be sanctioned by the appropriate associations of the community, and use of the domain will disrupt the efforts of self-regulation by the community.

27. The Objector also refers to evidence that the Applicant does not intend to act in accordance with the interests of the community, referring to the absence of cooperation with the German-speaking travel community and the lack of community-specific protection mechanisms. The Objector states that the applied-for domain will result in massive interference with the main marketing and sales channels as the German travel community expects high levels of quality and competence, particularly as <reisen>, unlike other TLDs, is a specific German language extension. The Objector refers to the concern in the community with the transition to an online, electronic model with dependency on the Internet and the domain name system.
28. As to the nature and extent of economic damage to the community the Objector states that the community has developed the trust of customers over decades and a loss of confidence and reputation would damage the community, particularly through the operation of a system of open registration, the system of allocation or premium names, the application of US law through the location of the registry in the United States (hampering users in a German-speaking area through requiring resort to an alien foreign language legal system). Finally it states that *“there is absolute certainty of detriment in case “.REISEN” is operated by the Applicant without appropriate community-based accountability. Not only the economic damage in the form of negative externalities is massive, but also its detriment to the reputation and interests of the community which cannot be measured in terms of money.”*
29. The Objector requests by way of relief that the Panel acknowledges that the <reisen> string targets the German-speaking travel community, that there is substantial opposition to the Application from a significant portion of the German-speaking travel community, and that consequently the Application for the <reisen> gTLD should be rejected.

## ***B. The Response***

30. The Applicant states the Objector employs the objection process to block the <reisen> gTLD for the purpose of protecting the value of its own application for the <reise> gTLD. It states that the Objector claims a cyber-monopoly over a word that does not describe a clearly delineated community. It states that the Objector’s failure to file and/or serve the

Objection in a timely manner compels the Panel to refuse to consider it for invalidity. It also states the Objector lacks standing to object since ICANN does not reserve community objections for mere industry segments or competing applicants. They must also represent a *bona fide* community. It states that had the Objector believed that it met the community criteria, it should have applied as such because a community has priority over all non-community applicants for the same string.

31. The Applicant states that the Objector does not represent a clearly delineated community, or show that such a community has a substantial opposition to, or strong association with the <reisen> gTLD string. The Applicant states that the Objector demonstrates no material detriment to its purported community.
32. As to standing, the Applicant states that the Objection was not served until April 2, 2013, three weeks after the deadline and should be dismissed for failure to comply with notice provisions of the Procedure. Secondly, the Applicant says the community concept in the new gTLD programme must be distinguished from an 'industry segment'. It states that ICANN did not intend for private parties purportedly representing an entire industry to claim community status.
33. The Applicant states that the Objector has failed to show that it is an established institution. It states that it only came into existence 17 years ago, and has limited membership. Further, "*Objector's extremely narrow representation of a handful German-speaking travel industry interests in Europe belies any "global" recognition among the numerous travel interests among German speakers worldwide who have nothing to do with the Objector's specific constituency*" (emphasis original).
34. The Applicant states that the Objector has no ongoing relationship with a clearly delineated community. The Applicant states that clear delineation of the travel industry is hardly possible given the many diverse, unrelated parties such as consumers, retailers, commentators, historians, activists and others. It says the Application is for a dictionary word and one party cannot control it to the exclusion of all others.
35. The Applicant also states that the Objection has no merit. It states that the Objector does not represent a 'clearly delineated' community. It refers to many dictionary definitions of the word 'reisen' and states that these diverse meanings of the generic term 'reisen' make it impossible for the Objector to show that the string describes a 'clearly delineated' community. It states that the term is incapable of denoting formal boundaries that indicate who makes up the community, and therefore the Objector cannot



establish the community's existence, global distribution or number of its members.

