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9 SUPERIOR COURT FOR THE STATE OF CALIFORNIA  
10 IN AND FOR THE COUNTY OF LOS ANGELES

11 KARL AUERBACH, an )  
individual, )  
12 )  
Petitioner, )  
13 )  
v. )  
14 )  
INTERNET CORPORATION )  
15 FOR ASSIGNED NAMES AND )  
NUMBERS, a California Nonprofit )  
16 Public Benefit Corporation, )  
17 Respondent. )

Case No. BS 074771

PETITIONER KARL AUERBACH'S  
MEMORANDUM OF POINTS AND  
AUTHORITIES IN SUPPORT OF  
MOTION FOR SUMMARY JUDGMENT

[THE HONORABLE DZINTRA JANAVS]

DATE: June 21, 2002  
TIME: 9:30 a.m.  
DEPT: 85

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1 **INTRODUCTION AND SUMMARY OF ARGUMENT**

2 This is an action by Petitioner KARL AUERBACH ("Auerbach") against Respondent  
3 INTERNET CORPORATION FOR ASSIGNED NAMES AND NUMBERS ("ICANN"). ICANN  
4 is a California Nonprofit Public Benefit Corporation (California Corporations Code §§ 5110 *et seq.*)  
5 which, among other things, is responsible for the domain naming system of the Internet. Auerbach  
6 is, and since the conclusion of ICANN's annual meeting in November 2000 has been, a member of  
7 ICANN's Board of Directors.

8 It is undisputed that, as a Director of ICANN, Auerbach has a right to inspect and copy  
9 ICANN corporate records. Corporations Code § 6334, which applies to ICANN, states that:

10 Every director shall have the absolute right at any reasonable time to inspect and copy  
11 all books, records and documents of every kind and to inspect the physical properties  
12 of the corporation of which such person is a director.

13 At least in theory, ICANN does not dispute that Auerbach has the right to inspect and copy  
14 ICANN's records. Indeed, Article V, Section 21 of ICANN's Bylaws is similar, though not identical,  
15 to § 6334. Article V, Section 21 provides:

16 Section 21. RIGHTS OF INSPECTION  
17 Every Director shall have the right at any reasonable time to inspect and copy all  
18 books, records and documents of every kind, and to inspect the physical properties  
19 of the Corporation. The Corporation shall establish reasonable procedures to protect  
20 against the inappropriate disclosure of confidential information. (Emphasis added.)

21 Virtually from the moment Auerbach became a Director of ICANN in November 2000, he  
22 has been seeking to inspect and copy ICANN's General Ledger, as well as other documents he later  
23 requested. In December 2000, he was told by Michael Roberts ("Roberts"), then the President and  
24 CEO of ICANN, that ICANN never had received such a Director request, and that it needed to  
25 develop a procedure for handling it. Auerbach waited, patiently, but nothing happened. In response  
26 to an e-mail which Roberts sent in early March 2001, Auerbach requested to see additional records.<sup>1</sup>  
27

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28 <sup>1</sup>As set forth in more detail in Auerbach's accompanying Declaration, ICANN's Directors  
are spread around the planet. It is customary and normal ICANN business practice for Board  
members to communicate by e-mail, and ICANN has a Bylaw provision, Article V, Section 20,  
which allows for e-mail communications in the conduct of the Board's business.

1 Dr. Vinton Cerf ("Cerf"), the Chairman of the Board of ICANN, said in e-mail that Auerbach had a  
2 right to see the records, and that he would so advise either Roberts or M. Stuart Lynn ("Lynn"), who  
3 was scheduled to succeed Roberts as ICANN's President and CEO within a matter of weeks.

4 Again, Auerbach waited, patiently. Lynn being new to the job, it was appropriate for  
5 Auerbach to give him a settling-in period, so Auerbach waited until June 2001 to reiterate his records  
6 request, even though more than six months had elapsed since his initial request.

7 Finally, in September 2001, nine months after Auerbach's initial request, more than five  
8 months after Lynn succeeded Roberts, and virtually three years after ICANN adopted its Bylaws,  
9 including Article V, Section 21, Lynn circulated to the Board a two page document called  
10 "Procedures Concerning Director Inspection of Records and Properties" (hereinafter simply the  
11 "Inspection Procedures"). Shortly thereafter, Auerbach renewed his December 2000 document  
12 request and requested to inspect and copy additional documents. However, Lynn would not allow  
13 Auerbach even to inspect the requested documents, let alone copy them, without first agreeing both  
14 to the Inspection Procedures and to additional restrictions Lynn sought to impose in a letter he wrote  
15 to Auerbach on October 5, 2001.

16 In Auerbach's accompanying Declaration and the thirty exhibits attached to it, we will  
17 introduce a substantial quantity of evidence concerning what has occurred, and it will be clear that  
18 ICANN has engaged in a pattern of conduct designed to prevent or delay Auerbach from inspecting  
19 and copying the corporate records. But the issues raised by this case are not primarily factual, they  
20 are legal issues. Auerbach contends that both the Inspection Procedures themselves and Lynn's  
21 subsequent letter unlawfully interfere with his rights as a Director to inspect and copy ICANN  
22 corporate records, under both Corporations Code § 6334 and Article V, Section 21 of ICANN's own  
23 Bylaws. ICANN contends to the contrary. Thus, the Court will be asked to decide four questions  
24 of law:

25 First, what are the nature and extent of Auerbach's rights, as a Director of a California  
26 Nonprofit Public Benefit Corporation, to inspect and copy the records of that corporation?  
27  
28

1 Second, if the corporation has the right to impose restrictions on Auerbach's right (other than  
2 reasonable time restrictions, about which the parties do not disagree), would ICANN's Inspection  
3 Procedures (Exhibit 20) be in accordance with the law, assuming that they had been adopted or  
4 approved by the Board?

5 Third, given that the Inspection Procedures have not been adopted or approved by the Board,  
6 are they valid nonetheless?

