

INDEPENDENT REVIEW PROCESS

INTERNATIONAL CENTER FOR DISPUTE RESOLUTION

AFILIAS DOMAINS NO. 3 LTD.,

Claimant,

and

INTERNET CORPORATION FOR
ASSIGNED NAMES AND NUMBERS,

Respondent,

and

NU DOTCO, LLC. and VERISIGN, INC.

Amicus Curiae

ICDR CASE NO: 01-18-0004-2702

WITNESS STATEMENT OF PAUL LIVESAY IN SUPPORT OF

ICANN'S REJOINDER AND *AMICI'S* BRIEFS

Confidential Attorneys' Eyes Only

Not to be Publicly Disclosed in IRP



I, Paul Livesay, declare as follows:

1. I am a former Vice-President and Associate General Counsel of VeriSign, Inc. (“Verisign” or the “Company”). I have personal knowledge of the matters set forth herein, except where I indicate otherwise, and am competent to testify as to those matters.

2. From 2014 through 2018, I served as a Vice-President and Associate General Counsel for Verisign. In that capacity, I was in charge of intellectual property matters, had responsibility for certain strategic business transactions for the Company, and provided general advice and counseling to the Company’s management on business and legal matters. My position at the company had both business and legal components. My statement is only a statement of facts and not legal reasoning or opinions. Previously, I had been with Verisign in 2009-2010 as Vice-President, Strategy and Management, for Verisign’s digital certificate business.

3. I have been an intellectual property and technology transactions attorney for over twenty-five years. Prior to joining Verisign in 2014, among other roles, I practiced law at the firm of Wilson, Sonsini, Goodrich & Rosati, was General Counsel of RSA Data Security, Inc., was General Counsel at the design firm IDEO LLC, and was Vice-President, Technology, for Symantec Corporation. I am a member of the Bar of the State of California.

The Secondary Market for new gTLDs and Discussions with .WEB Applicants

4. In 2014, I was put in charge of identifying potential business opportunities for Verisign in ICANN’s New gTLD Program. Up until that point, Verisign had participated in the New gTLD Program by filing applications for new TLDs that were variants of its company name (*i.e.*, “.Verisign”) or internationalized versions of Verisign’s existing TLDs, but Verisign had not sought to acquire the rights to a new gTLD not already associated with Verisign.

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. The period for filing new applications as part of the New gTLD Program had ended. Redacted - Third Party Designated Confidential Information



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I studied very closely the New gTLD Applicant Guidebook (the “Guidebook”) published by ICANN, the Auction Rules, and other information regarding the New gTLD Program available on ICANN’s website, www.icann.org, to familiarize myself with the rules applicable to the Program. Redacted - Third Party Designated Confidential Information

6. The Guidebook and Auction Rules do not prohibit applicants from entering into business transactions with other entities with respect to an applied-for TLD. Based on the Guidebook, it is apparent that ICANN’s concern with respect to such transactions is whether a transaction would require re-evaluation of the applicant, which could result in a delay in the resolution of a contention set. For example, Section 4.1.3 of the Guidebook acknowledges that applicants may seek to resolve string contentions (*i.e.*, which of various competing applicants for a TLD would be awarded the TLD) by establishing joint ventures among themselves, which could change the ownership of the applicant or the identity of the applicant itself.¹ The Guidebook cautions that material changes such as these could require re-evaluation, and encourages applicants to combine in ways that do not require re-evaluation: “Applicants are encouraged to resolve contention by combining in a way that does not materially affect the

¹ Afilias C-3 (*gTLD Applicant Guidebook*, Module 4, § 4.1.3, available at <https://newgtlds.icann.org/en/applicants/agb>).



remaining application. Accordingly, new joint ventures must take place in a manner that does not materially change the application, to avoid being subject to re-evaluation.”²

7. Similarly, Clause 68 of the Auction Rules recognizes that applicants may enter into “settlement agreements or post-Auction ownership transfer arrangements, with respect to any Contention Strings in the Auction”; although once within an active auction timeline, these activities are prohibited during a “Blackout Period” extending from the deposit deadline for an auction through full payment of the winning auction bid, but permitted both for the period prior to and after the Blackout Period.³

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). Donuts was a major participant in the new gTLD Program, filing hundreds of applications for new gTLDs. Under the arrangement between Donuts and Demand Media, which was entered into while the new gTLD applications were pending, the gTLDs would be transferred to Demand Media after rights to the subject new gTLDs were awarded to Donuts in exchange for Demand Media’s assistance in funding Donuts’ acquisition of the gTLDs. Donuts also was one of the several applicants for the .WEB gTLD. Attached hereto as Exhibit A is a true and correct copy of a press release dated June 11, 2012 from Demand Media describing its arrangement with Donuts (<https://ir.leafgroup.com/investor-overview/investor->

² *Id.*

³ Afilias C-4 (*Auction Rules for New gTLDs, Indirect Contentions Edition, Version 2015-02-24*, Clause 68(a) & (b), available at <https://newgtlds.icann.org/en/applicants/auctions>).



press-releases/press-release-details/2012/Demand-Media-to-Participate-in-Historic-Expansion-of-Generic-Top-Level-Web-Domain-Name-Extensions/default.aspx).

