

INDEPENDENT REVIEW PROCESS
INTERNATIONAL CENTER FOR DISPUTE RESOLUTION

AFILIAS DOMAINS NO. 3 LTD.,

Claimant,

and

INTERNET CORPORATION FOR
ASSIGNED NAMES AND NUMBERS,

Respondent,

and

VERISIGN, INC. and NU DOTCO, LLC.

Amicus Curiae.

ICDR CASE NO: 01-18-0004-2702

WITNESS STATEMENT OF JOSE IGNACIO RASCO III

1 June 2020

HIGHLY CONFIDENTIAL – ATTORNEYS’ EYES ONLY

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Counsel to *Amicus Curiae*
Nu Dotco, LLC

I, Jose Ignacio Rasco III, declare as follows:

1. My full name is Jose Ignacio Rasco III, and I reside in Miami, Florida. I am currently the Chief Financial Officer and a Manager of Nu Dotco, LLC (“NDC”), a company founded to submit applications and acquire rights for new generic top level domains (“gTLD”) as part of the Internet Corporation for Assigned Names and Number’s (“ICANN”) New gTLD Program.

I. Biography

2. In 2001, I graduated from the University of Pennsylvania’s Wharton School with a Bachelor of Science Degree in Economics with concentrations in Accounting and Real Estate. In 2003, I earned a Master’s Degree in Taxation from Florida International University.

3. In 2005, I saw an opportunity to enter the domain name industry after I began working with Juan Diego Calle, an entrepreneur working within the internet space. In 2007, the Colombian government announced the release of the .CO geographic top level domain (“TLD”) for public auction. In 2009, I, Mr. Calle, Nicolai Bezsonoff, and a few others co-founded .CO Internet S.A.S. (“dotCO”) to acquire, develop, and operate the .CO TLD. I served as dotCO’s Chief Financial Officer, while Mr. Calle and Mr. Bezsonoff served as dotCO’s Chief Executive Officer and Chief Operating Officer, respectively. We operated dotCO as a joint venture with Neustar, Inc. (“Neustar”), an American technology company that served as our technical partner. In 2009, dotCO successfully bid for the .CO TLD, which we then operated with considerable success. Under our leadership, for example, we increased registrations and revenue to the point where .CO operated on par with top-echelon domains. Following that success, we sold dotCO to Neustar in 2014.

4. In 2012, while still at dotCO, Mr. Calle, Mr. Bezsonoff, and I began to strategize the future of our domain industry business. During this time, we closely followed ICANN’s

announcement of its New gTLD Program, under which ICANN promised to introduce numerous new gTLDs to the domain name system. As a complement to our existing dotCO business, we decided to participate in the New gTLD Program by applying to be operators of certain new gTLDs. We focused on those potential gTLDs that could occupy a corporate space similar to .CO and had the greatest potential for commercial success.

II. NDC's Management and Ownership

5. The business organization we used to pursue our interest in participating in ICANN's New gTLD Program was NDC, a name ("Nu Dotco") that is a takeoff on our then-existing business "dotCO." On March 19, 2012, Mr. Calle, Mr. Bezsonoff, and I founded NDC, a company organized under the laws of Delaware with its principal place of business in Florida. Maintaining the same positions and roles we served at dotCO, I served as NDC's Chief Financial Officer, Mr. Calle served as NDC's Chief Executive Officer, and Mr. Bezsonoff served as NDC's Chief Operating Officer.

6. At its formation, NDC was owned by two entities as follows: Domain Marketing Holdings, LLC ("DMH") owned 85% of NDC; Nuco LP, LLC ("Nuco") owned the other 15%. That ownership structure remained the same until December 2017, at which time Nuco distributed its 15% ownership interest in NDC to Nuco's members. As a result of that distribution, as of December 2017, DMH continued to hold 85% of NDC and the three other entities that had comprised Nuco collectively held the remaining 15% (with each necessarily owning less than 15%).

7. Accordingly, other than DMH and Nuco, no other entity or person has ever owned at least 15% of NDC. Similarly, there have been no changes or amendments to NDC's management since 2012. Mr. Calle, Mr. Bezsonoff, and I remain the sole officers of NDC and continue to perform the duties associated with those positions.

8. Formed for the specific purpose of submitting applications to ICANN to acquire gTLDs, NDC ultimately applied for thirteen (13) gTLDs through ICANN's New gTLD Program, including .WEB.¹

III. NDC's Application for .WEB

9. On June 13, 2012, NDC submitted an application to ICANN to acquire the right to operate the .WEB gTLD (the "Application"). Exhibit A attached hereto is a true and correct copy of the Application, together with the exhibits to that Application.² NDC timely paid the required \$185,000 application fee.

10. NDC's Application satisfied all of ICANN's requirements. For example:

- **Corporate Information**

11. Mr. Bezsonoff and I completed NDC's .WEB Application. In that regard, as specified by Sections 1 and 8 of the ICANN gTLD application form, we identified NDC as the applicant and as a Delaware limited liability company. Ex. A.1, §8(b). As specified by Sections 6 and 7 of the form, we listed me as NDC's "Primary Contact" and listed Mr. Bezsonoff as NDC's "Secondary Contact." *Id.* at §§6-7. And as specified by Sections 11(a) & (b), we listed three people as NDC's directors and officers: me as CFO, Mr. Calle as CEO, and Mr. Bezsonoff as COO. *Id.* at §§11(a), (b). This information was accurate at the time NDC's Application was prepared and submitted and this information remains accurate today.

12. To comply with the requirements of Section 11(c) of the gTLD application form, we identified "all shareholders holding at least 15% of shares" in NDC. As was accurate at the time, we listed Domain Marketing Holdings, LLC and Nuco LP, LLC as entities that held at least

¹ NDC applied for the following 13 gTLDs: .INC, .LLC, .GROUP, .LTD, .DESIGN, .MOVIE, .BOOK, .WEB, .CORP, .GMBH, .APP, .LAW, and .TECH.

² Exhibit A.1 contains publicly available portions of the Application. Exhibit A.2 contains non-public, confidential portions of the Application. Exhibits Aa-Ap contain exhibits submitted with the Application.

a 15% ownership interest in the LLC. *Id.* at §11(c). As stated above, these two entities are the only entities or persons that have ever held at least 15% of NDC.