7 Fourth and finally, are the additional restrictions set forth in Lynn's October 5, 2001 letter  
8 (Exhibit 25) lawful and binding on Auerbach?<sup>2</sup>

9  
10 **I.**

11 **THE FACTS**

12 **A. Facts Prior to Auerbach Becoming an ICANN Director.**

13 ICANN is a California Nonprofit Public Benefit Corporation. See ICANN Articles of  
14 Incorporation (Auerbach Decl. ¶ 4 and Ex. 1). There is no single governing body for all of the  
15 Internet, but ICANN bears responsibility for certain key functions of the Internet. (Auerbach Decl.  
16 ¶ 4.) Currently, ICANN has 18 members on its Board of Directors, who reside around the world,  
17 not just across the United States. (Auerbach Decl. ¶ 9.) Having won an election for the At Large  
18 Director seat for the North America region, Auerbach became a Director of ICANN on the  
19 conclusion of ICANN's November 2000 annual meeting. (Auerbach Decl. ¶ 2.) His term as an  
20 ICANN Director continues through ICANN's 2002 annual meeting, presently scheduled to be held  
21 in Shanghai on October 31, 2002. (*Id.*)

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22  
23  
24 <sup>2</sup>The interpretation of written instruments, including the Inspection Procedures and Lynn's  
25 letter, of course is a question of law for the Court. Parsons v. Bristol Development Co., (1965)  
26 62 Cal.2d 861, 865 ("The interpretation of a written instrument, even though it involves what  
27 might properly be called questions of fact [...] is essentially a judicial function to be exercised  
28 according to the generally accepted canons of interpretation so that the purposes of the  
instrument may be given effect. [...] It is therefore solely a judicial function to interpret a written  
instrument unless the interpretation turns upon the credibility of extrinsic evidence.")

1 In November 1998, ICANN adopted its first set of Bylaws. (Auerbach Decl. ¶ 5.) Though  
2 the Bylaws have been amended or revised from time to time, there are three provisions of Article V  
3 that are relevant here and that have remained unchanged from the beginning. First, given the purpose  
4 of ICANN's existence and that its Board members are located around the world, it is no surprise that  
5 the Bylaws specifically provide for the conduct of ICANN business through the use of e-mail. Article  
6 V, Section 20 states:

7 If permitted under applicable law, communication by electronic mail shall be  
8 considered equivalent to any communication otherwise required to be in writing. The  
9 Corporation shall take such steps as it deems appropriate under the circumstances to  
10 assure itself that communications by electronic mail are authentic.

11 (Auerbach Decl. ¶ 9 and Ex. 2 [ICANN Bylaws, Article V].)

12 Second, the ICANN Bylaws recognize that a Director must act consistent with the Director's  
13 reasonable belief as to what is in the best interest of ICANN. Article V, Section 8 of the Bylaws  
14 provides that:

15 Directors shall serve as individuals who have the duty to act in what they reasonably  
16 believe are the best interests of the Corporation and not as representatives of the  
17 subordinate entity that selected them, their employers, or any other organizations or  
18 constituencies. (Emphasis added.)

19 Third, to help a Director make a determination of what he or she sees as being in the best  
20 interest of ICANN, Article V, Section 21 of ICANN's Bylaws, as quoted in the Introduction, allows  
21 a Director the right to inspect and copy "...all books, records and documents of every kind...."

22 **B. November 2000 Through August 2001.**

23 Shortly after Auerbach became an ICANN Director in November 2000, he made an oral  
24 request of Michael Roberts ("Roberts"), the President and CEO of ICANN at the time, to inspect and  
25 copy ICANN's General Ledger. On December 3, 2000, Auerbach followed up the oral request by e-  
26 mailing a letter to Roberts, making the same request. (Auerbach Decl. ¶s 7, 8 and Ex. 3.) Roberts  
27 responded by e-mail of December 6, 2000. He stated:

28 Thanks for your reminder note about access to financial records. Because we haven't  
had this type of Director access request before, and because there are legal interests  
involved, both the corporation's and yours as a serving Director, we need to establish  
a written procedure and related agreement. As you note, there are other things on our  
plate at the moment, but Louis [Touton, ICANN's General Counsel] will be in touch



1           sometime in the next couple of weeks. Since financial records are involved, I've also  
2           discussed your verbal request to me at the annual meeting with Linda Wilson, Chair  
3           of the Audit Committee, which has oversight responsibility for financial matters, and  
4           will include her in future correspondence on your request.

5           (Auerbach Decl. ¶ 10 and Ex. 4.)

6           Despite what Roberts wrote, Auerbach did not hear anything further from Roberts, Touton,  
7           Wilson or any other ICANN representative. Nothing happened with respect to Auerbach's request  
8           until three months later, in early March, 2001. On or about March 3, 2001, Roberts sent an e-mail  
9           to the Board e-mail list <[icann-board@icann.org](mailto:icann-board@icann.org)> concerning ICANN's financial statements.  
10          Responding to a particular item mentioned by Roberts, Auerbach replied by e-mail on March 3,  
11          stating in part that "I, for one, would like to see the detailed statements of account for all financial  
12          matters related to the DNSO. Consider this a request for that material." (The DNSO is one of  
13          ICANN's core functions.) (Auerbach Decl. ¶ 14 and Ex. 6.)

14          A series of e-mails related to Auerbach's document request ensued, between Roberts, ICANN  
15          Vice President, Secretary and General Counsel Louis Touton ("Touton"), Board Chair Cerf and  
16          Auerbach. (Auerbach Decl. ¶ 15 and Exs. 7 - 15.) In Exhibit 7, Roberts suggested that Auerbach  
17          take up the matter of access to corporate records with Phil Davidson ("Davidson"), who had  
18          succeeded Linda Wilson as Chair of the Board's Audit Committee, thus implying that at least  
19          Davidson, and possibly the whole Audit Committee, had access to the information Auerbach sought.  
20          In Exhibit 8, Auerbach again requested the DNSO financial records, and reminded Roberts that he  
21          had not dropped his earlier request for the ICANN General Ledger. In Exhibit 10, responding to an  
22          e-mail from Cerf about the DNSO funds, Auerbach wrote that he had a right to see the records, that  
23          he had been patient, but that Roberts' response the previous day had made him impatient. In Exhibit  
24          11, Cerf wrote to Auerbach that "i agree that you have a right to see financial records - and I will  
25          advise Mike (or perhaps more appropriately, Stuart) that this is the case." (Mike Roberts was  
26          departing ICANN, and was scheduled to be replaced as President and CEO later in March by M.  
27          Stuart Lynn ("Lynn")).  
28

1 In Exhibit 12, Roberts wrote, in part:

2 For the record, at no time have I ever told you that you could not have access to the  
3 records of the corporation. I said to you that if you felt this was necessary, I would  
4 discuss the matter with General Counsel, with the Chair of the Board, and with the  
5 Chair of the Audit Committee, with the intention to establish a written procedure for  
the finance staff to follow, which hasn't been necessary in the past because the other  
Directors have felt that their responsibilities on financial matters were fulfilled by the  
work of the Audit Committee and the external auditors.

