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6 INTERNET CORPORATION FOR ASSIGNED
NAMES AND NUMBERS
7

8 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**
9 **COUNTY OF LOS ANGELES**

10
11 **KARL AUERBACH,**

12 **Plaintiff,**

13 **v.**

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

16 **Defendant.**

Case No. BS 074771

**DEFENDANT ICANN'S SEPARATE
STATEMENT OF UNDISPUTED
MATERIAL FACTS 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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18
19 Defendant Internet Corporation for Assigned Names and Numbers ("ICANN") hereby
20 submits its Separate Statement of Undisputed Material Facts in support of its motion for summary
21 judgment dismissing Auerbach's Petition for Writ of Mandate.
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1 **Supporting Statement: ICANN's Inspection Procedures Are Reasonable.**

2 Undisputed Material Facts:

Supporting Evidence:

3 1. Article V, Section 21 of ICANN's
4 Corporate bylaws provides that the Corporation
5 shall establish reasonable procedures to protect
6 against the inappropriate disclosure of
7 confidential information.

Lynn declaration ("Lynn decl."), (page:line)
2:6- 10; Bylaws, Ex. 1 to Lynn decl.

8 2. ICANN's Guidelines for Directors state
9 that "[i]n discharging the duty of loyalty, the
10 Director must observe those policies which are
11 established by the Board of Directors or the
12 Officers which are intended to protect the
13 legitimate interests of the corporation. For
14 example, policies concerning confidentiality of
15 corporate information and employee relations
16 must be strictly observed even if a Director
17 may personally disagree with the policy, since
18 violations of these policies may cause damage
19 to the corporation and subject all Directors to
20 liability."

Touton declaration ("Touton decl."), 4:1-9;
Director Guidelines, Ex. 8 to Touton decl. at p.
4.

21 3. ICANN's procedures for director access
22 to its corporate records and properties are
23 called "ICANN Procedures Concerning
24 Director Inspection of Records and Properties"
25 (the "Inspection Procedures").

Lynn decl., 2:11-14; Inspection Procedures, Ex.
2 to Lynn decl.

26 4. Section 1 of ICANN's Inspection
27 Procedures provides that "[t]hese procedures
28 balance the Directors' interest in inspecting

Lynn decl., 2:15-21; Inspection Procedures, Ex.
2 to Lynn decl.

1 records and corporate properties with the
2 legitimate interests of the Corporation in
3 ensuring that requests are addressed in a
4 reasonable fashion without undue burden on
5 management, and with the protection of the
6 security of corporate information against
7 inappropriate disclosure and the protection of
8 privacy interests. These procedures do not
9 diminish a Director's rights to inspect, as
10 reflected in California law and Article V,
11 Section 21 of the Corporation's bylaws"

12 5. ICANN's Inspection Procedures outline Petition, Ex. 2.
13 basic arrangements to be made for any director
14 request for inspection, including that requests
15 for inspection shall be made in writing and that
16 the records be made available during normal
17 business hours on a date convenient to the
18 inspecting director.

19 6. Section 5 of ICANN's Inspection Lynn decl., 2:22-28; Inspection Procedures, Ex.
20 Procedures provides that "[t]o the extent the 2 to Lynn decl.
21 Chief Executive Officer, in consultation with
22 the General Counsel of the Corporation,
23 determines that compliance with any request
24 for records necessarily involves issues of
25 confidentiality, privilege, or privacy of a nature
26 which require limitation of or conditions on the
27 Director's access or use of the requested
28

1 records, the Chief Executive Officer shall
2 advise the requesting Director of the issues
3 which require the restrictions and the nature of
4 any proposed restrictions on access or use."

5 7. Section 6 of ICANN's procedures
6 provides that "[i]f the Director believes that any
7 restrictions proposed by the Chief Executive
8 Officer are unreasonable, the Chief Executive
9 Officer shall submit the request to the Audit
10 Committee of the Board of Directors of the
11 Corporation for resolution."

Lynn decl., 3:1-6; Inspection Procedures, Ex. 2
to Lynn decl.

12 8. The Audit Committee of ICANN's
13 Board of Directors has endorsed the Inspection
14 Procedures.

Touton decl., 5:1-5; August 21, 2001 minutes,
Ex. 12 to Touton decl.

15 9. The Inspection Procedures were
16 circulated to the Board of Directors on
17 September 2, 2001.