- **Mission/Purpose of Proposed .gTLD**

13. Consistent with other gTLD applications NDC had submitted, in Section 18(a) of the Application we stated that the “mission/purpose” of .WEB was “to provide the internet community at-large with an alternative ‘home domain’ for their online presence. We envision that through strategic marketing campaigns designed to brand the domain, it will become a premium online namespace for a variety of businesses and websites. This general domain will provide new registrants with better, more relevant alternatives to the limited options remaining for current commercial TLD names.” *Id.* at §18(a).

14. Sections 18(b) and 18(c) of the ICANN gTLD application ask applicants, respectively, to describe how the “proposed gTLD will benefit registrants, Internet users, and others” and to describe “operating rules ... to eliminate or minimize social costs.” *Id.* at §§18(b), (c). In answering these questions, NDC provided its general vision of new gTLDs in the marketplace and its general strategy at the time as to how .WEB might be successfully and productively introduced and used to benefit consumers. *Id.* Although NDC used its experience with .CO as an *example* of how .WEB might accomplish these goals, we understood, and we stated in our answers, that specific plans would depend on market conditions and thus were not fully described in the Application. Nonetheless, we repeatedly stated NDC’s intent to follow ICANN’s policies, rules, and recommendations in connection with .WEB.

15. With slight modifications to reflect the specific gTLD at issue, NDC’s statements in Section 18 of its .WEB Application were largely identical to corresponding statements in all of NDC’s other ICANN gTLD applications. We understood Section 18 to request general

descriptions of marketing and other business intent, not binding commitments of future actions. In fact, as described in more detail below, I understand that ICANN does not use Section 18 to evaluate gTLD applications and does not take any interest in any distinctions that might arise between statements made in Section 18 of a gTLD application and how a domain is ultimately operated. To the best of my knowledge, other applicants—including Claimant Afilias Domains No. 3 Ltd. (“Afilias”)—similarly responded to Section 18 (and other sections) of the ICANN gTLD application form with near-identical statements in each of their applications, irrespective of how they operated domains they ultimately acquired or whether they subsequently transferred the domains to another entity. And, also to the best of my knowledge, ICANN has never policed any distinctions between Section 18 statements and such subsequent actions.

16. Nonetheless, I understand that Afilias has alleged that NDC’s answers to the application form’s “mission/purpose” inquiries in Section 18 were made false or misleading, thereby requiring an update to NDC’s Application, by NDC’s entry into the Domain Acquisition Agreement (“DAA”) with Verisign over three years later. *See* Part VI, *infra*. That is incorrect. First, NDC’s subjective views as to the “mission/purpose” of gTLDs, including .WEB, and how .WEB might benefit consumers and others have not changed, irrespective of who operates .WEB. Second, NDC’s Section 18 responses expressly stated that NDC’s marketing and other business plans were not final and were subject to market conditions. In all of my experience with ICANN applications, I have never updated, nor known any applicant to update, an application to reflect new and different marketing and business plans for a gTLD.

17. Third, given that NDC’s marketing and business plans were subject to change, as a baseline position NDC stated that it planned to follow ICANN’s policies, rules, and recommendations in connection with .WEB. Nothing in the DAA required an update to that

statement, including because I understood that Verisign, a longstanding registry owner and operator with whom ICANN was very familiar, would also follow those policies, rules, and recommendations. As a baseline, therefore, I did not believe anything about our Section 18 responses had materially changed on account of the DAA and I did not believe any amendment to NDC's Application was required or warranted. Among other things, in

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18. Moreover, as stated above, it has always been my understanding that the Section 18 "mission/purpose" inquiry is intended to provide ICANN with certain New gTLD Program statistics and is not part of the evaluation criteria. Rather, when evaluating whether an applicant is qualified to participate in a new gTLD contention set, ICANN has always been most concerned with whether that applicant has the financial ability and technical infrastructure to successfully operate the gTLD registry. For example, the ICANN Guidebook states that responses to Section 18 are "not used as part of the evaluation or scoring of the application, except to the extent that the information may overlap with questions or evaluation areas that are scored."³

19. Instead, the Guidebook explains that Section 18 responses are used in connection with *ex-post* reviews of the gTLD program in general and not in connection with any specific application:

The information gathered in response to Question 18 is intended to inform the post-launch review of the New gTLD Program, from the perspective of assessing the relative costs and benefits achieved in the expanded gTLD space. For the application to be considered complete, answers to this section must be fulsome and

³ Afiliis C-3 (*gTLD Applicant Guidebook*, Attachment to Module 2, A-11, A-12, available at <https://newgtlds.icann.org/en/applicants/agb>).

sufficiently quantitative and detailed to inform future study on plans vs. results. The New gTLD Program will be reviewed, as specified in section 9.3 of the Affirmation of Commitments. This will include consideration of the extent to which the introduction or expansion of gTLDs has promoted competition, consumer trust and consumer choice, as well as effectiveness of (a) the application and evaluation process, and (b) safeguards put in place to mitigate issues involved in the introduction or expansion. *Id.*

20. As a result, while helpful for ICANN to assess the New gTLD Program in general, Section 18 responses are not a material part of evaluating a particular application and, moreover, are not subject to subsequent enforcement by ICANN in the event those responses differ from how or by whom a domain is ultimately operated. Accordingly, for this additional reason, I again did not believe that NDC was obligated to update any such response in its .WEB Application.

- **Technical Capabilities**

21. In Sections 23-44, NDC provided a robust description of its technical ability to operate the .WEB gTLD. For example, NDC explained that it had partnered with Neustar, an experienced domain registry company with proven and scalable infrastructure. Ex. A.2, §§23-27. NDC further provided detailed information regarding the specific services Neustar would provide, including the necessary security, abuse prevention, and rights protection services. *E.g., id.* at §§28-44.

- **Financial Information**

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This financial information is considered confidential by ICANN, and is not disclosed by ICANN in its public posting of new gTLD applications. Therefore, only ICANN would have had access to this information about NDC's financial ability to operate the .WEB gTLD. Other members of the Contention Set, including those who might bid at auction for .WEB, would not have had access to such financial information.