6 Again, Roberts implies that the Board members who were also members of the Audit Committee had  
7 access to the records Auerbach was seeking, even though a written procedure had not yet been  
8 established. In Auerbach's response to Roberts, Exhibit 13, he reminded Roberts that his initial  
9 records request already had been pending for three months, but that neither Roberts nor Touton nor  
10 the Audit Committee had done anything to advance the request. Roberts had insisted that there be  
11 written procedures and a related agreement, but Auerbach was aware of no progress towards  
12 producing either of those documents. In Exhibit 14, Touton responded to some of Auerbach's  
13 statements about what he believed to be the rights and duties of a Director of a corporation such as  
14 ICANN. Touton did not state any disagreement with Auerbach's right to inspect the corporate  
15 records. Knowing that Touton, unlike Roberts, would be continuing with ICANN, Auerbach made  
16 certain in his response, Exhibit 15, that Touton understood that Auerbach was still seeking access to  
17 the General Ledger.

18 Shortly after the early March e-mail exchanges, Roberts did in fact depart ICANN, and was  
19 replaced as President, CEO and Board member by Lynn. As Lynn was new to ICANN, it was  
20 appropriate for Auerbach to give him a settling-in period before pursuing the records request with  
21 him, particularly since Auerbach's impression was that the March exchange of e-mails had gotten  
22 things moving on the creation of the procedures which Roberts required. On June 22, 2001, roughly  
23 three months after Lynn's tenure with ICANN began, Auerbach e-mailed Lynn a short note saying  
24 that he was still interested in looking at the General Ledger and inquiring how best to arrange it.  
25 Lynn responded by e-mail dated June 26, 2001. Lynn indicated that the Audit Committee had some  
26 changes it wanted made to the "governing document", but that he expected to have it approved within  
27 the next few weeks, depending on schedules. Auerbach was uncertain what exactly that "governing  
28

1 document" might be, but at least he was encouraged that, apparently, progress was being made. On  
2 August 6, 2001, Lynn e-mailed Auerbach an update. (Auerbach Decl. ¶ 18 and Exs 16 - 18.)

3 **C. September 2001 Through November 2001.**

4 Finally, on September 2, 2001, almost nine months to the day after Auerbach's initial written  
5 request, more than five months after Lynn took office, more than two months after Lynn wrote  
6 (Exhibit 17) that he expected the document to be ready within two to three weeks, depending on  
7 schedules, and almost three years after ICANN adopted a Bylaw provision (Article V, Section 21)  
8 that calls for ICANN to "establish reasonable procedures to protect against the inappropriate  
9 disclosure of confidential information," Lynn sent e-mails to the Board and to Auerbach saying that  
10 the procedures for directors to inspect corporate records had been released, and attaching the two-  
11 page Inspection Procedures. (Auerbach Decl. ¶ 19 and Exs 19, 20.)

12 We will discuss the Inspection Procedures in detail in the Argument section. Here, we simply  
13 set forth the most critical provisions, paragraphs 3, 5 and 6:

14 **3. Responses to Requests for Inspection of Records.**

15 Within 10 business days of receipt of a Director request for inspection of records the  
16 Chief Executive Officer will advise the Director as to the time and place at which the  
17 records will be available for inspection and any restrictions on access to requested  
18 records. Records shall be made available during normal business hours of the  
19 Corporation and at a location in the Corporation's offices which is convenient to the  
20 conduct of the Corporation's business. Except in the case of a burdensome request  
21 for records, records shall be available for inspection not more than 20 days from the  
22 request; provided that the actual inspection may occur on a date that is convenient to  
23 the Director.

24 [...]

25 **5. Restrictions on Access or Use.**

26 To the extent that the Chief Executive Officer, in consultation with the General  
27 Counsel of the Corporation, determines that compliance with any request for records  
28 necessarily involves issues of confidentiality, privilege, or privacy of a nature which  
require limitation of or conditions on the Director's access or use of the requested  
records, the Chief Executive Officer shall advise the requesting Director of the issues  
which require the restrictions and the nature of any proposed restrictions on access  
or use. Similarly, if permitting an inspection of the Corporation's properties  
necessarily involves such issues, the Chief Executive Officer shall advise the  
requesting Director in writing of any restrictions on access to the Corporation's  
properties. If the Director accepts the restrictions by countersigning the statement

1 concerning limitations, the records shall be made available to the Director or the  
2 inspection scheduled as soon as possible.

### 3 **6. Appeal of Restrictions.**

4 If the Director believes that any restrictions proposed by the Chief Executive Officer  
5 are unreasonable, the Chief Executive Officer shall submit the request to the Audit  
6 Committee of the Board of Directors of the Corporation for resolution. The Audit  
7 Committee shall consider the request and respond to the Director not more than 20  
8 days following submission of the request by the Chief Executive Officer. If the  
9 Director disagrees with the resolution of the issue by the Audit Committee, the  
10 Director may appeal this decision by notice to the Chairman of the Board of the  
11 Corporation, and the entire Board (other than the requesting Director) shall make a  
12 final and binding decision concerning the production of the records involved or the  
13 timing of any inspection of the Corporation's properties.

14 By e-mail on September 2, 2001 to Lynn and the Board list, Auerbach thanked Lynn for  
15 having the Inspection Procedures prepared. Without regard to whether he agreed with them, at least  
16 he finally had something tangible with which to work. In that e-mail, Auerbach stated that the  
17 Inspection Procedures appeared to be at variance with California law. (Auerbach Decl. ¶ 24 and Ex.  
18 21. Though not engaged in the active practice of law, Auerbach has been a member in good standing  
19 of the California bar since 1978. (Auerbach Decl. ¶ 25.)

20 On September 3, 2001, Touton and Auerbach exchanged e-mails through the Board e-mail  
21 list. Touton presented his interpretation of the Inspection Procedures, and why he thought they were  
22 reasonable. Auerbach responded that he was happy that the long awaited procedures had finally  
23 come into existence. However, that statement did not imply that those procedures lacked flaws. In  
24 fact, in the same e-mail Auerbach pointed out some of those flaws. He recognized, as he always has  
25 done, the fiduciary duties imposed on him as a Director of ICANN, including the duty of confidence,  
26 but he was concerned, among other things, that the Inspection Procedures could result in a conflict  
27 between those procedures and the law, to the detriment of both ICANN and Auerbach, or any other  
28 Director. (Auerbach Decl. ¶ 25 and Exs 22, 23.)