36. The Applicant states that the Objector demonstrates no substantial opposition to the Application within this 'community' it claims to represent. It states that the evidence provided by the Objector does not amount to a meaningful number of objectors within the larger German-speaking travel community. It also demonstrates no strong association between the community invoked and the applied-for gTLD string because the purpose of the gTLD is open and the string itself is not tied to a specific community as it is a generically worded TLD.
37. Further, the Applicant states that the Objector has not shown that granting the Application would cause material detriment to the community invoked by the Objector. The Applicant denies that the <reisen> gTLD string is likely to harm the community, referring to the lack of any causal link between the harm alleged and the applied-for gTLD, as well as the Applicant's commitment to mechanisms of protection from abuse. Further, the Applicant states that it will act in the best interests of the community and protect all users. It states that the Application respects ICANN's principles for the new gTLD programme and that the Objector fails to show that the Applicant's operation of the gTLD would interfere with the community's core activities. On the contrary, the Applicant's new safeguards are likely to reduce the types and amount of bad behaviour seen in large registries. The Applicant states that regulatory and governmental oversight is irrelevant and unnecessary for administering a top-level domain. Finally the Applicant states that the Objector's concerns regarding economic damage to the community lack merit.
38. The Applicant requests that the Panel reject the Objection and direct the Objector to pay costs.

***D. The Additional Submissions***

39. The Parties both provided an additional submission on the sole question of the representative role of the Objector and its significance for the standing requirements set out in Section 3.2.2.4 of the Guidebook.
40. The Objector in its Additional Submission said that it represents a significant portion of the community to which <reisen> gTLD is explicitly and implicitly targeted. It states that it represents the overall majority and turnover of the German travel industry. All sectors of the travel industry are represented including transportation, lodging and dining, tour operators, travel agencies, tour companies, etc. The Objector proceeds to



describe the role and function of some of the members of the Objector under the headings of travel agencies, tour operators and travel associations, travel companies and tour operators, lodging and dining, road traffic, air traffic, rail traffic, and travel insurance. It also refers to provisions in its by-laws.

41. The Applicant in its Additional Submission states that <reisen> is a generic word related to the perspective of individuals or groups who are travelling, as opposed to entities providing goods and services in travel-related industries. The Applicant states that the travel industry is not the only interest implicated by the <reisen> string. It states that the Objector does not share interests with and cannot speak for these same travel industry segments outside of Europe. It also states that the Objector does not represent the largest group of people with an interest in this string, which is German-speaking travellers. The Applicant states that, with its focus on the travel industry, neither the Objector nor any of its affiliated organisations has purported to represent the interests of any individual German-speaking travellers, which in 2010 alone numbered 49 million. The Applicant also says that there are a myriad of travel-related interests amongst German speakers around the world for whom the Objector does not speak. The Applicant also refers to countries outside the area represented by the Objector which have significant German-speaking populations including: Argentina, Brazil, France, Canada, Kazakhstan, Luxemburg, the Netherlands, South Africa and the United States of America. The Applicant concludes that, as the Objector fails to adequately represent the interests of German-speaking travellers around the world, it does not play a 'representative role' that satisfies the standing requirement.

#### IV. THE LEGAL STANDARD FOR A COMMUNITY OBJECTION

42. A Community Objection refers to an objection that "there is substantial opposition to the application from a significant portion of the community to which the string may be explicitly or implicitly targeted." The grounds on which a Community Objection may be made are set out in full in the Guidebook, and are based upon the Final Report on the Introduction of New Generic Top-Level Domains dated 7 August 2007, issued by the ICANN Generic Names Supporting Organization (GNSO).
43. In order to make a Community Objection an Objector must first demonstrate standing as defined in Sections 3.2.2 and 3.2.2.4 of the Guidebook:

"3.2.2. Standing to Object.