Lynn decl., 3:25-28; e-mail to Board, Ex. 6 to
Lynn decl.

18 10. Auerbach is a member of the Board of
19 Directors and is on the Board e-mail list.

Petition, p. 1 and ¶ 8.

20 11. On December 3, 2000, Auerbach made
21 a written request to inspect and copy ICANN's
22 records, including the General Ledger.

Letter, Ex. 9 to Touton decl.

23 12. Auerbach's request for records was the
24 first request by a member of ICANN's Board of
25 Directors to inspect corporate records raising
26 significant issues of confidentiality and ICANN
27 had not yet developed its Inspection
28

Touton decl., 4:13-15.

1 Procedures.

2 13. On September 3, 2001, Auerbach sent Touton decl., 5:6-10; e-mail, Ex. 13 to Touton
3 Touton an e-mail in reference to his inspection decl.
4 request that stated, "[t]hat some of this, perhaps
5 even all of this, is confidential is understood by
6 me. In fact I embrace the thought that there is a
7 clear statement of what such concerns may be
8 so that mistakes may be avoided."

9 14. On September 23, 2001 Auerbach Lynn decl., 4:9-11; letter, Ex. 9 to Lynn decl.
10 expanded his written request for access to
11 ICANN's corporate records to include
12 documentation concerning ICANN's funds,
13 financial obligations, and ICANN's
14 relationships with its lawyers.

15 15. Lynn determined that Auerbach's Lynn decl., 4:12-15.
16 September 23, 2001 request for access to
17 corporate records necessarily involved issues of
18 confidentiality, privilege, or privacy.

19 16. Lynn advised Auerbach, by letter dated Lynn decl., 4:18-22; letter, Ex. 10 to Lynn decl.
20 October 5, 2001, of the proposed arrangements
21 for Auerbach's access or use of the
22 corporation's records.

23 17. The proposed arrangements for Touton decl., 5:18-26; arrangements, Ex. 16 to
24 Auerbach's inspection of the corporate records Touton decl.; arrangements, Ex. 10 to Touton
25 were substantively similar to the arrangements decl.; Lynn decl. 7:5-9.
26 proposed for Director Phil Davidson's
27 subsequent request for inspection of the
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1 corporate records.

2 18. Director Davidson requested to inspect Lynn decl., 7:5-9; request, Ex. 20 to Lynn decl.
3 the same corporate records that Auerbach
4 requested to inspect.

5 19. Lynn determined that Davidson's Lynn decl., 7:13-15.
6 request for access necessarily involved issues
7 of confidentiality, privilege, or privacy.

8 20. For both Auerbach and Davidson, the Arrangements, Ex. 16 to Touton decl.;
9 proposed arrangements detailed the date(s) and Arrangements, Ex. 10 to Lynn decl.
10 manner in which the records would be made
11 available, the necessity of the director's
12 presence at the inspection, and the ability of the
13 director to be accompanied by counsel or an
14 advisor so long as that person's identity and
15 proposed function during the request was
16 provided in advance.

17 21. The proposed arrangements also Arrangements, Ex. 16 to Touton decl.;
18 identified the documents that would be made arrangements, Ex. 10 to Lynn decl.
19 available during the inspections and advised the
20 directors that if copies were required, a request
21 for copies could be made at the conclusion of
22 the inspection and the CEO would, in
23 conjunction with ICANN's General Counsel,
24 promptly consider whether the request for
25 copies implicated confidentiality or privilege
26 concerns.

27 22. The letters to the directors also provided Arrangements, Ex. 16 to Touton decl.;
28

1 that if, during the Inspection, the director has arrangements, Ex. 10 to Lynn decl.
2 any questions regarding the extent of
3 confidentiality of any item, the director should
4 direct the inquiry in writing to Lynn and
5 maintain the utmost confidentiality until
6 receiving a response from Lynn relaxing the
7 confidentiality.

8 23. The letters requested that the directors Arrangements, Ex. 16 to Touton decl.;
9 countersign the proposed arrangements in arrangements, Ex. 10 to Lynn decl.
10 acknowledgement of their duties as directors to
11 preserve confidentiality.

12 24. Section 5 of ICANN's procedures Inspection Procedures, Ex. 2 to Lynn decl.
13 provides that if the director countersigns the
14 statement concerning the arrangements, the
15 records shall be made available to the director
16 or the inspection scheduled as soon as possible.