23. Notably, the ICANN application form did not call for, and therefore NDC did not provide, any information regarding NDC's financial capability to acquire the .WEB gTLD in an auction or sources of financing for that auction. In more than a dozen ICANN applications I have overseen for NDC, ICANN has never requested and NDC has never provided such information.

24. As NDC's primary contact for the Application, I received confirmation from ICANN that our .WEB Application had been accepted—meaning that the Application had satisfied all applicable ICANN criteria and evaluations—in June 2013.

25. Pursuant to the ICANN Guidebook, if more than one applicant applies for a gTLD, then the approved applicants are grouped together into a “Contention Set,” with the competing applications resolved either through (i) a private auction or other negotiated settlement conducted by agreement of the applicants or, if all members of the Contention Set do not agree to a private auction, (ii) a public auction conducted under the auspices of ICANN.

26. In addition to NDC, there were six other approved applicants for the .WEB gTLD: Web.com Group, Inc., Charleston Road Registry Inc. (Google), Schlund Technologies GmbH, Dot Web Inc. (Radix), Ruby Glen LLC (“Donuts”), and Afilias. In February 2014, ICANN officially formed a Contention Set for .WEB comprising these seven applicants, including NDC.

27. It was not until April 2016, however, that ICANN sent notice to the Contention Set that ICANN would issue the .WEB gTLD and, therefore, that ICANN had scheduled a public

auction for .WEB to take place on July 27, 2016. Until ICANN sent that formal notice, there was no guarantee that ICANN would hold an auction for .WEB. Rather, as had occurred with other domain strings (such as .CORP), ICANN had the right to decline to issue the .WEB gTLD and thus not to hold an auction.

28. As a result, between June 2013, when ICANN approved NDC's application, and April 2016, when ICANN scheduled the public auction, there was no clarity as to how NDC's application for .WEB might ultimately be resolved.

IV. Changes to the gTLD Marketplace and the Emergence of New Participants

29. Following NDC's successful acquisition and operation of the .CO domain in 2010 and ICANN's introduction of the New gTLD Program in or around 2012, NDC decided to focus its gTLD acquisition strategy on similar company-type domains. For example, because "CO" is short for "Company," NDC applied for domain strings such as .INC, .LLC, .CORP, .LTD, and others in this corporate short identifier space. NDC also applied for domain strings related to high traffic Internet searches, including .MOVIE, .BOOK, and, of course, .WEB. In total, NDC submitted 13 ICANN applications for these and similar domains.

30. Between 2012 and 2015 several other companies emerged as repeat participants in the ICANN New gTLD Program. Prominent among these was Donuts. On information and belief, Donuts raised funds through private equity transactions to finance ICANN applications and auction bids. With that money, it is my understanding that Donuts applied for and bid on at least 300 gTLD domain strings, far more than NDC or, I believe, most other companies.

31. Donuts also emerged as a driving force behind the private auctions permitted by ICANN. As briefly described above, ICANN does not specify how applicants might privately resolve the Contention Set, and applicants may mutually agree to resolve the Contention Set through a private auction or other means. In fact, ICANN encourages applicants to resolve

Contention Sets on their own terms—viewing a public auction as a last resort—and historically has neither participated in nor policed those private resolutions.

32. To the contrary, once ICANN has determined that a gTLD application satisfies the requirements of the Guidebook and placed the various applicants into a Contention Set, to the best of my knowledge, ICANN has effectively fulfilled any gatekeeping function that it might undertake: ICANN has determined that the applicant is qualified and capable of operating the gTLD if that applicant emerges from the Contention Set and secures the rights to operate the domain. Beyond that, to the best of my knowledge, ICANN takes no position *on which* applicant in a Contention Set subsequently becomes eligible to sign a registry agreement with ICANN for the domain in question *or how* they do so. In fact, the Auction Rules expressly state that applicants within a Contention Set may discuss and negotiate, among other things, “settlement agreements or post-Auction ownership transfer arrangements” for the domain in question so long as the Contention Set is not within a designated Blackout Period shortly before a public auction.⁴

33. Accordingly, over the years, applicants have considered and employed numerous means to resolve Contention Sets. For example, when NDC first considered participating in the New gTLD Program, we researched the program rules and considered various means of resolving Contention Sets, including trading domains with other applicants who might have a greater interest in a particular domain string than NDC, cross-selling percentage interests in different domains, and buying various applicants out of their applications before any auction was held. Although NDC has never used these means in practice, I have never considered, and am not aware of anyone who does consider, such means of resolving Contention Sets to be prohibited by the ICANN rules.

⁴ Afiliias C-4 (*Auction Rules for New gTLDs: Indirect Contentions Edition*, 68(a)-(b), available at <https://newgtlds.icann.org/en/applicants/auctions>).

34. Following the disclosure by ICANN of the various entities that had submitted gTLD applications, NDC and those entities engaged in numerous discussions regarding how we might resolve Contention Sets without proceeding to a public ICANN auction. Most of the ideas discussed were variations on private auctions, and private auctions have since become the most prominent means to resolve Contention Sets. Although the terms of those auctions may vary depending on the agreement reached by members of the Contention Set, a common form of private auction—which Donuts was heavily involved in creating—is resolved in favor of the highest-bidding applicant. Unlike a public auction under the auspices of ICANN, however, the money offered by the *highest* bidder is often divided equally among the *losing* bidders, not paid to ICANN. As a result, each member of the Contention Set stands to benefit from a private auction as long as the “losers’ share” exceeds expenses, including the ICANN \$185,000 application fee.