*Objectors must satisfy standing requirements to have their objections considered. As part of the dispute proceedings, all objections will be reviewed by a panel of experts designated by the applicable Dispute Resolution Service Provider (DRSP) to determine whether the objector has standing to object...*

44. Section 3.2.2.4 provides that to qualify for standing the Objector must prove both that it is an established institution, and that it has an ongoing relationship with a clearly delineated community. Section 3.2.2.4 sets out the factors to be considered to make these determinations. The Objector does not have to prove each and every factor to satisfy the standing requirements, and the Panel is required to perform a balancing of the factors, together with other relevant information.
45. Once the Objector has demonstrated standing, then Article 20(a) of the Procedure requires the Panel to *“apply the standards that have been defined by ICANN”* to the determination of the objection. Article 20(b) of the Procedure states that: *“In addition, 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.”* Article 20(c) of the Procedure states that: *“The Objector bears the burden of proving that its Objection should be sustained in accordance with the applicable standards.”*
46. The ‘standards defined by ICANN’ referred to in Article 20(a) of the Procedure are set out in Section 3.5 (‘Dispute Resolution Principles (Standards)’ of the Guidebook. The standard in relation to a Community Objection appear in Section 3.5.4. This section requires the Objector to meet four tests in order to demonstrate that there is substantial opposition from a significant portion of the community to which the string may be targeted.
47. The four tests that comprise the Community Objection standard are:
  - (i) The community invoked by the Objector is a clearly delineated community; and
  - (ii) Community opposition to the application is substantial; and
  - (iii) There is a strong association between the community invoked and the applied-for gTLD string; and
  - (iv) The application creates the likelihood of material detriment to the rights or legitimate interests of a significant portion of the community to which the string may be explicitly or implicitly targeted.
48. The Objector must meet all four tests in the standard to prevail.



49. Section 3.5.4 sets out in detail the facts that the Panel could consider and balance in addressing each of the four tests. These factors are not exclusive and the Panel can also consider other factors.
50. In this manner, the Community Objection standard is described as a series of mandatory criteria or tests to establish, firstly, standing, and then the substance of the objection, supported by non-exclusive lists of factors to be balanced by the Panel in its determination of each element. The various elements are described as if they are separate and distinct, but on closer examination this is not so. For example, the second element of standing, (that is, whether the Objector has an ongoing relationship with a clearly delineated community) incorporates an element (namely “a clearly delineated community”) which forms the first of the four tests of the substantial standard. The ‘definition of community’ test in section 3.5.4 might also require consideration of factors explicitly listed under the other tests because, for example, the concept of opposition forms part of the definition of community but is also the subject of the second test, while the target of the applied-for gTLD is also relevant to the definition of community. Indeed, the definition of community emerges as the key element of the Community Objection standard. Where a community is defined in narrow terms and it simplifies the task of the Objector in demonstrating its ongoing relationship for the purposes of standing as well as meeting the substantial opposition and detriment tests. Conversely it may be more difficult for an Objector to meet these tests where the community is widely defined.
51. For these reasons, as well as because of the differences in interpretation in this particular case by the Parties of the concept of ‘community’, the Panel proposes to begin by examining the concept of community, before considering the other elements of standing and the substance of the Community Objection.

## V. FINDINGS AND REASONS

### A. *The Community*

52. The Application is for the <reisen> gTLD. Two features of the word ‘reisen’ are relevant, in the Panel’s view, to the definition of the community in this proceeding. Firstly, ‘reisen’ is a word in the German language and suggests the gTLD is targeted at German speakers. Secondly, ‘reisen’ is a generic term in the German language. It has a wide variety of meanings, both as a verb and a plural noun, roughly corresponding to the multiple uses of the English word ‘travel’, or as a noun to ‘journeys’. Its meaning is not confined to commercial uses, and extends to private or





abstract experiences of travel. Accordingly, the applied-for gTLD naturally suggests the German-speaking travel community.