9. Through my research, I also became aware that it was not uncommon for entities interested in acquiring a new gTLD to form a special purpose entity to be the applicant for a new gTLD. For example, I understand that Donuts formed a separate special purpose entity for each gTLD for which it applied. For .WEB, Donuts formed Ruby Glen, LLC and used that entity to apply for the gTLD. By contrast, Google used the same entity, Charleston Road Registry Inc., to apply for all of the new gTLDs it sought to acquire.

10. One effect of the use of special purpose entities was to facilitate secondary market transfers of new gTLDs through the transfer of the special purpose entity independent of other assets of a party supporting the applicant. Another effect of the use of such entities can be to maintain as confidential the party for whose benefit the application was being pursued. In this regard, the new gTLD application form required the disclosure of the name of the applicant and the identity of any person or entity that owned more than 15% of the applicant.⁴ In some instances, this resulted in the disclosure of the real party in interest. For example, Google is identified as the owner of Charleston Road Registry Inc. In other instances, the requirement for a disclosure of the real party in interest was avoided by forming another entity to be the parent of the applicant, so the real parties in interest were not disclosed as the parent entity in the application. Donuts formed “Covered TLD LLC,” for example, and made that entity the disclosed parent entity on many of its applications.

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ICANN’s website identified each new gTLD for which an application had been filed and listed the identity of applicants along with a copy of non-confidential parts of their respective applications. Redacted - Third Party Designated Confidential Information

⁴ Afilias C-3 (*gTLD Applicant Guidebook*, Module 2, Attachment to Module 2, *Evaluation Questions and Criteria*, Question 11(c), available at <https://newgtlds.icann.org/en/applicants/agb>).

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The Domain Acquisition Agreement between Verisign and NDC

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. Private

auctions are conducted on terms privately negotiated among the competing bidders for the TLD, and private auction agreements commonly include terms for the losing applicants to split the proceeds of the auction among themselves. In private auctions, which may have been the most common form of resolving contention sets, there are no Guidebook requirements, and commonly no other requirements, with respect to how a participant conducts its bid, disclosure of financing terms, disclosure of interested parties, or post award intentions of the participants. Indeed, some applicants seem to have made a lucrative business out of losing private auctions. In a public auction, by contrast, the terms are not privately negotiated among the participants/competitors, and the proceeds of the auction are placed in a fund to be set up by ICANN for investment benefitting the Internet community as a whole rather than benefitting the losing bidders in a private auction.

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18. On August 15, 2015, NDC and Verisign entered into the Domain Acquisition Agreement (“DAA”). A copy of the DAA is attached hereto as Exhibit D. The DAA is a conditional agreement pursuant to which Verisign agreed to provide the funds for NDC to participate in an auction for the .WEB gTLD. In the event NDC prevailed at the auction and



entered into a registry agreement for .WEB with ICANN -- upon application to ICANN and with ICANN's consent -- NDC would assign the .WEB registry agreement to Verisign.

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20. The DAA is compliant with all terms of the Guidebook and consistent with transactions by others with respect to the new gTLD Program. Verisign did not acquire any interest in or control over NDC. The application for .WEB was not transferred to Verisign. The DAA's registry agreement assignment provision was conditional and contingent, applied only to an executed registry agreement following an award of .WEB to NDC, and was subject to ICANN's prior consent. The structure of the agreement also was consistent with industry practices in the secondary market for new gTLD applications of which I became aware in my research of the New gTLD Program, as explained above and as further documented below.

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22. The express terms of the DAA establish that it does not transfer NDC's application for .WEB and that any transfer to Verisign would be in the future and contingent on



ICANN's normal processes for such transfers, including application to ICANN for consent to an assignment of the registry agreement and ICANN's consent. For example, the DAA provides:

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Thus, a transfer or assignment would only take place after a registry agreement was signed between ICANN and NDC, ICANN's subsequent consent to an assignment of the registry agreement to Verisign, and the subsequent execution and delivery of the Transfer Agreement.

23. The lack of any transfer of rights in NDC's Application or assignment of a registry agreement is further confirmed by the terms of the DAA that permitted a termination of
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25. The Guidebook does not require an applicant to reveal the existence of, sources or amounts of any funding for a public or private auction for a new gTLD or other resolution of a contention set. ICANN's new gTLD application requires applicants to provide certain financial information to ICANN regarding its ability to *operate* a new gTLD.⁵ There is no requirement that an applicant disclose any information regarding funding for participation in an auction. It is further my understanding that financial information submitted as part of a gTLD application also is designated confidential by ICANN and not disclosed to other applicants or the public. Accordingly, under the terms of the new gTLD Program, even if the sources or terms of their funding for participation in the auction were subject to disclosure to ICANN, which they were not, other members of the contention set would never have access to that information.

