

**IN THE MATTER OF AN INDEPENDENT REVIEW PROCESS BEFORE THE  
INTERNATIONAL CENTER FOR DISPUTE RESOLUTION**

**AFILIAS DOMAINS NO. 3 LIMITED,**

*Claimant*

**v.**

**INTERNET CORPORATION FOR ASSIGNED NAMES AND NUMBERS,**

*Respondent*

**ICDR Case No. 01-18-0004-2702**

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**WITNESS STATEMENT OF CHRISTOPHER DISSPAIN**

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1 June 2020

I, Christopher Disspain, declare as follows:

1. I am a member of the Board of Directors for the Internet Corporation for Assigned Names and Numbers (“ICANN”) and have been since November 2011. I have personal knowledge of the matters set forth herein and am competent to testify as to those matters. I make this declaration in support of ICANN’s Rejoinder, which responds to the Reply submission made by Afilias Domains No. 3 Ltd. (“Afilias”) in the Independent Review Process (“IRP”) that Afilias initiated against ICANN.

2. I am a corporate lawyer and received my law degree at London Metropolitan University. For the past two decades, I have worked for a number of entities that have been involved in Internet Governance. For example, from 2000 until 2016, I was the CEO of auDA, the independent governing body/manager of, and the policy body governing, the Australian Internet Domain Name Space. From 2006 to 2014, I was a member of the United Nations Secretary-General’s Internet Governance Multi-Stakeholder Advisory Group. I was Chair of ICANN’s country code Names Supporting Organization from its foundation in 2004 until 2011, when I became a member of ICANN’s Board.

3. I am currently the Chair of the Board of Directors of Modeloo, a technology company in the United Kingdom, where I currently reside, and a Director of The Global Brain Data Foundation, a charitable and educational nonprofit based in the United States to support the scientific and practical applications of generative neurotechnologies within society.

4. Since joining ICANN’s Board of Directors, I have served on a number of its committees and working groups. For example, I have been Chair of the Board Governance Committee, Chair of the Board Accountability Mechanisms Committee, and a member of the Executive, Audit, Compensation and Finance Committees. From October 2017 to October 2019, I was Vice-Chair of the ICANN Board.

### **ICANN And Its Accountability Mechanisms**

5. I have read the witness statement of my fellow Board member J. Beckwith Burr, submitted in this IRP on 31 May 2019. In her witness statement, Ms. Burr provides the

background of the various Accountability Mechanisms that are built into ICANN's Bylaws to help ensure ICANN's accountability and transparency in all of its practices. ICANN considers these principles to be fundamental safeguards in ensuring that its bottom-up, consensus-driven, multistakeholder model remains effective. As Ms. Burr explains, these mechanisms include the Reconsideration Request, the Ombudsman, and the IRP. They also include the Cooperative Engagement Process ("CEP"), which is a process voluntarily invoked by a complainant prior to the filing of an IRP for the purpose of attempting to resolve or narrow the issues that might be brought in an IRP.

6. As also noted by Ms. Burr in her witness statement, persons and entities frequently express their views, complaints and concerns to ICANN through written correspondence. ICANN posts most of these communications on the Correspondence page of ICANN's website so that the general public can view this information. The public posting of these written communications is part of ICANN's accountability and transparency efforts. And while in some cases these communications may be properly addressed by ICANN outside of ICANN's formal Accountability Mechanisms, requests for reconsideration or reversal of a decision to act (or not act), or that otherwise challenge an ICANN or Board decision, must be made by invoking one of ICANN's formal Accountability Mechanisms, and resolved through those Mechanisms.

7. As the evaluation of new generic top-level domain ("gTLD") applications began, in 2012, applicants began lobbying ICANN through informal letters, emails and conversations to take certain actions with respect to certain applications. But ICANN adhered to, and continues to adhere to, the procedures set forth in the Bylaws and the New gTLD Program's Applicant Guidebook that require requests for ICANN to take action or not take action with respect to a particular application be made within ICANN's Accountability Mechanisms, rather than private lobbying or letter-writing campaigns.

### **The Auction for .WEB and ICANN's Initial Response**

8. As a Board member of ICANN, I was not directly involved in the auction for .WEB, but I was generally aware that it was occurring. I also was aware that an entity called Ruby Glen LLC ("Ruby Glen"), one of the applicants for .WEB, had filed a lawsuit against ICANN seeking to block the auction, and that Ruby Glen had failed to persuade the court to stop the auction, although the litigation continued after the auction. I was also aware that Nu Dotco, LLC ("NDC") was the prevailing bidder in the auction, and that shortly after the auction, Verisign, Inc. ("Verisign") disclosed publicly that it had entered into an agreement with NDC under which Verisign provided the funds for NDC's bid in exchange for NDC's future assignment of the .WEB registry agreement to Verisign, subject to ICANN's consent.

9. During the ensuing period, ICANN's lawyers periodically provided updates to the Board regarding the status of .WEB. These updates addressed various legal matters, including the status of the Ruby Glen litigation and the CEP that Ruby Glen's parent company, Donuts, Inc., had initiated. I understand that Afilias also had lodged a complaint with ICANN's Ombudsman and had sent letters to ICANN setting forth its allegations and legal positions. ICANN shortly thereafter sent a questionnaire to Verisign, NDC, Afilias and Ruby Glen to obtain their responses to a series of questions regarding the allegations that had been made about NDC's application and the .WEB auction, to which Afilias, NDC and Verisign substantively responded. In addition, in January 2017, the United States Department of Justice Antitrust Division ("DOJ") served a subpoena on ICANN in conjunction with its investigation of Verisign's proposed acquisition of NDC's contractual rights to operate .WEB.