53. The Objector defines the community in the first paragraph of the Objection as “*the German speaking travel community*”. The Objector argues that the <reisen> gTLD explicitly targets the German speaking travel community.
54. The Applicant in the Response argues that the diverse meanings of the generic term ‘reisen’ make it impossible for the Objector to show that the string describes a ‘clearly delineated community’, and that the factors referred to in the community test in Section 3.5.4 cannot be shown in this case. However, in its Additional Submission the Applicant refers to “*the entire German-speaking travel and tourism community*”, and discusses the composition of this community. Further, there are clear indications in both the Application and the GAC Reply (referred to in more detail under the heading ‘Targeting’ below) that the Applicant was targeting the German speaking travel community in choosing the <reisen> gTLD.
55. The Panel concludes that the community invoked by the Objector, implicitly acknowledged by the Applicant, and corresponding to the natural understanding of the gTLD, is ‘the German-speaking travel community’.
56. This community is clearly delineated by language and activity. The evidence indicates that in 2010 there were 49 million individual German-speaking travellers. The main concentration of German speakers is in Germany, Austria, and Switzerland but there are also significant populations of German speakers in other countries including France, Brazil, the United States, Argentina, Luxembourg, Kazakhstan, the Netherlands, South Africa and Canada (Applicant’s Additional Submission, and Declaration of Guido Flick, paragraph 5). The community consists of more than 80,000 commercial entities with a gross added value of over 100 billion euros. The community has more than 2.9 million employees (Objection, page 9).
57. The Panel considers that there is public recognition of the community at a local and global level. The Application for the <reisen> string (and the Objector’s own application for the <reise> gTLD) are themselves forms of public recognition of this community. The existence of various travel industry organizations referred to in the Objection (and including the Objector) is further public recognition of the community. The Objector provides evidence of the legislative and political recognition of the community. Such recognition also confirms that this is a clearly delineated community.



58. The level of formal boundaries around the community are minimal. The community is defined linguistically and by involvement in the activity of travel, either as a traveller or by any other involvement or interest in the travel. The community is large, and open to all who satisfy these minimal criteria.
59. The community has existed, as the Objector states, 'for centuries'. As already mentioned, the distribution of the community is global, although it is concentrated in Europe. The Panel has already referred to the number of people and entities that make up the community.
60. For these reasons, and having considered the factors referred to in Section 3.5.4, the Panel concludes that the German speaking travel community is a clearly delineated community.

#### ***B. Standing***

61. As a preliminary point, the Applicant states that the Objection should be dismissed for failure to comply with the notice provisions of the Procedure in that the Objection was not served until April 2, 2013.
62. On March 13, 2013 the Objection was filed with the Centre in accordance with Article 7 of the Procedure. On March 18, 2013 the Centre acknowledged receipt of the Objection, with a copy to the Applicant. Accordingly, the Applicant knew on this date at the latest that the Objection had been filed.
63. Article 7 of the Procedure imposes a mandatory requirement to file the objection before the published closing date of the objection filing period (that is, March 13, 2013), and this has been complied with. There is no such mandatory requirement as to service, and there is no allegation of any prejudice from the delay in service. The Panel considers no basis has been demonstrated to deny the Objector standing for this reason.
64. The first element of standing is that the Objector is required to demonstrate that it is an established institution. In this regard, the Panel may consider the factors set out in Section 3.2.2.4 of the Procedure. The Objector comprises travel associations and leading German companies in the travel sector. The Objector refers to the global recognition of its members, although Section 3.2.2.4 requires the Panel to consider the global recognition of the institution itself. There is evidence of the international recognition of the Objector as an associate member of the United Nations World Tourism Organisation and its activities with the EU Commission and Parliament. Its Constitution provides for the exercise of its



representative activities not only in Germany but also in Europe and throughout the world.