35. As another example, in July 2016, Oliver Mauss, the CEO of 1&1 Internet, which owns the Schlund entity that had applied for .WEB and was in the .WEB Contention Set, emailed Mr. Calle with a proposal for an “alternative private auction.” Exhibit C attached hereto is a true and correct copy of that email, which Mr. Calle forwarded to me on July 5, 2016. In his email, Mr. Mauss described the “basic principles” of his proposal: “It divides the participants into groups of strong and weak;” “the weak players are meant to lose and are compensated for this with a pre-defined sum;” “the strong players bid for the asset;” and “the highest bid wins, but the winner pays a lower price than the 2nd highest bid.” *Id.* According to Mr. Mauss, this proposal had several advantages over a typical private auction (which he called an “Applicant Auction”) and an ICANN public auction. *Id.* For example, “the winning party pays less for the asset in comparison to both” an ICANN public auction or an “Applicant Auction;” “the losing strong players receive a higher return than in the Applicant Auction;” and “the losing weak players receive a lower return than in

the Applicant Auction.” *Id.* Essentially, Mr. Mauss concluded, the “benefit for the strong bidders comes from a lower share of proceeds for the weak bidders than in the Applicant Auction.” *Id.* We did not agree to participate in Mr. Mauss’s proposal, but it was yet another example of means through which participants in the New gTLD Program attempted to resolve Contention Sets without proceeding to a public ICANN auction.

36. Following ICANN’s publication of the Guidebook in 2012, Donuts made significant efforts to coordinate private auctions between gTLD applicants. For example, Donuts hired a mathematician to develop models for operating such auctions, developed tutorials, and hosted meetings and mock auctions so participants could experience and evaluate how private auctions might work. I participated in at least one such meeting, which was held during an ICANN conference (but was not on the official conference schedule) and which I understood had been arranged by Donuts. At that meeting, a mathematician and a private auction company provided information to gTLD applicants about how a private auction might work.

37. Other companies, including Afilias, similarly prioritized private auctions, ultimately treating gTLD applications as a form of arbitrage in which each application was an asset to be leveraged for profit without ever intending to actually operate any, or most, of the gTLDs. Based on my active participation in the domain industry for over 12 years and numerous conversations with other participants, it is my understanding that such practices were commonly known in the industry. I believe that ICANN was aware of these practices and, to my knowledge, did not object to them. I believed that these practices were acceptable to ICANN, which sought only to ensure that the ultimate operator was qualified and technically and financially capable of operating each respective gTLD.

38. By 2015, Donuts had become a well-financed, major force in the New gTLD Program. In addition, large companies such as Amazon and Google also began to participate in the Program, including by participating in private and public auctions.

39. As private auctions proliferated and the value of gTLD domain strings increased, including as a result of the influx of money from participants such as Donuts, Amazon, and Google, the market expectations for the .WEB domain and other new gTLDs increased.

40. Given these changes in the marketplace, ^{Redacted - Third Party Designated Confidential Information}

V. The Domain Acquisition Agreement and Confirmation of Understandings

A. The Domain Acquisition Agreement

41. In or around May 2015, I received a phone call from Verisign expressing interest in working with NDC to acquire the rights to .WEB. As noted above, by that date ICANN had formed the Contention Set for .WEB (meaning no new applicants could join) and

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In addition, as also noted above, by that date ICANN had yet to schedule a public auction for .WEB, and thus the domain was still on hold, so there was no clarity as to a resolution by either a public *or* a private auction. Consequently, because

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42. As stated above, based on my experience and discussions with others in the industry, it was common industry knowledge by 2015-2016 that gTLD applicants used various means to resolve Contention Sets and monetize their applications. In addition to private auctions, it was common knowledge that interested parties had monetized successful gTLD applications by assigning interests in domain strings after securing the rights from ICANN. And it was commonly understood that ICANN approved of these assignments. In fact, when NDC first developed its strategy in connection with the New gTLD Program, we considered the possibilities presented by these secondary market opportunities to acquire others' rights in domains, and we came to understand that other gTLD applicants had utilized such opportunities and entered into registry agreements with ICANN based on those opportunities.

43. For example, in or around 2013-2014 I knew that Donuts and Rightside Media had entered into an arrangement whereby certain gTLD applications were potentially financed by the other party in exchange for an interest in the domains in question if and when the domains were acquired. To the best of my knowledge, more than twenty (20) domains have been assigned under this arrangement without any update to ICANN applications disclosing the underlying arrangement. Later on, I knew that the .BLOG gTLD had been acquired by WordPress, or an affiliated entity, after another entity, Primer Nevel S.A, prevailed at auction and executed a registry agreement with ICANN.

44. In addition, I have reason to believe that Radix Registry ("Radix") acquired the rights to the .TECH gTLD through an agreement with Dot Tech, LLC. Dot Tech, LLC was in the .TECH Contention Set with NDC. At no time in the auction process for .TECH did NDC think or know that Radix was participating in any way in the auction and Dot Tech LLC did not update its ICANN application prior to the auction to reveal any agreement with Radix. Dot Tech, LLC won

the .TECH auction on or around September 17, 2014. Thereafter, on October 23, 2014, Dot Tech, LLC updated its application to, among other things, add Radix personnel (including Brijesh Joshi, a Radix Director) as officers and as the new Primary and Secondary Contacts and to reflect that a Radix entity was the only party holding 15% or more of the shares of Dot Tech, LLC. Attached hereto as Exhibits D and E, respectively, are Dot Tech, LLC's original June 2012 application and the revised application dated October 23, 2014. On November 7, 2014, less than two months after Dot Tech, LLC won the auction, **Radix** issued a press release stating that “**Radix** made the winning bid of \$6.7 million for rights to .TECH, competing with Google, Donuts, and other industry players.” (Emphasis added.) Indeed, based on the unsigned .TECH Registry Agreement available on ICANN's website, that agreement was set to be signed for Dot Tech LLC by Brijesh Joshi, the Radix Director whose name appeared on the Dot Tech LLC application for the first time after the auction was held, not anyone from Dot Tech LLC who had participated in the .TECH Contention Set. Attached hereto as Exhibits F and G, respectively, are true and correct copies of Radix's press release and the publicly available, unsigned, .TECH Registry Agreement.

45. It was in this context—our knowledge of these transactions, and our interest in maximizing NDC's return from our .WEB Application—that we began to consider any type of contact with Verisign about .WEB. In the spring and summer of 2015 NDC engaged in discussions with Verisign about the .WEB domain. Those discussions culminated in the August 25, 2015 “Domain Acquisition Agreement” between NDC and Verisign. Ex. B.