10. In November 2016, the Board received a briefing from ICANN counsel on the status of, and issues being raised regarding, .WEB. The communications during that session, in which ICANN's counsel, John Jeffrey (ICANN's General Counsel) and Amy Stathos (ICANN's Deputy General Counsel), were integrally involved, are privileged and, thus, I will not disclose details of those discussions so as to avoid waiving the privilege. I recall that, prior to this session, the Board received Board briefing materials directly from ICANN's counsel that set

forth relevant information about the disputes regarding .WEB, the parties' legal and factual contentions and a set of options the Board could consider. During the session, Board members discussed these topics and asked questions of, and received information and advice from, ICANN's counsel.

11. At the November 2016 session, the Board chose not to take any action at that time regarding the claims arising from the .WEB auction, including the claim that, by virtue of the agreement between Verisign and NDC, NDC had committed violations of the Applicant Guidebook which merited the disqualification of its application for .WEB and the rejection of its winning bid. Given the Accountability Mechanisms that had already been initiated over .WEB, and given the prospect of further Accountability Mechanisms and legal proceedings, the Board decided to await the results of such proceedings before considering and determining what action, if any, to take at that time. To me, this made perfect sense. ICANN's Accountability Mechanisms are fundamental safeguards in ensuring that ICANN's model remains effective, and it did not seem prudent for the Board to interfere with or preempt issues that were the subject of Accountability Mechanisms regarding .WEB that were pending at that time (which might also be the subject of other soon-to-be filed Accountability Mechanisms) that might require the Board to take action. Moreover, as a matter of procedure, ICANN places new gTLD applications or contention sets on hold, and generally takes no action on those applications or contention sets while Accountability Mechanisms are pending, although with respect to IRPs, claimants typically are required to submit a request for interim measures in order for the hold to be instituted. Once the DOJ commenced its investigation, the Board also determined that it would wait for that investigation to conclude before acting further given the DOJ's expertise in evaluating potential competition issues.

#### **ICANN's Actions in June 2018**

12. I understand that ICANN prevailed in the Ruby Glen litigation and that the DOJ announced, in January 2018, that it had closed its investigation without taking any action to prevent Verisign from acquiring the rights to operate the .WEB registry. In the ensuing months,

I understand that Donuts withdrew its CEP. Further, the Board denied Afilias' Reconsideration Request regarding Afilias' document requests to ICANN pursuant to ICANN's Documentary Information Disclosure Policy ("DIDP"), which meant that no Accountability Mechanisms remained outstanding with respect to the .WEB contention set in early-June 2018. Prior to and during this period, Afilias also had sent letters to the Board indicating its intention to initiate an IRP if ICANN took the .WEB contention set off hold, assuming the Board had not disqualified NDC's application and/or rejected its winning bid and recognized Afilias as the winning bidder.

13. I recall that, once there were no pending Accountability Mechanisms, in early-June 2018, ICANN staff changed the status of the .WEB contention set from "on hold" to "resolved" and the status of NDC's application from "on hold" to "in contracting" and later sent a draft registry agreement for .WEB to NDC. In conjunction with this activity, ICANN would automatically have sent notification to all of the other members of the .WEB contention set, including Afilias, and it is my understanding that it did so. The change to the status of the contention set and NDC's application also was posted on ICANN's website so as to give notice to the public. Given the letters we had received from Afilias threatening to take legal action in such circumstances, I fully expected, as did others, that Afilias would immediately initiate another Accountability Mechanism related to .WEB, which in fact Afilias did. Although NDC promptly signed the draft Registry Agreement and returned it to ICANN, ICANN did not sign the agreement and, instead, put the .WEB contention set back on hold.

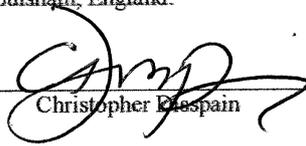
#### **ICANN's Role in Assessing Competition Concerns**

14. I share Ms. Burr's views of ICANN's role with respect to complaints regarding competition concerns within the Internet's domain name system. ICANN is not a regulator. ICANN definitely hoped and expected that the New gTLD Program, pursuant to which applications for new gTLDs were due in the Spring of 2012, would increase competition with respect to all top-level domains, but the New gTLD Program was not designed with the specific purpose of creating competition for .COM or for Verisign. Indeed, had the ICANN community – which provided extensive comments on multiple versions of the Applicant Guidebook over a

multi-year period – wished to prevent Verisign from being the registry operator for any particular new gTLD, the community could have barred Verisign from applying to become a registry operator for that gTLD. The community could even have requested that Verisign not be permitted to operate any gTLD registry other than the ones that it was already operating at the start of the New gTLD Program. But the community did not take such action, nor do I recall that such action ever was proposed.

I swear under penalty of perjury under the laws of the United States that the foregoing is true and correct. Executed this 1<sup>st</sup> day of June 2020 at Foulsham, England.

By:

  
Christopher Despain