65. Section 3.2.2.4 also refers to the length of time that the institution has been in existence, and the public historical evidence of its existence. The Objector has existed since 1995, and the Panel considers that its demonstrated levels of corporate and industry support confirm that it is now an established institution. There is public historical evidence of its existence in the form of its constitution, and its involvement in the United Nations World Tourism Organisation. Finally, Section 3.2.2.4 states that the institution must not have been established solely in conjunction with the new gTLD application process, and this is not the case, and nor has it been suggested.
66. For all these reasons, the Panel finds that the Objector is an established institution within the meaning of section 3.2.2.4 of the Procedure.
67. The second element of standing requires the Panel to consider the purposes, operation and activities of the Objector in relation to the community.
68. According to its constitution, the institutional purpose of the Objector is to represent the common business and political interests of the tourism industry in relation to tourism inside and outside of Germany. In order to achieve this purpose Article 2 of the constitution provides for functions including representation on matters of policy before legislative and executive bodies in Germany, Europe and throughout the world, the promotion of tourism inside and outside of Germany and representation in relation to matters of general economic and tourism policy. Its membership, consisting primarily of tourism associations and corporate members, have rights to vote and to consultation and the duty to support the association. There is also provision for commissions, working groups and committees. In summary, there is no doubt that the Objector is a formally constituted organisation, whose members include significant commercial interests in the German travel industry. Its regular activities for the benefit of the community include the political representation of its members, publications, conventions, trade shows and meetings between industry stakeholders. In the Panel's view its institutional purpose is closely related to the German-speaking travel community in that it performs regular activities for what the Objector and its members perceive to be the best interests of the community.
69. The Parties take different approaches to the factor of the level of formal boundaries around the community. The Objector interprets this factor in legal and educational terms, referring to German and European regulations



in the travel sector. The Applicant questions the relevance of such ‘Europe-wide’ standards which it states ignores diverse unrelated parties “such as consumers, retailers, commentators, historians, activists and others”.

70. The Panel considers that the formal boundaries of the community are defined by language and the activity of travel. The community is global and large, but the Objector has demonstrated an ongoing relationship with this community at German, European, and (through the United Nations World Tourism Organisation) global levels. For these reasons the Objector has demonstrated an ongoing relationship with a clearly delineated community, and so satisfies the standing requirement in Section 3.2.2.4 of the Procedure.

### ***C. Substantial Opposition***

71. The delineation of the community has already been considered and the Objector’s description of the ‘German-speaking travel community’ has been accepted. Accordingly, the Panel moves to consider whether the Objector has proved substantial opposition within the community it has identified itself as representing.
72. The Objector states that it is objecting “*on behalf of its entire membership*”. It refers to opposition to the <reisen> application by three industry stakeholders during the comments period. It also provides ten letters of support for its Objection from members as well as representatives of the travel industry in Switzerland and Austria. For example, there is a letter of support of the Objection from Schweiz Tourismus that confirms the support for the Objection and states: “*Swiss tourism is the national Marketing and Sales Organization for Switzerland’s Travel, Vacation and Congress activities. In order to offer visitors to Switzerland an unforgettable holiday experience, Swiss Tourism is committed entirely to serve its customers and cooperates closely with tourism partners and providers in Switzerland and their offices throughout the whole world*” (Objection, Attachment 7g). In such a manner, these letters of support describe the supporter and its membership or representative role. They confirm their support of the Objection without elaborating their own reasons for opposition to the Application (with the exception of the the letter from the Austrian Travel Association (ÖRV), referred to below). Nor do the letters indicate that the members of the various associations have been informed or consulted about the Objection prior to the endorsement of the Objection by means of a standard-form letter.



73. The Objector describes this representative opposition as “*not just significant, but overwhelming*”. The Applicant denies that the Objector has presented a meaningful number of expressions of opposition, or that such standard form letters fairly represent the views of the <reisen> community.
74. The Panel concludes that there is opposition to the Application at a representative level amongst leading commercial stakeholders in the travel sector in Germany, Switzerland and Austria. Their number is small, but they are representative of significant interests and economic power in the travel sector. In terms of the significance of the representative nature of these entities, the Panel notes that they represent the commercial interests of the travel community, as opposed to personal, consumer or other interests. Their stature amongst the commercial interests in the European travel sector is substantial.
75. In terms of the distribution and diversity amongst the expressions of opposition, the Panel notes that there are no expressions of opposition from individual German-speaking travellers or any group explicitly representing the consumer in the travel sector. The evidence indicates that there were 49 million German speaking travellers in 2010 and there is no direct evidence of opposition to the Application from this group. Such opposition may have taken the form, for example, of the direct support of the Objection by consumer groups, or of their independent representations to the authorities of German-speaking countries, or of expressions of opposition within the gTLD application process. Nor has the Objector demonstrated that commercial interests based in foreign destinations that serve the German-speaking travellers in their own countries oppose the Application.
76. There is also insufficient evidence of opposition from interests in the travel sector wider than the travel agencies, tour operators, accommodation, insurance and transportation interests included in the Objector’s membership. The Applicant refers to unrelated members of the community such as consumers, commentators, historians, activists and others. The GAC Reply emphasizes the personal and non-commercial users of the <reisen> gTLD. The travel sector is very wide and incorporates broad interests of an individual, cultural, educational and intellectual nature, and not simply commercial interests. The diversity of the German-speaking travel community is not adequately addressed by the Objector, and the Panel concludes that it represents a unified European interest, substantial in terms of industry leadership and in economic power, but numerically very small in absolute terms.
77. The Panel also considers that it is significant in this context that the Objector has itself applied for a similar gTLD. The Objector complains that the Applicant did not “*reach out*” to the Objector, or seek to cooperate