46. In the DAA, Redacted - Third Party Designated Confidential Information

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47. Redacted - Third Party Designated Confidential Information

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53. **Redacted - Third Party Designated Confidential Information**

Not only in the past did any transfer depend on ICANN determining to delegate a .WEB TLD (as noted above), and not only must ICANN consent to an assignment of a .WEB registry agreement to Verisign, but the DAA further provides that **Redacted - Third Party Designated Confidential Information**

B. The Confirmation Of Understandings

54. In July 2016, Verisign requested that NDC confirm the parties' understanding regarding NDC's .WEB Application in light of allegations by Donuts that NDC had transferred control of NDC to a third party or assigned the .WEB Application to a third party. *See* Part VII.C,

infra. Because those allegations were unequivocally false, and because

Redacted - Third Party Designated Confidential Information, NDC readily agreed to Verisign's request, and the parties subsequently executed a letter agreement dated July 26, 2016 (the "Confirmation of Understandings"). Exhibit H attached hereto is a true and correct copy of the Confirmation of Understandings. Redacted - Third Party Designated Confidential Information

55. I understand that Afilius has alleged that the Confirmation of Understandings contained "false 'talking points'" provided to me by Verisign that I "duly signed" because I was "instructed" to do so by Verisign. Reply Memorial ¶79. That is false. I did not view the Confirmation of Understandings as "talking points," let alone as something to be used in coordinating any response to ICANN, but instead as an accurate statement of NDC's rights and obligations that protected NDC. As a result, I signed the Confirmation of Understandings of my own accord, for NDC and not for Verisign, because it was a true and accurate description of certain facts and understandings between NDC and Verisign, each of which is consistent with NDC's intent in executing the DAA. In addition, Redacted - Third Party Designated Confidential Information

56. For example, in the Confirmation of Understandings, Redacted - Third Party Designated Confidential Information

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57. Fully agreeing that the Confirmation of Understandings set forth NDC's rights as the applicant for .WEB and its rights and obligations under the DAA, each of which I understood to be consistent with and in compliance with ICANN rules and procedures, I signed the Confirmation of Understandings as of July 26, 2016. Importantly, the Confirmation of Understandings in no way contradicted what I told ICANN in June and July 2016—that NDC had not experienced any changes in its organizational management or control. *See* Part VII.C, *infra*.

As explained in detail below, my statements to ICANN were truthful, and I never deceived or misled ICANN or anyone else regarding NDC's .WEB Application.

VI. Neither the DAA Nor the Confirmation of Understandings Warranted an Update to NDC's .WEB Application

58. As discussed in Part III, *supra*, I did not believe that the DAA warranted or required any update to NDC's .WEB Application. The same is therefore true of the Confirmation of Understandings. For example, I address in Part III, *supra*, why I disagree with Afilias' assertions that the DAA rendered NDC's "mission/purpose" responses false or misleading. Simply put, nothing in the DAA changed NDC's view of the "mission/purpose" of .WEB or changed how NDC might operate .WEB or NDC's technical or financial capability to operate .WEB. Because nothing in those responses became false or misleading, I did not believe any update to the Application was necessary.

59. Indeed, Afilias assumes that, as of August 2015, there was no scenario in which NDC itself might operate .WEB. That is incorrect, including because
Redacted - Third Party Designated Confidential Information and, as of August 2015, ICANN had yet to even conclude whether or how the .WEB Contention Set would be resolved. There was no guarantee, therefore, that the DAA would be in effect when the Contention Set was resolved.

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These facts informed my belief that NDC was under no obligation to update its .WEB application upon execution of the DAA.

60. I understand that Afilias has emphasized two provisions of the DAA in support of its argument that the DAA required an update to NDC's .WEB Application. First, Afilias repeatedly quotes the following: Redacted - Third Party Designated Confidential Information

61. Redacted - Third Party Designated Confidential Information

In fact, in the context of private auctions, there is no disclosure of interested parties or planned transfers of acquired domains, and I am not aware of any applicant, including Afiliias, questioning or challenging the results of a private auction on any basis, let alone on the basis that the winner of the auction subsequently transferred its rights in the domain to another, previously unknown party. Redacted - Third Party Designated Confidential Information

62. Second, Afilias also relies on language

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VII. Pre-Auction Communications with the .WEB Contention Set and ICANN

A. NDC Did Not Agree to a Private Auction for .WEB

63. As noted above, in April 2016, eight months after NDC and Verisign executed the DAA, ICANN informed the .WEB Contention Set that it had scheduled a public auction for July 27, 2016. Thereafter, members of that Contention Set began to discuss the private and public auction options for .WEB.

64. For example, between April and June 2016, I and Mr. Calle (the CEO of NDC) had various phone, email, and text conversations with other members of the Contention Set regarding both .WEB and other outstanding TLDs for which we had pending applications. In the course of those conversations, other members of the Contention Set, including Donuts and Afilias, attempted to persuade NDC to participate in a private auction for .WEB.

65. Because there is no obligation under the ICANN Guidebook or otherwise to participate in a private auction, NDC declined to do so in connection with .WEB. Not only did

Mr. Calle and I repeatedly decline requests from Donuts, Afiliias, and others, but we also never signed any agreement committing NDC to a private auction for .WEB. To be plain, NDC was not required to participate in a private auction for .WEB and never agreed to do so.

66. Nor would NDC Redacted - Third Party Designated Confidential Information

B. Other Contention Set Members Sought to Pressure NDC to Agree to a Private Auction

67. At the time, I understood that other members of the .WEB Contention Set were unhappy that NDC would not agree to a private auction. Recall that a private auction requires the consent of all members of the Contention Set. And recall that, in a private auction, the winner secures the rights to the gTLD at issue and the winning bid is shared among the losing parties. In contrast, in a public auction, the winning bid is retained by ICANN (for investment in the Internet infrastructure) and the losing bidders recover nothing.⁵ Accordingly, other members of the Contention Set stood to lose the opportunity to “earn” significant amounts of money as the losers in a private auction were .WEB to proceed to a public auction.

⁵ Applicants can recover portions of their application fee depending on if and when they exit the auction process, but recover nothing if they complete the auction but do not prevail.