Subsequently, Lynn and Auerbach exchanged a series of e-mailed letters, each sent only or  
primarily one to the other, rather than through the Board e-mail list to the entire Board. On  
September 23, 2001, Auerbach e-mailed to Lynn a letter, which included another copy of Auerbach's  
December 3, 2000 letter to Roberts (Exhibit 3), and stated the following, among other things:

1 Please make available the following materials for my inspection and copying:

- 2 1. ICANN's General Ledger reports (chart of accounts, transaction journal, and  
3 account balances) from corporate inception to the present (or as close to  
4 present as is reasonably feasible.)  
5 a. These reports should include, at a minimum, the following standard  
6 accounting reports.  
7 i. Chart of Accounts  
8 ii. The daily transaction journal showing for each account in the  
9 chart of accounts all amounts and transactions that have been  
10 debited or credited to that account.  
11 b. In order to save time and cost and to facilitate my analysis, I'd prefer  
12 to get these reports in two distinct forms:  
13 i. An electronic image capture of each of the above described  
14 reports. This electronic image capture would, for example,  
15 use something like Adobe Acrobat.  
16 ii. Some format that can be loaded into Microsoft Excel.  
17 2. Any supplemental accounting ledgers showing all funds or financial  
18 obligations held by ICANN but not listed in the General Ledger. This would  
19 include, but is not limited to, accounting ledgers pertaining to entities such as  
20 IANA, the Domain Name Supporting Organization (DNSO), and the  
21 Government Advisory Committee (GAC).  
22 3. With regard to employee hiring and employee policies:  
23 a. The corporate employee handbook, if any.  
24 b. All materials, if any, that an employee of ICANN is expected to enter  
25 into when he or she is hired. These would include, for example, offer  
26 letter forms that are typically used, employment agreements,  
27 intellectual property agreements, non-disclosure agreements, and the  
28 like.  
29 4. With regard to ICANN's law firm:  
30 a. Engagement letters  
31 b. Conflict notices and requests for waivers that have been received from  
32 the law firm.  
33 c. Waivers granted by ICANN to the law firm.  
34 d. Detailed invoices from the law firm since the inception of the  
35 corporation.  
36 5. Logs of all international travel not directly associated with one of the regular  
37 public meetings made by ICANN officers other than the President from  
38 January 1, 2001 until the present (or as close to present as is reasonably  
39 feasible.)

40 Toward the end of the letter, Auerbach specifically stated that "It is my intention to exercise my right  
41 to make copies and to take them to my offices for examination." (Auerbach Decl. ¶ 26 and Ex. 4.)

42 Lynn responded by e-mailed letter dated October 5, 2001. Lynn proposed dates when  
43 Auerbach could inspect the requested materials at ICANN's office, but he also imposed additional  
44 restrictions that are beyond both the law and the Inspection Procedures (Exhibit 20).

1           !       Lynn required that, to the extent there were any concerns about the confidentiality of  
2                   a document, Auerbach make a written inquiry to Lynn about same, and that Auerbach  
3                   maintain the utmost confidentiality until Lynn responded. In other words, Lynn was  
4                   reserving to himself the right to determine if any particular document, or even all the  
5                   requested documents, were confidential;

6           !       Lynn allowed Auerbach to be accompanied by Auerbach's attorney or other advisor,  
7                   but reserved to himself the right to veto the person(s) selected;

8           !       Lynn determined that, though Auerbach would be allowed to inspect paper copies of  
9                   the records requested, Auerbach would not be given electronic copies as requested  
10                  of at least some of them;

11          !       Lynn required Auerbach to sign and return a copy of his letter as a prior condition of  
12                  Auerbach's inspection;

13          !       Finally, only after Auerbach had inspected the records could he designate those for  
14                  which he wanted copies made. His "request" for copies then would be considered by  
15                  Lynn, with the advice of Touton and in consultation with the Audit Committee, at  
16                  which point copies of the records might or might not be provided; this despite the  
17                  clear statement in Auerbach's September 23 letter that he wanted copies of  
18                  everything.<sup>3</sup>

19 Lynn concluded the letter by stating that Auerbach's refusal to countersign the letter would be  
20 "inconsistent with the Procedures endorsed by the Board's Audit Committee" and that if Auerbach  
21 believed that anything in Lynn's letter was unreasonable, Auerbach should refer the matter to the  
22 Audit Committee. (Auerbach Decl. ¶ 27 and Ex. 25.) As set forth towards the end of the  
23  
24

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25  
26               <sup>3</sup>Auerbach lives in Santa Cruz and works near his home. ICANN is located in Marina Del  
27               Rey, more than 300 miles away. The records he requested were fairly extensive. It is not  
28               unreasonable for Auerbach to want to actually study the records, rather than to just skim through  
              them at ICANN's office.

1 Introduction, this October 5 letter from Lynn, along with the Inspection Procedures, are the writings  
2 which the Court must construe.

3 By letter e-mailed to Lynn on October 15, 2001, Auerbach responded to Lynn's October 5  
4 letter. He declined to sign Lynn's letter for the reasons stated there and in his Declaration  
5 accompanying this motion. On October 21, 2001, Lynn responded by e-mailing Auerbach a four-  
6 page letter, including multiple case citations, setting forth "the corporation's legal position on these  
7 points." Auerbach responded by letter e-mailed on October 27, 2001. Lynn responded by letter e-  
8 mailed on October 31, 2001. (Auerbach Decl. ¶ 31 and Exs 26 - 29.)