with the “*Community protection mechanisms*”. Some of its supporters express similar concerns. The Applicant is an outsider in terms of the European commercial travel sector, and also a competitor to the gTLD applicant endorsed by that sector. The Panel notes that there is a competitive and even philosophical element to the opposition, and expressions of support to the Objection have been organized on this basis.

78. The Panel has considered the submissions on historical defence of the community and costs incurred by the Objector and considers them of peripheral significance in this case.
79. The Panel considers that there is some opposition within the German-speaking travel community but the Objector has not met the standard of substantial opposition. The Objector has failed to demonstrate any opposition outside the segment of the community that it represents in Germany, and representatives of similar interests in Austria and Switzerland. The German-speaking travel community is very large, geographically diverse and spans a broad range of activities connected with travel, and without some evidence of opposition from other sectors, interests or regions within the community the opposition cannot be said to be substantial. The most significant component of the community is individual travellers. The Objector expresses its desire to protect the interests of the German travellers, but the fact remains that there is no evidence of significant opposition from German travellers, or even specific sectors amongst German travellers.

#### ***D. Targeting***

80. Under the heading of targeting the Objector must show a strong association between the community invoked and the applied for gTLD string.
81. The very term ‘reisen’ identifies the community involved in both its language (German) and its activity (travel). The public, or at least German-speaking Internet users, will immediately associate this gTLD with the German speaking travel community, and the evidence suggests that it was chosen for exactly this reason.
82. The Application in answer to Question 18(a) confirms that the target of the Application is the German speaking travel community, in its widest sense:

*“The .REISEN TLD will be of interest to the millions of individuals and organizations involved in the business or enjoyment of travel. This very large and diverse group includes those involved in transportation, accommodation and lodging, dining, entertainment, sightseeing and exploration, travel education, adventure travel, travel writing, and other commercial and non-*



*commercial pursuits. The TLD also is useful to the many worldwide who elect to comment on travel providers, destinations, tours, etc., or who simply wish to catalogue their travel experiences or otherwise have a forum for self-expression."*

83. The answer to Question 18(b) shows that the application was based on "deeply researched discrete industries and sectors of human activity" and that the gTLD would offer "a very high level of user utility" and "precision in content delivery". In other words, the gTLD was carefully chosen because it invoked a particular sector and activity.

84. In the GAC Reply the Applicant acknowledges the strong association of the community with the <reisen> gTLD in stating that:

*"Donuts expects most registrants for .REISEN second-level names will be German speakers with a personal or professional interest in travel."*

*"While the travel industry will certainly welcome the new naming options allowed for by .REISEN, so too, for example will individuals who enjoy personal travel and will make non-commercial use of a second-level registration (perhaps, for example, to share photos and travel notes with friends)."*

85. The Applicant argues that the concept of targeting runs directly contrary to its intention in operating an open registry available to a broad audience of registrants consistent with the competition goals of the new gTLD expansion programme. However, the philosophy of an open registry and broad based participation is not incompatible with targeting where the community is as broad as the community in this case.