68. One such party was Donuts. On June 6, 2016, I received an email from Jon Nevett, a co-founder of Donuts, regarding .WEB. Exhibit I attached hereto is a true and correct copy of an email string containing Mr. Nevett's June 6 email and our subsequent communications. In his June 6 email, Mr. Nevett said that he was unsure if I, Mr. Calle, and Mr. Bezsonoff were "still the Board members of your applicant" and asked us to agree to a two-month delay of the public auction for .WEB while the Contention Set tried "to work this out cooperatively." *Id.* Based on prior communications with Mr. Nevett, I understood him to be asking to discuss further NDC's participation in a private auction. On June 7, I replied to Mr. Nevett's email and informed him that NDC would not agree to a private auction (maintaining its intention to proceed to a public auction administered by ICANN) and would not agree to a postponement of the public auction. *Id.* In particular, I told Mr. Nevett that, based on his request, "I went back to check with all the powers that be and there was no change in the response and [NDC] will not be seeking an extension." *Id.*

69. In addition, in response to Mr. Nevett's inquiry about whom at NDC he should contact regarding .WEB, I stated that "Nicolai [Bezsonoff] is at [Neustar] full time and no longer involved with our TLD applications. I'm still running our program and Juan [Calle] sits on the board with me and several others." *Id.* Mr. Nevett responded with "Thanks Jose," and asked a follow-up question about unrelated domains. He did not ask for any other information or for any clarification about what I had written. *Id.*

70. I am aware that my reply to Mr. Nevett is being mischaracterized and used as the basis to withhold the award of .WEB to NDC following our successful auction bid in July 2016. My email to Mr. Nevett was an informal email between colleagues who, though also competitors, had a cordial, and even friendly relationship. In that context, I sought to politely respond to Mr.

Nevett's inquiry and deflect further questions. I never intended to suggest any of the changes to the ownership or control of NDC that have been alleged. Nor did I have any obligation or intention to provide detailed, formal information about our company or its management to Donuts.

71. To the contrary, as I have previously attested, I intended the following by the statements in my June 7 email:

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72. Again, I did not intend my June 7 email to a competitor to convey formal information about NDC's corporate organization, let alone to communicate some change to NDC's management that warranted an update to our .WEB Application, as there had been no such change since NDC submitted its .WEB Application. Rather, the language I used was intended to politely dissuade Mr. Nevett from continuing to pursue the issue of a private auction but, at the same time, not to create any ill will between us. I viewed the email as a polite "stiff-arm" response to a competitor to whom neither I nor NDC had any duty to provide either information or explanations for our decisions.

73. On the same day that Jon Nevett of Donuts emailed me, June 7, 2016, Steve Heflin of Afilius contacted Mr. Calle by text message to similarly ask if NDC would reconsider its decision to forego a private auction for .WEB. Exhibit J attached hereto is a true and correct copy of those text messages, which Mr. Calle forwarded to me on June 7, 2016. In those messages, Afilius offered to "guarantee [NDC] score[s] at least 16 mil if you go into the private auction and

lose.” Mr. Calle declined Afiliias’ offer. *Id.* Afiliias then offered to increase the guaranteed payment to “\$17.02” million. Mr. Calle again declined. *Id.*

74. John Kane of Afiliias also texted me to make the same request. I again declined. Exhibit K attached hereto is a true and correct copy of my text messages with Mr. Kane.

C. ICANN Investigated and Dismissed Complaints by the Other Contention Set Members

75. Unable to persuade NDC to participate in a private auction for .WEB, and, in my opinion, motivated entirely by a desire to delay the upcoming *public* auction so as to preserve the possibility that they might profit from the losers’ share in a *private* auction, on June 23, 2016, Donuts and Ruby Glen (which is owned and operated by Donuts) complained to ICANN that NDC had changed its ownership and/or management structure but had not reported the change to ICANN as allegedly required. Donuts and Ruby Glen requested that ICANN investigate those allegations and requested that the public auction for .WEB be delayed during that investigation. Exhibit L attached hereto is a true and correct copy of Donuts’ and Ruby Glen’s June 23, 2016 complaint to ICANN (the “Donuts Complaint”).

76. Signed by Jon Nevett of Donuts—with whom I had emailed between June 6-8, 2016—the Donuts Complaint was entirely premised on the misconception that my statements to Mr. Nevett on June 7 revealed a change in “ownership or control” of NDC that NDC had not communicated to ICANN through an update to NDC’s .WEB Application. *See id.*

77. On June 27, 2016, I received an email message from a member of ICANN’s New gTLD Operations department stating that ICANN “would like to confirm that there have not been changes to [NDC’s] application or the [NDC] organization that need to be reported to ICANN. This may include any information that is no longer true and accurate in the application, including changes that occur as part of regular business operations (e.g., changes to officers and directors

[and/or] application contacts).” Exhibit M attached hereto is a true and correct copy of ICANN’s June 27, 2016 email and subsequent communications on that day between me and ICANN. ICANN’s email requested that, if “there have been any such changes,” NDC submit the changes to ICANN via ICANN’s customer portal. *Id.*

78. I responded to ICANN’s email on the same day, confirming that “there have been no changes to the [NDC] organization that would need to be reported to ICANN.” *Id.* ICANN responded that same day, informing me that no further action was required at the time. *Id.* I believed—and still believe—that my answer to ICANN’s inquiry was accurate and fully responsive. It most certainly was not an “outright lie” as Afilias accuses it to be. *Cf.* Reply Memorial, ¶73. To the contrary, as shown on Exhibit M, ICANN’s June 27 emails to me did not reference any complaint received by ICANN from any other party or any specific information that ICANN or any other party believed might be incorrect. Rather, given the type of potential changes highlighted in ICANN’s email—“changes that occur as part of regular business operations (*e.g., changes to officers and directors [and/or] application contacts*)” (my emphasis)—I understood ICANN to be making a routine inquiry of the Contention Set members given that many years had passed since the .WEB applications had been submitted and that the public auction date had been set and was rapidly approaching. That is, in the context of this very specific inquiry, I understood ICANN to be asking whether the identifying information set forth in NDC’s application, (*e.g., management, ownership, and contacts*) had changed, not whether *any aspect of NDC’s business had changed*. As such, it never occurred to me that ICANN’s routine inquiry might require disclosure of NDC’s financing arrangement with Verisign in general or the DAA in particular, especially given the well-known industry practice of transferring domains, with ICANN’s consent, after the auction process concluded.