26. As another example of the confidential nature of financial arrangements, it was disclosed after the fact that Automattic Inc. ("Automattic") financed the successful bid in a private auction for the .BLOG gTLD by applicant Primer Nivel S.A. ("Primer Nivel"). The auction took place in February 2015. In May 2016, before the .WEB auction, it was reported that Primer Nivel's bid had been financed by Automattic, the owner of the blogging platform wordpress.com. According to press reports, Automattic paid Primer Nivel \$19 million in exchange for Primer Nivel's agreement to assign the .BLOG gTLD to Automattic if it was successful in the private auction. One of the press reports that I reviewed regarding this

⁵ Afilias C-3 (*gTLD Applicant Guidebook*, §§ 1.2.1.2, 1.2.2 & 2.2.2.2, available at <https://newgtlds.icann.org/en/applicants/agb>).



transaction is attached hereto as Exhibit E (Kevin Murphy, WordPress Reveals IT Bought .blog For \$19 Million, Domain Incite (May 13, 2016), <http://domainincite.com/20440-wordpress-reveals-it-bought-blog-for-19-million>). This funding transaction appears to have been kept confidential and not revealed to ICANN or other bidders, which included an Afilias entity (Afilias Domains No. 1 Limited), prior to the .BLOG auction. Specifically, a press report states that WordPress financed Primer Nivel’s winning auction bid but “wanted to stay stealth while in the bidding process and afterward in order not to draw too much attention.” *See* Ex. F (Alan Dunn, Knock Knock WordPress Acquires Blog for 19 million, NameCorp (May 15, 2016), <https://namecorp.com/knock-knock-wordpress-acquires-blog-for-19-million/>). On April 29, 2016, ICANN consented to the assignment of .BLOG from Primer Nivel to Knock Knock WHOIS There, LLC, a subsidiary of Automattic. *See* Ex. G (<https://www.icann.org/resources/agreement/blog-2015-05-14-en>). To the best of my knowledge, Afilias did not object to the .BLOG auction after Automattic’s role in financing Primer Nivel’s bid was revealed. This transaction further supported my understanding then that pre-auction financing agreements, such as the DAA, were consistent with the Guidebook.

The Assurances of Performance

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Afilias Claims in the IRP

29. It is my understanding that Afilias argues in this IRP that the DAA constitutes an impermissible transfer by NDC of rights in its new gTLD application. Such an argument is inconsistent with the express terms of the DAA and Confirmation of Understandings described above. Further, such an interpretation of the Guidebook would be contrary to industry practices with respect to the New gTLD Program that I learned in researching the Guidebook and secondary market.

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31. Redacted - Third Party Designated Confidential Information

A public auction is specifically provided for in the Guidebook, is fair and conducted under ICANN's oversight, and I am not aware of any requirement under the Guidebook that an applicant agree to a private auction. To the contrary, the Guidebook provides a private auction may only be conducted if *all* members of the Contention Set agree to have a private auction.⁶

⁶ Afilias C-3 (*gTLD Applicant Guidebook*, §§ 4.13 & 4.3, available at <https://newgtlds.icann.org/en/applicants/agb>).



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35. I understand that Afilias has stated that its bidding in the .WEB auction was constrained by the terms of its financing arrangement, which limited its bidding to no more than \$135 million.⁷ The limits on Afilias' funding demonstrates that Afilias' own conduct as a bidder during the .WEB auction was limited by its own financing arrangements, appearing to confirm again the industry practice of financing arrangements with parties not part of the .WEB contention set.

The Auction

36. In accordance with the DAA, Verisign provided funds for NDC to use in bidding for the .WEB gTLD in the public auction. NDC submitted a final bid that ICANN deemed to be and announced as the winning bid. Shortly after the auction, NDC paid ICANN \$135 million as the winning bid for the .WEB gTLD. Those funds were provided to NDC by Verisign.

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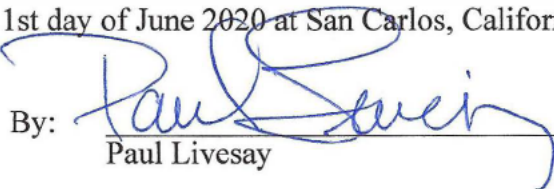
38. Finally, I understand that Afilias makes a claim that there was some form of collusion between Verisign and ICANN during or following the auction proceedings. This is untrue. I was responsible for this transaction. I did not have any communications with ICANN before or following the auction process. Redacted - Third Party Designated Confidential Information

⁷ See Witness Statement of Ram Mohan, 1 November 2018, ¶ 35, fn. 38 (<https://www.icann.org/en/system/files/files/irp-afili-as-witness-statement-mohan-redacted-26nov18-en.pdf>).



. As a major participant in the DNS, Verisign has regular dealings with ICANN on a range of matters. Also, with respect to the questionnaire ICANN sent out to Verisign, NDC and contention set members who objected to ICANN regarding the public auction for .WEB, I am unaware of any advance notice by ICANN to NDC or Verisign of the questionnaire.

I swear under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed this 1st day of June 2020 at San Carlos, California.

By: 
Paul Livesay