17 25. Lynn's October 5, 2001 letter to Lynn decl., 4:18-22; letter, Ex. 10 to Lynn decl.
18 Auerbach provided space for Auerbach to
19 countersign it.

20 26. Auerbach did not countersign Lynn's Lynn decl., 4:23-26.
21 October 5, 2001 letter and return it to Lynn.

22 27. Davidson, on the other hand, promptly Touton decl., 6:1-4; countersigned letter, Ex.
23 acknowledged the proposed inspection 16 to Touton decl.
24 arrangements by countersigning the letter and
25 proceeded to conduct his review of the
26 requested records at ICANN's corporate
27 headquarters in Marina del Rey, California.
28

- 1 28. In an October 15, 2001 response to Lynn decl., 5:1-3; letter, Ex. 11 to Lynn decl.
2 Lynn's October 5, 2001 letter, Auerbach
3 objected to the proposed arrangements.
- 4 29. In an October 21, 2001 letter, Lynn Lynn decl., 5:4-7; letter, Ex. 12 to Lynn decl.
5 informed Auerbach that based on the objections
6 to the proposed arrangements stated in
7 Auerbach's October 15, 2001 letter and
8 pursuant to Section 6 of the Inspection
9 Procedures, Lynn was referring Auerbach's
10 letter to the Audit Committee for its
11 consideration.
- 12 30. In the October 21, 2001 letter, Lynn Lynn decl., 5:7-10; letter, Ex. 12 to Lynn decl.
13 reiterated his invitation to Auerbach to come to
14 ICANN to inspect the records according to the
15 proposed arrangements.
- 16 31. In an October 27, 2001 letter to Lynn, Lynn decl., 5:11-14; letter, Ex. 13 to Lynn decl.
17 Auerbach stated objections to the proposed
18 arrangements.
- 19 32. In his October 27, 2001 letter, Auerbach Letter, Ex. 13 to Lynn decl.; Lynn decl., 5:12-
20 proposed to provide seven days advance notice 13.
21 to the corporation before "any disclosure of
22 data that I learn solely from the corporate
23 materials I have inspected to parties beyond my
24 inner circle of advisors."
- 25 33. In Lynn's October 31, 2001 response to Letter, Ex. 14 to Lynn decl.; Lynn decl., 5:15-
26 Auerbach's proposal to provide seven days 19.
27 advance notice to the corporation before any
28

1 such disclosure, Lynn told Auerbach "[y]our
2 proposal merely to give the corporation notice
3 of a prospective disclosure would require that
4 we be prepared to go to court to prevent
5 unwarranted disclosure. Since you are not
6 entitled to make these determinations in the
7 first place, it seems inappropriate to force
8 ICANN to vindicate its rights, rather than your
9 being obligated to seek permission for
10 disclosures."

11 34. In the October 31, 2001 letter, Lynn
12 also re-invited Auerbach to inspect the records
13 according to the proposed arrangements.

Lynn decl., 5:19-22; letter, Ex. 14 to Lynn decl.

14 35. Auerbach has never signed an
15 acknowledgement of the proposed
16 arrangements and provided it to ICANN.

Lynn decl., 5:23-24.

17 36. After determining that one category of
18 documents in Auerbach's September 23, 2001
19 request relating to an international travel log for
20 certain ICANN officers did not involve matters
21 that the corporation would wish to claim as
22 confidential, Lynn e-mailed Auerbach the log
23 on November 10, 2001.

Lynn decl., 5:25-6:2; e-mail, Ex. 15 to Lynn
decl.

24 37. On November 15, 2001, the Audit
25 Committee considered Lynn's referral of
26 Auerbach's request for inspection of the
27 corporate records.

Minutes, Ex. 14 to Touton decl.

1 38. On November 17, 2001, the Audit
2 Committee informed Auerbach, via an e-mail
3 from Phil Davidson, then Chair of the
4 Committee, that, on November 15, 2001, the
5 Audit Committee had considered the referral of
6 Auerbach's request for inspection of the
7 corporate records and the lack of agreement on
8 the arrangements for access or use.

Lynn decl., 6:4-9; letter, Ex. 16 to Lynn decl.

9 39. The Audit Committee informed
10 Auerbach that it determined that the
11 arrangements requested by Lynn, in his
12 October 5, 2001, letter provided reasonable
13 safeguards for the confidentiality of ICANN
14 information.

Lynn decl., 6:9-13; letter, Ex. 16 to Lynn decl.