9 It is clear from reading those letters that there were (and are) fundamental disagreements  
10 between Lynn and Auerbach. Yet, in an attempt to go forward, Auerbach was willing to compromise  
11 on some (but not all) of his positions. Lynn stresses, for example, the duties which a Director owes  
12 to a corporation. Auerbach has always acknowledged those duties. Lynn says that ICANN never  
13 refused to permit Auerbach's inspection. But the simple fact is that for more than nine months  
14 Auerbach was blocked from inspection because ICANN claimed it had no procedures for him to make  
15 an inspection and that he had to wait for ICANN to create such procedures. After nine months of  
16 waiting, and once those procedures were revealed, Auerbach discovered that his ability to inspect was  
17 made dependent on his signing an agreement with ICANN in which Lynn imposed substantive  
18 limitations and restrictions as set forth in his October 5 letter (Exhibit 25). As far as compromises,  
19 Auerbach did not believe that ICANN could force him to disclose the names of his advisors and  
20 obtain ICANN's approval of those advisors (one of the additional terms imposed by Lynn's October  
21 5 letter), but Auerbach did so anyway in his October 27 letter (Exhibit 28). Most importantly, though  
22 Auerbach had stated repeatedly to Lynn and others that it was not his intent to publicly disclose the  
23 corporate records, Lynn remained fearful, without foundation, that Auerbach would do so.  
24 Consequently, in his October 27 letter, Auerbach suggested the following compromise that he did not  
25 believe was required by law:

26 I will undertake the following as a matter of courtesy: I am willing to give ICANN  
27 seven calendar days advance written or e-mail notice of any disclosure of data that I  
28 learn solely from the corporate materials I have inspected to parties beyond my inner

1 circle of advisors. (My inner circle consists of my attorney, Curtis Karnow of  
2 Sonnenschein Nath & Rosenthal, Sheila Joyce Kellerman, CPA, and the members and  
3 employees of their respective firms.) This will give you ample opportunity to suggest  
alternatives, to offer constructive advice, or, to take other actions if you feel that I am  
violating my rights and duties as a Director.

4 Lynn dismissed Auerbach's offer in his October 31 letter, even though, in that same letter, he wrote  
5 that "[y]ou have stated that your actions are governed by your duty of loyalty to the corporation, and  
6 of course we accept your representation of this at face value." (Auerbach Decl. ¶ 32.)

7 In his October 21 letter (Exhibit 27), Lynn said that the matter would be referred to the  
8 Board's Audit Committee if Auerbach did not wish to proceed in accordance with Lynn's October 5  
9 letter. As Auerbach declined to do so, the matter apparently was referred to the Audit Committee,  
10 though Auerbach was given no notice of when the committee would meet and was given no  
11 opportunity to present his position to the committee.

12 On November 17, 2001, Phil Davidson, at the time the Chair of the Audit Committee, sent  
13 an e-mail to Auerbach stating that the committee had met on November 15, 2001. (Auerbach Decl.  
14 ¶ 33 and Ex. 30.) In that e-mail, Davidson wrote that "[t]he material considered was the e-mail and  
15 letter attachments sent by the CEO [Lynn] to Director Karl Auerbach on 22 October 2001. This  
16 means, among other things, that the Audit Committee did not have Auerbach's October 27, 2001 e-  
17 mailed letter (Exhibit 28), in which Auerbach proposed the compromise of giving seven days notice  
18 of any disclosures that might be contemplated. Without the benefit of knowledge of Auerbach's  
19 proposal, Davidson wrote that the committee believed that Lynn's October 5, 2001 letter provided  
20 reasonable safeguards for the confidentiality of ICANN information, and that the committee urged  
21 Auerbach to reconsider his refusal to accept the terms of Lynn's October 5 letter.



1 This action followed.<sup>4</sup>

2 **II.**

3 **ARGUMENT**

4 **A. The Right of a Director to Inspect and Copy Under Corporations Code § 6334**  
5 **is Close to Absolute.**

6 As a California Nonprofit Public Benefit Corporation, ICANN is governed by Corporations  
7 Code § 6334, which provides that:

8 Every director shall have the absolute right at any reasonable time to inspect and copy  
9 all books, records and documents of every kind and to inspect the physical properties  
10 of the corporation of which such person is a director.

11 The reason why Directors have such expansive rights is set forth in Corporations Code §  
12 5210:

13 "...the activities and affairs of a corporation shall be conducted and all corporate  
14 powers shall be exercised by or under the direction of the board. The board may  
15 delegate the management of the activities of the corporation to any person or persons,  
16 management company, or committee however composed, provided that the activities  
17 and affairs of the corporation shall be managed and all corporate powers shall be  
18 exercised under the ultimate direction of the board. (Emphasis added.)

19 We assume that the Legislature knew what it was doing when it included the word "absolute"  
20 in § 6334 and when it did not include other limiting language. Compare, for example, Corporations  
21 Code § 9513, applicable to Nonprofit Religious Corporations, which states:

22 Every director shall have the right at any reasonable time to inspect and copy all  
23 books, records and documents of every kind and to inspect the physical properties of  
24 the corporation of which such person is a director for a purpose reasonably related  
25 to such person's interests as a director.

26 A Director of a Nonprofit Public Benefit Corporation has an "absolute right" to inspect and  
27 copy, while a Director of a Nonprofit Religious Corporation only has a "right" to inspect and copy.  
28

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24 <sup>4</sup>We are aware that, in its First Amended Answer to the Petition, ICANN has made wild  
25 and speculative allegations about a number of matters, including the timing of this action as it  
26 related to a recent ICANN Board meeting. ICANN can not rely on its pleadings to oppose a  
27 summary judgment motion, and it is not Auerbach's burden to negate in his moving papers any  
28 alleged defenses raised by the Amended Answer. Code of Civil Procedure § 437c(o). If ICANN  
raises those matters in a manner which requires response, we will do so accordingly.

1 Further, a Director of a Nonprofit Religious Corporation must show that the request to inspect and  
2 copy is "for a purpose reasonably related to such person's interests as a director," but a Director of  
3 a Nonprofit Public Benefit Corporation is not required to make such a showing.<sup>5</sup>

4 § 6334 also should be contrasted to § 6333, which governs the inspection rights that the  
5 members of a Nonprofit Public Benefit Corporation have with respect to the corporation's accounting  
6 records. It provides:

7 The accounting books and records and minutes of proceedings of the members and  
8 the board and committees of the board shall be open to inspection upon the written  
9 demand on the corporation of any member at any reasonable time, for a purpose  
10 reasonably related to such person's interests as a member.

11 Here again, the "reasonably related to such person's interests" language appears, as in § 9513,  
12 but not in § 6334. The Legislature is telling us something, and part of the focus of this case is to  
13 ascertain what is the message.

14 Despite the differences in these code sections, we recognize that a Director's rights under §  
15 6334 are not literally absolute. First, the statute itself contains the "reasonable time" limitation, about  
16 which the parties do not seem to disagree. Second, however, as with any statute, it must yield to  
17 Constitutional rights, and may yield to other statutes in conflict with it.