79. The next I heard from anyone at ICANN about any potential concerns regarding NDC's .WEB Application was July 6-7, 2016, when I received emails from ICANN ombudsman Chris LaHatte informing me that "one or more" of the other applicants for .WEB had complained that NDC's .WEB Application had not been properly updated due to changes in NDC's board. Exhibit N attached hereto is a true and correct copy of Mr. LaHatte's emails to me and my response.

80. In particular, Mr. LaHatte referenced an email "which suggests that one of [NDC's] directors is no longer taking an active part in the application, and that there are other directors now involved." *Id.* And he informed me that the "complainant also suggested that NDC's shareholders have changed since the original application." *Id.* In the communications with ICANN that followed, I endeavored to be as thorough and responsive as possible, and I provided accurate and what I thought were clear answers to the questions I was asked. For example:

81. I responded to Mr. LaHatte on July 8, 2016, telling him that there had "been no changes to the [NDC] application. Neither the governance, management nor the ownership in [NDC] has changed." *Id.* I further explained that, in an LLC like NDC, "there are no directors, it is a manager managed company, as designated by the Members of the LLC within the Operating Agreement of the Limited Liability Company." *Id.* And in the case of NDC, I explained that there "has never been an amendment to that operating agreement. There are no new 'directors,' nor have any left the company." *Id.* Finally, I explained that, "while the managers are ultimately responsible for the LCC, as a manager, I take my duties very seriously and for major decisions, I confer with the Members (i.e. shareholders), which again for clarification, have never changed." *Id.*

82. My July 8 email was accurate at the time and remains accurate today. Mr. LaHatte asked if other NDC directors were involved with the .WEB application and if any shareholders had changed. I truthfully answered that neither was true. Moreover, in stating that I confer with other Members regarding “major decisions,” I only meant to clarify our general practice at NDC and not to represent anything specifically about .WEB. *Cf.* Reply Memorial, ¶81.

83. Also on July 8, 2016, I received an email from Christine Willett, whom I understand to be a Vice President, gTLD Operations, Global Domains Division, at ICANN. Ms. Willett asked me to call her regarding NDC’s .WEB Application and I did so the same day.

84. During that July 8, 2016 telephone conversation with Ms. Willett, I reiterated what I had explained to Mr. LaHatte, which was that neither the ownership nor the control of NDC had changed Redacted - Third Party Designated Confidential Information

85. During that same telephone conversation, I also explained that Redacted - Third Party Designated Confidential Information

86. Realizing that Donuts had misconstrued my June 7 response to Mr. Nevett and that my email was now the basis for the complaint to ICANN, I further explained to Ms. Willett that Redacted - Third Party Designated Confidential Information

87. I understand that Afilias now contends that my statements to the other applicants were intentionally misleading. However, I was under no obligation to be completely forthcoming about our internal operations or plans with parties who were competing for the same gTLD. Nor did I expect the same candor from the other applicants. My statements to Donuts were an attempt at politely deflecting a competitor. Nothing in ICANN’s rules prohibits doing so. To be clear, nothing I said to Donuts or to ICANN was a “blatant falsehood” or any attempt to “affirmatively conceal” anything from anyone. *Cf.* Reply Memorial, ¶78. Afilias’ assertions to the contrary are simply not true.

88. In fact, on July 11, 2016, I wrote to Ms. Willett to make sure the statements I made in our conversation on July 8 were clear. Exhibit O attached hereto is a true and correct copy of my July 11, 2016 email to Ms. Willett. In addition to reiterating what I had told her about the lack of any changes to the ownership or control of NDC, I also reiterated that I shared her understanding that other applicants had raised the complaint “in order to get more time to convince us to resolve the contention set via a private auction, even though we have made it very clear to them (and all other applicants) that we will not participate in a private auction and that we are committed to participating in ICANN’s auction as scheduled.” *Id.* In addition, I noted that under ICANN’s rules every member of the Contention Set was required to join in a request for the postponement of a public auction, but as of July 11, 2016, the deadline to make such a unanimous request for .WEB had passed. *Id.*

89. On July 13, 2016, Ms. Willet informed the Contention Set that, among other things, ICANN had investigated the complaints of “potential changes of control” of NDC and, “to date we have found no basis to initiate the application change request process or postpone the auction.” Exhibit P attached hereto is a true and correct copy of Ms. Willett’s letter dated July 13, 2016.

90. Although my June 7, 2016 email to Mr. Nevett was taken entirely out of context, my responses to ICANN’s inquiries were unequivocal and accurate. In particular, as described above, I repeatedly told Ms. Willett and Mr. LaHatte in July 2016 that there had been no change to NDC’s management, control, or ownership since the filing of NDC’s .WEB Application, including because the LLC Operating Agreement had not been amended. *See, e.g.*, ¶¶ 81, 84, *supra*. Those statements were unequivocally true.

91. Moreover, the only changes to NDC’s ownership structure (pursuant to which Nuco distributed its shares in NDC to its shareholders) that have ever been made did not occur until December 2017, more than five years *after* NDC submitted its .WEB Application in 2012 and more than one year *after* both my communications with ICANN and the .WEB Auction in 2016. And in any event, that change to NDC’s ownership structure did not result in any new person or entity having more than a 15% interest in NDC, the threshold required to be disclosed in the ICANN application form. *See*, ¶12, *supra*. As such, even today, nearly eight years after NDC submitted its .WEB Application, the information therein remains accurate.

D. Afilias Attempted to Arrange a Private Auction for .WEB During the ICANN Blackout Period

92. As noted above, ICANN informed the parties in April 2016 that a public auction for .WEB had been scheduled for July 27, 2016.

93. Under the ICANN Auction Rules and Bidder Agreement, upon the commencement of a “Blackout Period,” “all applicants for Contention Strings within the Contention Set are

prohibited from cooperating or collaborating with respect to, discussing with each other, or disclosing to each other in any manner the substance of their own, or each other's, or any other competing applicants' bids or bidding strategies, or discussing or negotiating settlement agreements or post-Auction ownership transfer arrangements with respect to any Contention Strings in the auction."⁶ Violations of the Blackout Period can result in disqualification from the Contention Set.