15 40. The Audit Committee urged Auerbach
16 to reconsider his refusal to accept the proposed
17 arrangements proposed in Lynn's October 5,
18 2001 letter so that he might proceed with the
19 inspection of the records he had requested.

Lynn decl., 6:9-13; letter, Ex. 16 to Lynn decl.

20 41. On November 17, 2001, Auerbach e-
21 mailed a response to the Audit Committee's
22 November 17, 2001 e-mail letter.

Lynn decl., 6:14-16; letter, Ex. 17 to Lynn decl.

23 42. Section 6 of the Inspection Procedures
24 provides that "[i]f the Director disagrees with
25 the resolution of the issue by the Audit
26 Committee, the Director may appeal this
27 decision by notice to the Chairman of the
28

Inspection Procedures, Ex. 2 to Lynn decl.

1 Board of the Corporation, and the entire Board
2 (other than the requesting Director) shall make
3 a final and binding decision concerning the
4 production of the records involved or the
5 timing of any inspection of the Corporation's
6 properties."

7 43. Auerbach has not requested full Board Cerf decl., 2:5-7.
8 review of the Audit Committee's determination
9 regarding the proposed arrangements for his
10 inspection.

11
12 **Supporting Statement: Auerbach Has Not Denied That the Records He Seeks to Inspect**
13 **Involve Confidential, Non-Public Information.**

14 Undisputed Material Facts:

Supporting Evidence:

15 44. In an e-mail to Touton dated September E-mail, Ex. 13 to Touton decl.
16 3, 2001, Auerbach stated: "That some of this,
17 perhaps even all of this, is confidential is
18 understood by me."

19 45. Auerbach stated: "Mike Roberts had Article, Ex 3 to Touton decl.
20 better know that when I come in there, I am
21 going to exercise every power given to a
22 director under California law to review every
23 single document that ICANN has and every
24 process. California law gives directors very
25 strong authority to direct a corporation. In fact
26 they're obligated to direct the corporation, and I
27 suspect that we will find things that could very
28 well trigger things like the IRS intermediate

1 sanctions for 501(c)'s. That's a big hammer
2 against a corporation and its board members."
3

4 **Supporting Statement: ICANN's Inspection Procedures Are Just And Proper As To All**
5 **Directors and Particularly As To Auerbach Because of Auerbach's Conduct Before and**
6 **After Joining the ICANN Board.**

7 Undisputed Material Facts:

Supporting Evidence:

8 46. Auerbach stated in an interview: "So
9 what I'm afraid of is [ICANN] growing."

Article, Ex. 3 to Touton decl.

10 47. In Auerbach's "Campaign Platform" on
11 his website, Auerbach has stated "[t]he larger
12 part of my platform is the reformation of
13 ICANN and its procedures."

Platform, Ex. 1 to Touton decl.

14 48. In Auerbach's "Campaign Platform" on
15 his website, Auerbach has stated "ICANN was
16 in need of reformation before it was even
17 created - its initial structure was the creation of
18 a secretive process that both actively and
19 passively excluded any but those who were
20 insiders to the process . . . ICANN is as
21 secretive as ever."

Platform, Ex. 1 to Touton decl.

22 49. In an interview the year he was selected
23 for ICANN's Board, Auerbach stated: "ICANN
24 is governance with a vengeance. The worst
25 form of governance. Arbitrary, capricious,
26 imposed without any input from those who
27 have to pay the taxes and suffer its regulations.
28 It is an oligarchy. It is a business-run

Article, Ex. 3 to Touton decl.

1 oligarchy. It is a secret society. Do I support
2 ICANN? I support the concept. Do I support
3 ICANN as it is? No, I think it should be
4 dismembered, right down to the ground."

5 50. Auerbach's At-Large Nomination

Application, Ex. 2 to Touton decl.

6 Application states that Auerbach desired "deep,
7 substantial, and fundamental reform" of
8 ICANN.

9 51. An October 16, 2000 interview with

Interview, Ex. 4 to Touton decl.

10 Auerbach begins: "For the past two years, Karl
11 Auerbach has made a hobby of criticizing
12 ICANN, the Internet Corporation for Assigned
13 Names and Numbers. He has called the Net's
14 controlling authority over domain names
15 everything from inept to 'an organ of the
16 trademark lobby.' But on Tuesday the 50 year-
17 old 'wild-eyed radical', as he often calls
18 himself, became part of that which he loathes:
19 one of five new members of ICANN's board of
20 directors."