18 For example, in Chantiles v. Lake Forest II Master Homeowners Ass'n, (1995) 37  
19 Cal.App.4th 914, a Director of a homeowners association requested to inspect the ballots of the most  
20 recent election of Board members.<sup>6</sup> Citing the privacy rights of the individual association members,  
21 the Association refused, and Chantiles filed a writ of mandate petition. The trial court found that the  
22 ballots were the type of record that a Director of the association had a right to inspect, but that the  
23 inspection right had to be balanced against the reasonable expectations of privacy of the association

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24 <sup>5</sup>Both sections were enacted in the same legislation in 1978, effective January 1, 1980,  
25 though § 9513 subsequently was amended.

26 <sup>6</sup>There are no cases construing Corporations Code § 6334. Thus, to a point, we look to  
27 cases construing similar statutes applicable to corporations other than Nonprofit Public Benefit  
28 Corporations. Chantiles construed Corporations Code § 8334, which is worded identically to §  
6334.

1 members, 120 of whom submitted Declarations in opposition to Chantiles' petition. The trial court  
2 declined to allow Chantiles to inspect the ballots, but allowed his attorney to do so under certain  
3 conditions. Chantiles appealed, and the Court of Appeal affirmed.

4 The Court found that the individual owners had a right of privacy to their ballots under Article  
5 I, Section 1 of the California Constitution.<sup>7</sup> The Court further found that a Director's statutory  
6 inspection rights needed to be balanced against the Constitutional privacy right. Finally, the Court  
7 held that the trial court struck the proper balance by denying Chantiles the right to inspect the ballots  
8 personally, but allowing his attorney to inspect them, without revealing the names of who voted for  
9 whom. 37 Cal.App.4th at 926. The decision is no surprise given the sanctity that free countries place  
10 on the privacy of the ballot box.

11 In *dicta*, the Court gave other examples of where a Director's inspection rights might collide  
12 with the Constitutional right of privacy. At 37 Cal.App.4th 925, the Court stated:

13 We reject Chantiles's assertion because section 8334 gives him an "absolute right" to  
14 inspect, this right need not yield to any other right, not even a constitutional right.  
15 As Sproul & Rosenberry note, "[Section 8334's] broad and unqualified statement of  
16 a director's inspection rights can present difficult ethical and legal issues.... [For]  
17 example, what if a director who ran for office on a platform critical of the present  
18 general manager's conduct and salary demands the right to inspect the general  
19 manager's personnel file and to disclose its contents to the members ...? [¶] [T]he  
20 manager's constitutional right of privacy under [California Constitution, article I,  
21 section 1] may preempt a director's general rights of inspection [.]" (Sproul &  
22 Rosenberry, *supra*, § 2.52, pp. 103-104; see also *Advising California Nonprofit  
23 Corporations* (Cont.Ed.Bar 1984) § 8.53, p. 439 ["A director's right of inspection  
24 may be subordinate to other statutes specifically protecting confidential, private, or  
25 privileged records against inspection, although there is no such express provision."].)

26 Havlicek v. Coast-to-Coast Analytical Services, Inc. (1995) 39 Cal.App.4th 1844 is another  
27 instructive case. After disposing of a choice of law issue, the Court analyzed Corporations Code §  
28 1602, the analog to § 6334 in the General Corporation Law. At 39 Cal.App.4th 1852, it stated:

29 The directors of a corporation owe a fiduciary duty to the corporation and its  
30 shareholders. Section 1602 represents a legislative judgment that directors are better  
31 able to discharge those duties if they have free access to information concerning the

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32 <sup>7</sup>"All people are by nature free and independent and have inalienable rights. Among these  
33 are enjoying and defending life and liberty, acquiring, possessing, and protecting property, and  
34 pursuing and obtaining safety, happiness, and privacy."

1 corporation. Thus, California has a public policy favoring broad inspection rights for  
2 the directors. The Legislature has also declared that it is the public policy of California  
3 to apply the same standards to foreign corporations whose principal executive offices  
4 are located in California. We may not ignore that declaration of public policy.  
(Citations omitted.)<sup>8</sup>

5 The issue in Havlicek was whether corporate directors who might use the corporate records  
6 to open a competing business could be denied access to the records. The trial court said they could  
7 be denied, but the Court of Appeal reversed. In the only case in addition to Chantiles that speaks  
8 meaningfully to a director's absolute right to inspect and copy, the Court stated (39 Cal.App.4th at  
9 185-56):

10 The trial court must apply California law but is not obligated to grant appellants  
11 unfettered access to every document ever created by CCAS. Instead, the trial court  
12 may impose "just and proper conditions" upon appellant's otherwise "absolute"  
13 inspection rights. We admit that the Legislature's choice of the word, "absolute," in  
14 section 1602 does give us pause. But one hypothetical illustrates that "absolute"  
15 cannot mean "absolute." A disgruntled director unambiguously announces his or her  
16 intention to violate his or her fiduciary duties to the corporation and the shareholders  
17 by using inspection rights to learn trade secrets, gain access to confidential customer  
18 lists, and compete with the corporation. In this situation, does the Legislature want  
19 the judiciary to come to the aid of the disgruntled director, enforce the "absolute  
20 right" to inspect and help the director commit a tort against the corporation? No.

21 Auerbach, of course, has made no such announcement. At 39 Cal.App.4th 1856, the Court  
22 continued, in language most important to what the parties need to do in this case:

23 The "absolute right" to inspect documents is the general rule in California. However,  
24 section 1602 must be read *in pari materia* with section 1603. The language of section  
25 1603, subdivision (a) is expansive. It is not expressly limited to an inspection request  
26 by a shareholder. Being a remedial statute, it must be liberally construed. Where the  
27 corporation determines that an unfettered inspection will result in a tort against the  
28 corporation, it may decline the request for inspection. In this situation, "... directors  
can enforce their inspection rights by court action.... [§ 1603]."

Upon a director's request for inspection pursuant to section 1603 in the superior  
court, the corporation must demonstrate, by evidentiary showing, that a protective  
order is necessary to prevent a tort against the corporation. Whether there are other  
situations where a director's inspection rights may be curtailed is not before us and we

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<sup>8</sup>We note, however, that directors of a nonprofit public benefit corporation owe fiduciary  
duties to more than just the corporation and its members. See Advising California Nonprofit  
Corporations, 2d Ed. (Cont.Ed.Bar 2001) § 8.100, pp. 385-86 ("Thus, the fiduciary duties of a  
public benefit corporation's directors are not only to the members but also to the general public.")  
See also paragraph 4 of ICANN's Articles of Incorporation (Auerbach Decl., Ex 1): "The  
Corporation shall operate for the benefit of the Internet community as a whole ...."