86. For these reasons the Panel is satisfied that there is a strong association between the applied for gTLD and the community.

### ***E. Detriment***

87. The Objector alleges a wide range of risks and damages from the Application. This detriment includes a lack of adequate legal protection (non-applicability of German and European consumer and data protection legislation; and indirectly though jurisdictional issues arising from the fact the registry is subject to U.S. law), as well as detriment likely to arise from an open registry, unregulated access, privacy services, fraudulent users, and the lack of protection for community specific marks and names in an industry increasingly dependent on an online model. The Objector fears erosion of the trust of its customers, and states that "trust in the respectability and high quality standards obviously represent quite a significant portion of capital of the Community". It states that there is an

absolute certainty of detriment if the gTLD is operated by the Applicant “without appropriate community-based accountability”.

88. The importance to the Objector of “community based accountability” is also the basis of the complaint that the Applicant did not consult with the representatives of the German travel industry. For example, the Austrian Travel Association (ÖRV) in a letter in evidence stated (Objection, Attachment 6):

*“The German candidate of .REISE (dotreise GmbH) is [sic] been in closed contact since its foundation with the tourist industry in the German-speaking countries. Associations, like for instance BTW, DRV, Travel-Industrie-ClubSchweiz, Österreich-Werbung and others are represented in the committee of the dotreise GmbH and introduce here the interests of the national tourist industry in the development of .reise. We could make sure ourselves that the dotreise GmbH answers the demands of the Austrian tourist industry for using .REISE.*

*The USA-candidate for .REISEN, the New Cypress LLC (or rather its parent company Donuts Inc) didn't contact us to discuss our demands and considerations for using .REISEN with us...*

*One of the main tasks of the tourist industry is already for a couple of years the protection of the consumers from illegal contents, misuse and embezzlement and to strengthen and protect on this way the trust of the users in online-offers.....*

*So we can't accept the idea to use such top-level domains .REISEN of New Cypress, LLC(Donuts Inc.) without the above mentioned mechanisms.”*

89. The concept of community-based accountability does not explicitly appear in the tests in the Procedure and is a difficult concept in a community as large and geographically widespread as the German-speaking travel community. The Objector's members are largely German, with Swiss and Austrian support, and represent travel associations and service interests, and not the other members of this community referred to by the Applicant. As already noted, it has not been demonstrated that the Objector represents or can speak for the ordinary German-speaking traveller that is the numerically most important element of the community. The Objector is clearly highly concerned to protect and maintain the trust of the ordinary German-speaking traveller (at least within Europe) but this self-interested paternalism is not the same as representing or speaking for the German traveller.
90. The Applicant promotes the virtues of an open registry and free speech, competition and innovation in cyberspace. It states that regulatory oversight is irrelevant to the operation of a TLD registry, refers to its enhanced level protection against abuse and refers to the risk that “over-



*regulating registrant eligibility unnecessarily restricts users by preventing a substantial segment of legitimate registrants from participating in a space to which they are legitimately connected”.*

91. The Panel notes that many of the risks referred to by the Objector are inherent in the use of the Internet. The Objector assumes that German-speaking consumers expect European consumer and data protection legislation to apply to all transactions in the German language on the Internet. There is no reason to accept that this would be the expectation when a German traveller, for example, makes a reservation with a hotel in Argentina that markets itself on the Internet as German-speaking. The use of the Internet requires a certain amount of care by users, and the Objector has not demonstrated that German Internet users will relax their normal levels of care, and suffer detriment as a result, simply because the TLD is a German word, or from the manner that the Applicant proposes to operate the registry. The Objector asserts that German Internet users will have “*a false sense of official sanction by virtue of ‘REISEN’*”, and that they will proceed “*on the assumption that the legal regulations prevailing there [i.e. in German-speaking countries] also apply to offers under ‘REISEN’*” but these are broad generalisations, unsupported with evidence.
92. Further, if the Applicant is successful in its application for the <reisen> gTLD, then consumer and data protection legislation will continue to apply to domain name registrants based in Europe, and the Objector can continue to exercise its “*community-based accountability*” over its own members in the <reisen> gTLD. If that accountability is an advantage to consumers, then the Objector can encourage consumers to prefer the websites of its members or associates, or to direct themselves to the <reise> gTLD endorsed by the Objector (assuming this gTLD application is successful).
93. The evidence confirms that the Applicant intends to institute effective security protection for user interests. It is true that the Applicant’s protection mechanisms might reduce but are unlikely to eliminate abusive registrations and the misuse of <reisen> domains, particularly in such a large and diverse community. However, the standard requires an element of causation in that the material detriment must be linked to the application in some way and not generic to all Internet use. The Application provides for a full range of protections, the technical and commercial capability of the Applicant to operate the TLD in accordance with the Application has not been questioned, and there is no suggestion of discrimination or exclusion that might cause material detriment to a significant portion of the community. On this basis, the Applicant’s operation of the <reisen> gTLD will not prejudice the core activities of the community.