21 52. When asked how he would like to see

Article, Ex. 3 to Touton decl.

22 ICANN changed, Auerbach responded: "We're
23 talking about a California remodeling job,
24 where you knock down the whole house but for
25 one wall and build a new house around it, then
26 tear down the remaining wall. Essentially that's
27 what ICANN needs. It needs a fundamental,
28

1 ground-up restructuring. I'm talking about a
2 restructuring to the point where the supporting
3 organizations -- such as its law firm -- need to
4 be redefined, if not eliminated; where the board
5 members come exclusively from the at-large
6 membership votes; where everything that
7 ICANN has done so far is subject to a very
8 short sunset provision and has to be reenacted
9 lest it expire. I'm talking about a major
10 overhaul I'm now just downright angry
11 that it continues to exist."

12 53. Auerbach stated: "Mike Roberts had
13 better know that when I come in there, I am
14 going to exercise every power given to a
15 director under California law to review every
16 single document that ICANN has and every
17 process. California law gives directors very
18 strong authority to direct a corporation. In fact
19 they're obligated to direct the corporation, and I
20 suspect that we will find things that could very
21 well trigger things like the IRS intermediate
22 sanctions for 501(c)'s. That's a big hammer
23 against a corporation and its board members."

Article, Ex 3 to Touton decl.

24 54. Auerbach has been the sole, or one of
25 two votes against the majority of the Board on
26 a large number of matters.

Touton decl., 3:18-19; tally, Ex. 5 to Touton
decl.

27 55. Auerbach stated: "Well . . . my family
28

Article, Ex. 3 to Touton decl.

1 has a history of radicalism. Being arrested for
2 various protests is a mark of honor in my
3 family. Unfortunately, I do not have this mark
4 of honor. I have never been arrested for a
5 protest. I've been beaten up by the police. So,
6 the long history of being troublemakers, and
7 asking questions, questioning authorities, has
8 been ingrained from day one."

9 56. Auerbach stated "Oh boy. I don't like Article, Ex. 3 to Touton decl.

10 consensus . . . because you can't define it.
11 When you are getting to hard decisions, I think
12 people have to stand up and be counted because
13 the consensus-taker - the person who is
14 counting or measuring consensus - can become
15 a tyrant."

16 57. Auerbach is one of five ICANN Touton decl., 3:2-4.

17 Directors who was selected for the ICANN
18 Board of Directors through an experimental
19 process involving an on-line vote of Internet
20 users in October 2000.

21 58. Auerbach was chosen for ICANN's Touton decl., 3:4-6.

22 Board after receiving only 1,738 votes from all
23 of the United States and Canada.

24 59. Auerbach's initial written request for Petition, ¶ 6.

25 access to ICANN's corporate records was made
26 on December 3, 2000.

27 60. Auerbach stated that he intends to Letter, Ex. 9 to Lynn decl.

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"make copies and to take them to my offices
for examination."

61. Paul Alan Levy of the Public Citizen Levy note, Ex. 15 to Touton decl.
Litigation Group noted on an Internet list that
"I must say, if Auerbach is insisting he has the
right to go public with private corporate
information, and that is the only obstacle, he
has nothing so far as I can see. An entity has
the right to decide about the privacy of its
information."

62. An Internet user commented on an Comment, Ex. 19 to Lynn decl.
Internet list that "Karl could use the standard
procedure of bringing the matter to the full
ICANN Board. . . . Karl is not the first director
of a non-profit corporation to have a conflict
with the corporation's staff. Such matters are
not usually resolved by resorting to public
outcry. There are more typical and productive
paths. But no, rather than pursue the matter
along such a path, he insists on playing in a
public sandbox, where he can have fun without
doing anything productive."

63. Auerbach claims that he last heard from Petition, ¶ 21.
ICANN regarding his request for access to
ICANN's corporate records on October 31,
2001.

64. Auerbach responded to a November 17, E-mail, Ex. 17 to Lynn decl.

1 2001 e-mail letter from the Phil Davidson of
2 ICANN's Audit Committee regarding
3 Auerbach's request for access to ICANN's
4 corporate records on November 17, 2001.

5 65. Almost four months later, at the March Lynn decl., 8:1-4.
6 14, 2002 ICANN Board of Directors meeting,
7 the Board voted not to establish a process of
8 on-line selections for certain directors of
9 ICANN by a vote of 14-1 (with 2 abstentions).