1 offer no opinion thereon. The superior court may then exercise its broad discretion  
2 under section 1603, subdivision (a) to fashion a protective order imposing just and  
3 proper conditions on the inspection. Precisely what "just and proper conditions" are  
4 necessary in this case, if any, is a question we leave to the superior court. (Citations  
5 omitted; emphasis added.)

6 Stated simply, the "absolute right" of § 6334 to inspect and copy is not literally absolute, but  
7 it is very close. It can be defeated where the exercise of the right would be outweighed in the balance  
8 by constitutional privacy rights, and it can be defeated where the corporation demonstrates, with  
9 admissible evidence, not just speculation, surmise and innuendo of the sort contained in ICANN's  
10 First Amended Answer to the Petition, that a protective order is necessary to prevent a tort against  
11 the corporation.<sup>9</sup> There is little, if anything, else that can defeat the absolute right, because  
12 "California has a public policy favoring broad inspection rights for the directors."<sup>10</sup> Havlicek, 39  
13 Cal.App.4th at 1852.<sup>11</sup> Further, in considering what a tort against ICANN is, the Court should not  
14 simply take ICANN's word, but instead should remember that, as a Nonprofit Public Benefit  
15 Corporation, ICANN itself and its directors owe fiduciary duties to the public, not just to the

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16 <sup>9</sup>We await ICANN's evidence as we recall Lynn's words in his October 31, 2001 letter to  
17 Auerbach (Auerbach Decl. Ex. 29): "You have stated that your actions are governed by your duty  
18 of loyalty to the corporation, and of course we accept your representation of this at face value."

19 <sup>10</sup>Part of the reason for that broad policy is set forth in Corporations Code § 5231(a):

20 A director shall perform the duties of a director, including duties as a member of  
21 any committee of the board upon which the director may serve, in good faith, in a  
22 manner such director believes to be in the best interests of the corporation and  
23 with such care, including reasonable inquiry, as an ordinarily prudent person in a  
24 like position would use under similar circumstances. (Emphasis added.)

25 <sup>11</sup>Based on Lynn's October 21, 2001 letter to Auerbach (Auerbach Decl. Ex. 27), we  
26 anticipate that ICANN may cite National Football League Properties v. Superior Court (1998) 65  
27 Cal.App.4th 100 for the proposition that the absolute right also does not allow for inspection of  
28 attorney-client privileged documents. However, in that case, the parties already were in litigation  
when the request for records concerning the litigation was made. More important, the case  
simply did not involve a request by a corporate director. "Most importantly, the discovery dispute  
between NFLP and the Raiders cannot be resolved by looking to a director's right to inspect  
corporate records. No NFLP director is a party to this dispute." *Id.* at 109.

1 corporation, see footnote 8, *supra*. If ICANN cannot meet its high burden of proof, then its remedy,  
2 in the unlikely event that Auerbach should breach his fiduciary duties, is an action for damages. Valtz  
3 v. Penta Investment Corp. (1983) 139 Cal.App.3d 803, 810; Hoiles v. Superior Court (1984) 157  
4 Cal.App.3d 1192, 1201.

5 **B. Article V, Section 21 of ICANN's Bylaws Does not Conflict With the Meaning**  
6 **of Section § 6334.**

7 Article V, Section 21 provides:

8 Section 21. RIGHTS OF INSPECTION

9 Every Director shall have the right at any reasonable time to inspect and copy all  
10 books, records and documents of every kind, and to inspect the physical properties  
of the Corporation. The Corporation shall establish reasonable procedures to protect  
against the inappropriate disclosure of confidential information. (Emphasis added.)

11 Though Section 21 does not contain the word "absolute," it accomplishes much the same by  
12 making it explicit, as does § 6334, that the right to inspect and copy applies to books and records of  
13 every kind, not just to certain kinds or to those which the ICANN President or Audit Committee  
14 agrees. That being the case, the second sentence regarding procedures cannot reasonably be  
15 construed to limit or place any prior conditions on a director's right to inspect corporate records, and  
16 cannot reasonably be construed to limit or place any prior condition on a director's right to copy  
17 corporate records, save only for the exceptional circumstances set forth in cases such as Chantiles and  
18 Havlicek.<sup>12</sup> By speaking in terms of reasonable procedures to prevent disclosure, it presumes that  
19 the Director already has the pertinent corporate records. The "reasonable procedures" simply are not  
20 intended, according to the plain reading of the Section, to limit or put conditions on a Director's right  
21 to inspect or copy.

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26 <sup>12</sup>Of course, if Article V, Section 21 did conflict with § 6334, necessarily the statute would  
27 take precedence over the Bylaw. Nothing in the nonprofit public benefit corporation law says that  
28 a corporation may by Bylaw or otherwise abrogate the rights conferred by § 6334.

1           **C. The Inspection Procedures Conflict with § 6334 and with Article V, Section 21**  
2           **of ICANN's Bylaws.**

3           Simply by setting forth the facts in Part IC, *supra*, we have made much of the argument.  
4 Except under rare circumstances, which must be proven, not just baldly asserted, a nonprofit public  
5 benefit corporation cannot deny or put prior conditions on a director's right to inspect and copy the  
6 corporate records. However, that is exactly what the Inspection Procedures (Exhibit 20) do.

7           Paragraph 3 of the Inspection Procedures specifically states that it includes "... restrictions on  
8 access to requested records," even though both Corporations Code § 6334 and Article V, Section  
9 21 of ICANN's Bylaws (quoted in paragraph 1 of the Inspection Procedures) are explicit that a  
10 Director has a right of access to "all books, records and documents of every kind ..." subject only to  
11 reasonable time limitations. Both the title and text of paragraph 5 of the Inspection Procedures make  
12 the conflict between the statute and the Inspection Procedures even more clear. Paragraph 5, entitled  
13 "Restrictions on Access or Use," provides in part that "[to] the extent that the Chief Executive  
14 Officer, in consultation with the General Counsel of the Corporation, determines that compliance with  
15 any request for records necessarily involves issues of confidentiality, privilege, or privacy of a nature  
16 which require limitation of or conditions on the Director's access or use of the requested records, the  
17 Chief Executive Officer shall advise the requesting Director of the issues which require the  
18 restrictions and the nature of any proposed restrictions on access or use."