94. The Blackout Period for .WEB commenced on July 20, 2016, when the deposit deadline for the .WEB auction expired. In particular, on July 20, 2016, I received an email from Larry Ausubel of Power Auctions LLC (the administrator appointed by ICANN to conduct the .WEB auction) advising me—as every other member of the Contention Set was also advised—that “the Deposit Deadline for .WEB/.WEBS has passed and we are now in the Blackout Period.” Exhibit Q attached hereto is a true and correct copy of the July 20, 2016 email from Mr. Ausubel.

95. On July 22, 2016, two days after Mr. Ausubel notified the Contention Set that the Blackout Period had begun, I received a text message from John Kane of Afilias asking: “If ICANN delays the auction next week would you again consider a private auction? Y-N.” Exhibit R attached hereto is a true and correct copy of that July 22, 2016 text message.

96. I did not respond to Afilias' text message, as it was sent within the Blackout Period in violation of the Auction Rules and Bidder Agreement. Specifically, I understood that message to be an attempt to discuss resolution of the .WEB Contention Set by settlement during the Blackout Period and thus viewed it as a direct inquiry regarding NDC's strategy for the upcoming auction, in violation of the Blackout Period.

⁶ Afilias C-4 (*Auction Rules for New gTLDs: Indirect Contentions Edition*, 68(a), available at <https://newgtlds.icann.org/en/applicants/auctions>).

97. I also understood Afiliás' text message to refer back to a proposal made by Afiliás to Mr. Calle in June 2016 under which Afiliás attempted to induce NDC to agree to a private auction for .WEB by guaranteeing NDC over \$17 million if NDC lost that auction. Because we were in the Blackout Period and the public auction was scheduled for five days later, July 27, I ignored Afiliás' improper contact.

VIII. The .WEB Public Auction

98. The public auction for .WEB took place on July 27, 2016, continuing into the morning of July 28, 2016. I participated in that auction from Verisign's offices in Reston, Virginia.

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99. Redacted - Third Party Designated Confidential Information

100. Similarly, I believed that it was reasonable for

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Given the significant interest in the .WEB domain, there were numerous rounds of bidding across the two auction days. In an ICANN auction, a price is set in each round and applicants must enter a bid amount that is equal to or greater than the set price to continue to the next round. Although applicants know *how many* parties are participating in each round, they do not know *which* parties remain at any time or the limits of each party's financing or interest in the gTLD.

101. The .WEB auction concluded on July 28

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Apart from that statement, I have never possessed any information regarding the terms of Afiliás' financing, which I believe remains confidential.

102. Financing arrangements secured by the .WEB Contention Set were not disclosed by NDC or other bidders, as any such arrangements are commonly confidential. Nor is there any ICANN or other requirement that the Contention Set disclose available financing to ICANN or other members of the Contention Set. To the contrary, doing so would provide an unfair advantage to bidders that, upon such disclosure, would know the limits of their competitors' funds and thus know what amount of money would secure the winning bid. Such disclosure would thus be counterintuitive to a competitive auction, and I am not aware of any auction, ICANN or otherwise, that proceeds in such a manner. As a result, I did not know (and could not have known) that Afiliás

Redacted - Third Party Designated Confidential Information Nor would it have been appropriate for others to know the amount NDC could or might bid.

103. Having secured the winning bid, NDC

Redacted - Third Party Designated Confidential Information I understand that ICANN has retained the entire notwithstanding that it has not yet agreed to execute a Registry Agreement with NDC for the .WEB gTLD.

IX. Post-Auction Communications with ICANN Regarding .WEB

104. On September 16, 2016, I received an email from Ms. Willett at ICANN stating that Ruby Glen and Afiliias had continued to complain that NDC should not have participated in the .WEB public auction and that NDC's Application should be rejected. That letter was a surprise to me, as prior to receiving it I had not heard from or communicated with Ms. Willett or anyone else at ICANN about .WEB since confirming our payment for .WEB in August 2016.

105. In her letter, Ms. Willett requested that NDC provide responses to 20 questions posed by ICANN so that ICANN could evaluate those complaints. Ms. Willett's email also invited Ruby Glen, Afiliias, and Verisign to respond to the same questions, and I understand that each of those entities received the same request from ICANN. Exhibit S attached hereto is a true and correct copy of Ms. Willett's September 16, 2016 email.

106. NDC provided responses to ICANN's 20 questions on October 10, 2016. Exhibit T attached hereto is a true and correct copy of the October 10, 2016 email I sent to ICANN attaching those responses and the responses themselves.

107. Since submitting those responses in October 2016, NDC has periodically made inquiries to ICANN through the ICANN customer service portal regarding the status of .WEB. ICANN has never responded beyond a statement that the resolution of .WEB is on hold due to the pendency of accountability mechanisms or similar processes.

108. I understand Afilius has suggested that NDC somehow colluded with Verisign and ICANN regarding ICANN's investigation of Afilius' complaints. That is false. NDC does not have any ability to direct or control ICANN's investigation and has not remotely attempted to do so. NDC was not consulted by ICANN about its investigation and has no more insight into ICANN's investigation than any other party.

109. What is true, however, is that it is now June 2020, nearly four years after the public auction for .WEB. NDC has been seriously injured by the delays caused by the various—and in my opinion entirely unfounded—complaints and objections by Donuts and the pursuit of this proceeding by Afilius. Among other things, Redacted - Third Party Designated Confidential Information

110. Redacted - Third Party Designated Confidential Information by members of the .WEB Contention Set, including Afilius, following their unsuccessful attempts to either (i) coerce NDC to participate in a private auction for .WEB—thus ensuring a profit even if they lost that auction—or, (ii) when those efforts failed, to obtain the rights to .WEB themselves. Having accomplished neither, it is my belief that Afilius' continued complaints are no more than a transparent attempt to profit at NDC's and Verisign's expense. I respectfully submit that, as set forth in this statement, there is no factual basis for those complaints.

I swear under penalty of perjury under the laws of the United States that the foregoing is true and correct to the best of my knowledge and belief.

Executed on this 30th day of May, 2020 at Miami, Florida.



Jose Ignacio Rasco III