10 66. Auerbach was the only dissenting vote. Lynn decl., at 8:4-5.

11 67. During the Board debate on the Transcript, Ex. 22 to Lynn decl.
12 resolution, Auerbach commented "[w]hat this
13 resolution does very clearly, it says to the world
14 that ICANN is not a democratic public
15 institution but it's a paternalistic oligarchy. We
16 return to the day when we assume the white
17 man's burden."

18 68. At the March 14, 2002 Board meeting, Lynn decl., 8:10-12.
19 the Board also rejected an effort to commit to
20 on March 14, 2002 extending the length of the
21 terms on the Board of Auerbach and the eight
22 other At Large directors by a 13-3 vote (with 1
23 abstention), leaving that issue to be decided at a
24 subsequent meeting.

25 69. Of the five Board members who had Lynn decl., 8:12-14.
26 been previously selected through the on-line
27 voting process, three voted in favor of the
28

1 resolution to defer any action to extending At
2 Large director terms and one other abstained.

3 70. Auerbach was the only such director Lynn decl., 8:14-15.
4 who voted against the resolution.

5 71. On March 14, 2002, this comment on Posting, Ex. 17 to Touton decl.
6 the Internet was posted in Auerbach's name:

7 "My board seat, and those of the other four
8 elected board members will simply vaporize
9 this fall, with no replacements, no elections . . .
10 no nothing. ICANN will be reduced a body run
11 by those who have today proclaimed
12 themselves to be our self-designated 'betters',
13 who know better than we do what is best for
14 you and me."

15 72. On Friday, March 15, 2002, the day Verification to Petition
16 after the Board votes, Auerbach signed the
17 Verification for his Petition.

18 73. On Monday, March 18, 2002, Auerbach Petition
19 filed his Petition for Writ of Mandate.
20

21 **Supporting Statement: Auerbach Cannot Be the Sole Arbiter of What Records Should**
22 **Remain Confidential.**

23 Undisputed Material Facts:

Supporting Evidence:

24 74. In Auerbach's October 15, 2001 letter to Letter, Ex. 11 to Lynn decl.
25 Lynn he states "[t]he decision as what material
26 is confidential, and from whom, and how I may
27 use such materials, is not in your discretion; it
28 is subject to my own discretion, carefully

1 exercised as Director, and defined and limited
2 solely by the laws of California and the United
3 States. I am of course, very happy to review
4 and will seriously consider a statement from
5 corporate management that describes, with
6 particularity, your concerns for confidentiality
7 in a particular body of information."

8 75. In Auerbach's "Campaign Platform" on Platform, Ex. 1 to Touton decl.
9 his website, Auerbach has stated that "[i]t is my
10 position that ICANN must operate with
11 absolute openness, transparency, and
12 accountability. This means that absolutely
13 every input, every discussion, every decision -
14 everything - must be done in open session with
15 a written or electronic record. All decisions
16 must be made by recorded vote - with the
17 position of each director clearly shown. The
18 only exception to this would be matters
19 pertaining to personnel and litigation. And
20 even a decision that a matter falls into those
21 categories must be made in public."

22 76. In his October 27, 2001 letter, Auerbach Letter, Ex. 13 to Lynn decl.; Lynn decl., 5:11-
23 proposed to provide seven days advance notice 14.
24 to the corporation before "any disclosure of
25 data that I learn solely from the corporate
26 materials I have inspected to parties beyond my
27 inner circle of advisors."
28

1 77. In Lynn's October 31, 2001 response to Letter, Ex. 14 to Lynn decl.
2 Auerbach's proposal to provide seven days
3 advance notice to the corporation before any
4 such disclosure, Lynn told Auerbach "[y]our
5 proposal merely to give the corporation notice
6 of a prospective disclosure would require that
7 we be prepared to go to court to prevent
8 unwarranted disclosure. Since you are not
9 entitled to make these determinations in the
10 first place, it seems inappropriate to force
11 ICANN to vindicate its rights, rather than your
12 being obligated to seek permission for
13 disclosures."
14

15 **Supporting Statement: Auerbach's Claim Is Not Ripe Because He Has Not Availed Himself**
16 **of the Opportunity to Inspect ICANN's Documents.**

17 Undisputed Material Facts:

Supporting Evidence:

18 78. ICANN's procedures for director access
19 to its corporate records and properties are
20 called "ICANN Procedures Concerning
21 Director Inspection of Records and Properties"
22 (the "Inspection Procedures").