19           Paragraph 6 of the Inspection Procedures provides for a referral of the matter to the Board's  
20 Audit Committee if there is a disagreement between the CEO and the requesting Director, but gives  
21 the requesting Director no right to appear before the Audit Committee to present his or her case, nor  
22 even notice of when the Audit Committee will consider the matter. Finally, paragraph 6 permits (but  
23 does not require) an appeal to the full Board if the requesting Director disagrees with the Audit  
24 Committee's decision, and the Board "... shall make a final and binding decision concerning the  
25 production of records involved ...." (Emphasis added.) That phrase would preclude the requesting  
26 Director from seeking judicial relief should the decision of the Board be adverse to the requesting  
27  
28

1 Director. There is no severability clause in the Inspection Procedures, and the idea that a corporation  
2 can deprive an aggrieved director of judicial access is utterly at odds with California law.

3 In short, the Inspection Procedures place both substantive and procedural restrictions on the  
4 Director's right to inspect and copy records; despite the fact that neither the statute nor the Bylaws  
5 allow for anything other than reasonable procedures to insure non-disclosure of specific items after  
6 the Director has obtained them, save only for exceptional and proven circumstances involving matters  
7 such as constitutional rights or a tort against the corporation.

8 ICANN's Board never has adopted or approved the Inspection Procedures (Auerbach Decl.  
9 ¶ 23), but we submit that their failure to do so is irrelevant. Even if the Inspection Procedures had  
10 been approved by the Board, they run afoul of both § 6334 and ICANN's own Bylaws.

11 **D. Lynn's October 5, 2001 Letter Runs Further Afoul of § 6334 and**  
12 **of Article V, Section 21 of ICANN's Bylaws.**

13 We have earlier set forth the problems with Lynn's October 5, 2001 letter (Auerbach Decl.  
14 Ex. 25). We reiterate here only the two most significant ones: (1) Lynn required that, to the extent  
15 there were any concerns about the confidentiality of a document, Auerbach make a written inquiry  
16 to Lynn about same, and that Auerbach maintain the utmost confidentiality until Lynn responded.  
17 In other words, Lynn was reserving to himself the right to determine if any particular document, or  
18 even all the requested documents, were confidential; and (2) only after Auerbach had inspected the  
19 records could he designate those for which he wanted copies made. His "request" for copies then  
20 would be considered by Lynn, with the advice of Touton and in consultation with the Audit  
21 Committee, at which point copies of the records might or might not be provided; this despite the clear  
22 statement in Auerbach's September 23 letter that he wanted copies of everything.

23 Clearly, these restrictions violate the law and the meaning of the relevant Bylaw provision,  
24 as we have argued already. A corporation's ability to impose *a priori* restrictions is itself highly  
25 restricted, and surely is not as broad as are these restrictions.

26 Further, Lynn's letter did not even follow the Inspection Procedures. Those procedures  
27 provide, among other things, that Lynn "shall advise the requesting Director of the issues which  
28



1 require the restrictions and the nature of any proposed restrictions on access or use." There is an  
2 obvious and good reason for such a provision. Lynn already has access to the records in question,  
3 he is better equipped to articulate why there may be a problem with a particular requested record.  
4 By explaining the issues, Lynn would have fostered a possible meeting of the minds, a possible  
5 agreement with Auerbach that certain records should be handled in a particularly sensitive manner.<sup>13</sup>  
6 Additionally, the law speaks of denying director access only to specific records, based on good  
7 reason.

8 But Lynn ignored all of that, he simply invoked the mantra, without explanation, that "... these  
9 materials are confidential, and their release or disclosure to anyone other than an officer or Director  
10 of ICANN has not been approved by the Board of Directors of ICANN."<sup>14</sup>

### 11 CONCLUSION

12 We return to the four questions of law we posed in the Introduction.

13 "First, what are the nature and extent of Auerbach's rights, as a Director of a California  
14 Nonprofit Public Benefit Corporation, to inspect and copy the records of that corporation?"

15 Auerbach's rights to inspect and copy ICANN's corporate records are absolute, unless ICANN  
16 can invoke, with admissible evidence, the exceptional circumstances concerning constitutional privacy  
17 rights or a tort against ICANN as set forth in Havlicek and Chantiles.

18 "Second, if the corporation has the right to impose restrictions on Auerbach's right (other than  
19 reasonable time restrictions, about which the parties do not disagree), would ICANN's Inspection  
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23 <sup>13</sup>Auerbach demonstrated his willingness to compromise, if only to attempt to move  
forward. See Auerbach Decl. ¶ 32 and Ex. 28.

24  
25 <sup>14</sup>The quote is from paragraph 4 of Lynn's October 5 letter, the same paragraph in which  
Lynn acknowledges that part of Auerbach's request was for the Chart of Accounts. Though some  
26 financial records may be confidential, we cannot possibly see how the Chart of Accounts would  
be, see Auerbach Decl. ¶ 29. If one assumes that ICANN really does want to accommodate  
27 Auerbach but just does not understand the law, then Lynn's coarse-grained approach helps no  
28 one.

1 Procedures (Exhibit 20) be in accordance with the law, assuming that they had been adopted or  
2 approved by the Board?"

3 No. ICANN has no such generalized right, and its Inspection Procedures run afoul both of  
4 Corporations Code § 6334 and of ICANN's own Bylaws.

5 "Third, given that the Inspection Procedures have not been adopted or approved by the  
6 Board, are they valid nonetheless?"

7 No, for the reasons stated. They would be invalid even if they had been adopted or approved.

8 "Fourth and finally, are the additional restrictions set forth in Lynn's October 5, 2001 letter  
9 (Exhibit 25) lawful and binding on Auerbach?"

10 Clearly not, they go beyond the scope of even the Inspection Procedures, let alone § 6334 and  
11 ICANN's own Bylaws.

12 One might conclude that ICANN has been drawing this out as long as possible, perhaps in the  
13 hope that, literally, Auerbach will go away – his two-year term as a Director ends in October of this  
14 year. But whatever motives ICANN may have, Auerbach has the right to inspect and copy the  
15 corporate records, and to do so now.

16 The questions we raise are ones of law, not fact. This Court should grant the motion, and in  
17 accordance with Code of Civil Procedure § 1085, should issue its peremptory writ ordering and  
18 directing ICANN to immediately make available to Auerbach for inspection and copying all of the  
19 records which he has requested, and which he may request.

20  
21 Dated: May 21, 2002

Respectfully submitted,

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24 Cindy A. Cohn, State Bar Number 145997  
25 ELECTRONIC FRONTIER FOUNDATION

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