94. In this regard, the Objector identifies the proposal to operate as an open registry as a source of risk to the community. However this risk materializes only when the open registration is accompanied by weak protection or poor control which is not the case here. To the contrary, a well-managed open registry ensures that any member of the German-speaking travel community can register a domain name for any legitimate purpose and so enables participation of all interests within a very large and geographically dispersed community.
95. Proxy and privacy services can be abused, but are also a legitimate element of registry services. They may be attractive and used by some members of the community and a source of obstruction to others, but they are not of such significance to threaten material detriment to any portion of the community.
96. The Panel considers that the allocation of the <reisen> gTLD to a corporation subject to the law of a federal state of the United States would not create any likelihood of material detriment to trademark owners or other members of the community, and is irrelevant. The Applicant addresses the question of disputes between registrars and registrants in the GAC Reply, and states that it expects the majority of <reisen> names will be sold by registrars in German-speaking jurisdictions. In any event, trademark abuse in the registration of domain names is largely regulated pursuant to ICANN's Uniform Dispute Resolution Policy, which has operated for many years and for which the location and applicable national law of the registry are irrelevant. Further, the Applicant's protection mechanisms address the legitimate interests of trademark owners.
97. For the above reasons, and having considered all the factors referred to under this heading in Section 3.4.3 the Panel finds that the Objector has failed to prove that the Application creates a likelihood of material detriment to the rights or legitimate interests of a significant portion of the community to which the string is targeted. Both the nature and extent of the harm alleged and the level of certainty that it would occur are based on assumptions about Internet use and the effects of possible abuse not supported by the evidence. There is a difference in philosophy between the Applicant and the Objector on the most appropriate means to service the German-speaking travel community on the Internet, but the Objector has not demonstrated that the Applicant's proposal will result in detriment to a significant proportion of that community.



*F. Conclusions*

98. For these reasons, the Panel finds that the Objector has standing to object, but has failed to prove that opposition of the German-speaking travel community to the Application is substantial, or that the Application creates a likelihood of material detriment to the rights or legitimate interest of a significant portion of the German speaking travel community. Accordingly, the Objection is dismissed.

**VI. COSTS AND PUBLICATION**

99. In accordance with Article 14(e) of the procedure, the Centre shall refund to the Applicant, as the prevailing party, its advance payment of costs.

100. The Parties have not made any submissions on publication, and therefore the Panel orders that the Expert Determination shall be published in full on the Centre's website.

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**VII. EXPERT DETERMINATION**

101. For all of the above reasons and according to Article 21(d) of the Procedure, I hereby render the following Expert Determination:

- (i) The Objection submitted by Bundesverband der Deutschen Tourismuswirtschaft (BTW) e.V. is dismissed;
- (ii) The Applicant New Cypress, LLC prevails;
- (iii) The Applicant New Cypress, LLC's advance payment of costs shall be refunded by the Centre to the Applicant.

**Place of Proceedings: Paris, France.**

**Date: 17<sup>th</sup> October 2013**



David J.A. Cairns  
Sole Expert