Lynn decl., 2:11-14; Inspection Procedures, Ex.
2 to Lynn decl.

23 79. Section 1 of ICANN's Inspection
24 Procedures provides that "[t]hese procedures
25 balance the Directors' interest in inspecting
26 records and corporate properties with the
27 legitimate interests of the Corporation in
28 ensuring that requests are addressed in a

Lynn decl., 2:15-21; Inspection Procedures, Ex.
2 to Lynn decl.

1 reasonable fashion without undue burden on
2 management, and with the protection of the
3 security of corporate information against
4 inappropriate disclosure and the protection of
5 privacy interests. These procedures do not
6 diminish a Director's rights to inspect, as
7 reflected in California law and Article V,
8 Section 21 of the Corporation's bylaws"

9 80. Section 5 of ICANN's Inspection
10 Procedures provides that "[t]o the extent the
11 Chief Executive Officer, in consultation with
12 the General Counsel of the Corporation,
13 determines that compliance with any request
14 for records necessarily involves issues of
15 confidentiality, privilege, or privacy of a nature
16 which require limitation of or conditions on the
17 Director's access or use of the requested
18 records, the Chief Executive Officer shall
19 advise the requesting Director of the issues
20 which require the restrictions and the nature of
21 any proposed restrictions on access or use."

22 81. Section 6 of ICANN's procedures
23 provides that "[i]f the Director believes that any
24 restrictions proposed by the Chief Executive
25 Officer are unreasonable, the Chief Executive
26 Officer shall submit the request to the Audit
27 Committee of the Board of Directors of the
28

Lynn decl., 2:22-28; Inspection Procedures, Ex.
2 to Lynn decl.

Lynn decl., 3:1-6; Inspection Procedures, Ex. 2
to Lynn decl.

1 Corporation for resolution."

2 82. Auerbach alleges ICANN's procedures Petition, ¶ 25.
3 unlawfully interfere with the rights of a
4 Director of a California Nonprofit Public
5 Benefit Corporation.

6 83. Auerbach has not shown how the E-mail, Ex. 7 to Lynn decl.; letter, Ex. 12 to
7 procedures have in fact prevented him from Lynn decl.; letter, Ex. 14 to Lynn decl.; e-mail,
8 performing his duties as a director. Ex. 16 to Lynn decl.; Lynn decl., 7:1-3; Lynn
9 decl., 5:23-24.

10 84. ICANN has repeatedly invited E-mail, Ex. 7 to Lynn decl.; letter, Ex. 12 to
11 Auerbach to inspect the corporate records Lynn decl.; letter, Ex. 14 to Lynn decl.; e-mail,
12 according to the Inspection Procedures. Ex. 16 to Lynn decl.; Lynn decl., 6:9-12.

13 85. In an October 21, 2001 letter, Lynn Lynn decl., 5:4-7; letter, Ex. 12 to Lynn decl.
14 informed Auerbach that based on the objections
15 to the proposed arrangements stated in
16 Auerbach's October 15, 2001 letter and
17 pursuant to Section 6 of the Inspection
18 Procedures, Lynn was referring Auerbach's
19 letter to the Audit Committee for its
20 consideration.

21 86. In the October 21, 2001 letter, Lynn Lynn decl., 5:7-10; letter, Ex. 12 to Lynn decl.
22 reiterated his invitation to Auerbach to come to
23 ICANN to inspect the records according to the
24 proposed arrangements.

25 87. In an October 27, 2001 letter to Lynn, Lynn decl., 5:11-12; letter, Ex. 13 to Lynn decl.
26 Auerbach stated objections to the proposed
27 arrangements.
28

1 88. In his October 27, 2001 letter, Auerbach Letter, Ex. 13 to Lynn decl.; Lynn decl., 5:12-
2 proposed to provide seven days advance notice 14.
3 to the corporation before "any disclosure of
4 data that I learn solely from the corporate
5 materials I have inspected to parties beyond my
6 inner circle of advisors."

7 89. In Lynn's October 31, 2001 response to Letter, Ex. 14 to Lynn decl.; Lynn decl., 5:15-
8 Auerbach's proposal to provide seven days 19.
9 advance notice to the corporation before any
10 such disclosure, Lynn told Auerbach "[y]our
11 proposal merely to give the corporation notice
12 of a prospective disclosure would require that
13 we be prepared to go to court to prevent
14 unwarranted disclosure. Since you are not
15 entitled to make these determinations in the
16 first place, it seems inappropriate to force
17 ICANN to vindicate its rights, rather than your
18 being obligated to seek permission for
19 disclosures."

20 90. In the October 31, 2001 letter, Lynn Lynn decl., 5:19-21; letter, Ex. 14 to Lynn decl.
21 also re-invited Auerbach to inspect the records
22 according to the proposed arrangements.

23 91. Auerbach never signed an Lynn decl., 5:23-24.
24 acknowledgement of the proposed
25 arrangements and provided it to ICANN.

26 92. After determining that one category of Lynn decl., 5:25-6:2; e-mail, Ex. 15 to Lynn
27 documents in Auerbach's September 23, 2001 decl.
28

1 request relating to an international travel log for
2 certain ICANN officers did not involve matters
3 that the corporation would wish to claim as
4 confidential, Lynn e-mailed Auerbach the log
5 on November 10, 2001.

6 93. On November 15, 2001, the Audit Minutes, Ex. 14 to Touton decl.
7 Committee considered Lynn's referral of
8 Auerbach's request for inspection of the
9 corporate records.

10 94. On November 17, 2001, the Audit Lynn decl., 6:4-9; letter, Ex. 16 to Lynn decl.
11 Committee informed Auerbach, via an e-mail
12 from Phil Davidson, then Chair of the
13 Committee, that, on November 15, 2001, the
14 Audit Committee considered the referral of
15 Auerbach's request for inspection of the
16 corporate records and the lack of agreement on
17 the arrangements for access or use.

18 95. The Audit Committee informed Lynn decl., 6:9-13; letter, Ex. 16 to Lynn decl.
19 Auerbach that it determined that the
20 arrangements requested by Lynn, in his
21 October 5, 2001, letter provided reasonable
22 safeguards for the confidentiality of ICANN
23 information.

24 96. The Audit Committee urged Auerbach Lynn decl., 6:9-13; letter, Ex. 16 to Lynn decl.
25 to reconsider his refusal to accept the proposed
26 arrangements proposed in Lynn's October 5,
27 2001 letter so that he might proceed with the
28

1 inspection of the records he had requested.

2 97. On November 17, 2001, Auerbach Lynn decl., 6:14-16; letter, Ex. 17 to Lynn decl.
3 e-mailed a response to the Audit Committee's
4 November 17, 2001 e-mail letter from
5 Davidson.

6 98. Section 6 of the Inspection Procedures Inspection Procedures, Ex. 2 to Lynn decl.
7 provides that "[i]f the Director disagrees with
8 the resolution of the issue by the Audit
9 Committee, the Director may appeal this
10 decision by notice to the Chairman of the
11 Board of the Corporation, and the entire Board
12 (other than the requesting Director) shall make
13 a final and binding decision concerning the
14 production of the records involved or the
15 timing of any inspection of the Corporation's
16 properties."

17 99. Auerbach has not requested full Board Cerf decl., 2:5-7.
18 review of the Audit Committee's determination
19 regarding the proposed arrangements for his
20 inspection.

21
22 **Supporting Statement: Alternatively, Auerbach's Claim Is Moot Because ICANN Is And**
23 **Always Has Been Willing To Allow Auerbach Access To ICANN's Corporate Records, and**
24 **ICANN's Procedures Are Appropriate As A Matter Of Law.**

25 Undisputed Material Facts:

Supporting Evidence:

26 100. ICANN's procedures for Director access Lynn decl., 2:11-14; Inspection Procedures, Ex.
27 to its corporate records and properties are 2 to Lynn decl.
28 called "ICANN Procedures Concerning

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Director Inspection of Records and Properties"
(the "Inspection Procedures").

101. ICANN has repeatedly invited
Auerbach to inspect the corporate records
according to the Inspection Procedures and that
invitation remains open.

E-mail, Ex. 7 to Lynn decl.; letter, Ex. 12 to
Lynn decl.; letter, Ex. 14 to Lynn decl.; e-mail,
Ex. 16 to Lynn decl.; Lynn decl., 7:1-3.

Dated: May 17, 2002

Respectfully submitted,
JONES, DAY, REAVIS & POGUE

By: _____
Jeffrey A. LeVee

Attorneys for Defendant
INTERNET CORPORATION FOR
ASSIGNED NAMES AND NUMBERS