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NAMES AND NUMBERS
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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. BS074771

**DEFENDANT ICANN'S VERIFIED FIRST
AMENDED ANSWER TO VERIFIED
PETITION FOR WRIT OF MANDATE TO
COMPEL INSPECTION AND COPYING
OF BOOKS, RECORDS AND
DOCUMENTS OF CALIFORNIA
NONPROFIT PUBLIC BENEFIT
CORPORATION**

(THE HONORABLE DZINTRA JANAVS)

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20 **VERIFIED ANSWER**

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22 Defendant Internet Corporation for Assigned Names and Numbers ("ICANN") files this
23 Verified Answer to the Verified Petition for Writ of Mandate ("Petition") filed herein by
24 admitting, denying and alleging as follows:

25 1. The Petition strikingly mischaracterizes both the facts and the law. The facts are
26 that ICANN has never denied Plaintiff Karl Auerbach ("Auerbach") the ability to inspect
27 ICANN's records. Instead, and as explained in greater detail beginning on page 12 of this
28 Verified Answer, this dispute has arisen only because Auerbach has steadfastly *refused* to inspect

1 ICANN's documents. Auerbach claims that the procedures that ICANN has established for
2 director review of documents are somehow contrary to California law, but Auerbach is wrong:
3 California law is clear that a director's right to inspect documents is not "absolute" in the sense
4 that a corporation cannot place into effect reasonable procedures for inspections that safeguard
5 the interests of the corporation. ICANN's procedures are, in fact, completely reasonable and
6 prudent under the circumstances, and they would not limit Auerbach's ability to inspect ICANN's
7 documents. Auerbach has never even attempted to explain to ICANN the bases, if any, for his
8 objections to the procedures other than to assert that his demands -- along with his view of the
9 law and his rights as a director -- trump the corporation's reasonable inspection procedures.

10 2. Auerbach also apparently believes that he has the unfettered right to decide
11 whether he can disclose ICANN's confidential documents to the public. Auerbach insists that
12 "what material is confidential, and confidential from whom, and how [Auerbach] may use such
13 materials, is not in [ICANN's] discretion; it is subject to my own discretion" Auerbach is
14 wrong, which is one of the reasons that the Audit Committee of the Board of Directors (the
15 "Audit Committee") has determined that he should follow the very same procedures that apply to
16 all of ICANN's other directors. (Even the then-Chair of the Audit Committee followed these
17 procedures for a recent inspection of his own.) As recognized in California law and authorized by
18 ICANN's Bylaws, a corporation may establish reasonable procedures to protect its confidential
19 information from unauthorized public disclosure.

20 3. ICANN's inspection procedures provide that a director disagreeing with the Audit
21 Committee's determination of the appropriateness of a request of a particular director first present
22 the dispute to the full ICANN Board, so that the interests of both the director and the corporation
23 can best be accommodated. Auerbach has bypassed this procedure, refusing to present the matter
24 to the full Board. Instead, he has subjected the corporation to this costly litigation, placing his
25 own unyielding view of his prerogatives above ICANN's interests. Auerbach's dispute with
26 ICANN, and his refusal to follow the procedures that the corporation has established for director
27 inspection of documents, merely reflects Auerbach's improper motives and his interest in
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1 attacking the corporation. There is no basis for this wasteful litigation, and the Petition should be
2 summarily denied.

3 4. With respect to the allegations contained in Paragraph 1 of the Petition, ICANN
4 denies the allegations that this case involves a California corporation refusing access to corporate
5 records to a member of its Board of Directors, or seeking to impose improper and unlawful
6 conditions on the director before allowing such access. With respect to the remaining allegations
7 of Paragraph 1, the allegations call for legal conclusions to which no response is required, and, on
8 that basis, ICANN denies the allegations. ICANN alleges that the right of a director to inspect
9 corporate records is subject to the overriding duty of a director to act in good faith and in the best
10 interests of the corporation. These inspection rights are not unfettered and must be tempered by
11 just and proper conditions to protect the interests of the corporation. ICANN has never refused to
12 permit Auerbach to inspect its corporate records. Rather, the sole reason that Auerbach has not
13 inspected ICANN's corporate records has been Auerbach's refusal to comply with ICANN's
14 Procedures Concerning Director Inspection of Records and Properties ("Inspection Procedures")
15 endorsed by the Audit Committee. ICANN's Inspection Procedures govern requests for
16 inspection of records by all members of ICANN's Board of Directors. ICANN has never refused,
17 but has repeatedly offered, to permit inspection by Auerbach under those procedures.

18 5. ICANN admits the allegations contained in Paragraph 2 of the Petition.

19 6. With respect to the allegations contained in Paragraph 3 of the Petition, ICANN
20 admits that M. Stuart Lynn ("Lynn") became President and Chief Executive Officer ("CEO") of
21 ICANN and a member of its Board of Directors on March 13, 2001. ICANN further admits that
22 Michael M. Roberts ("Roberts") was the President and CEO of ICANN from its inception through
23 March 13, 2001. Except as expressly admitted, ICANN denies each and every allegation
24 contained in Paragraph 3.

25 7. With respect to the allegations contained in Paragraph 4 of the Petition, ICANN
26 admits that Auerbach is a resident of Santa Cruz, California. ICANN does not have knowledge or
27 information sufficient to form a belief as to the truth of Auerbach's allegation that he is a member
28 in good standing of the California State Bar, and on that basis, denies that allegation. ICANN

1 admits that Auerbach was selected to become a member of ICANN's Board of Directors through
2 a vote of Internet users as part of an experimental on-line voting process conducted in 2000.
3 ICANN admits that Auerbach has been a member of ICANN's Board of Directors since
4 Auerbach's term commenced at the conclusion of ICANN's November 2000 Annual Meeting.
5 ICANN admits Auerbach's term of office as Director continues until the conclusion of ICANN's
6 2002 Annual Meeting. ICANN does not have knowledge or information sufficient to form a
7 belief as to the truth of Auerbach's allegation that he has acted solely in his capacity as a member
8 of ICANN's Board of Directors, and on that basis denies this allegation.

9 8. ICANN admits that the provisions of ICANN's Corporate Bylaws referenced in
10 Paragraph 5 of the Petition, among others, are relevant to this action. ICANN admits the
11 remaining allegations of Paragraph 5.

12 9. With respect to the allegations contained in Paragraph 6 of the Petition, ICANN
13 admits that in November 2000 Auerbach made an oral request to Roberts, who was then President
14 and CEO of ICANN, to inspect the General Ledger. In response, Roberts informed Auerbach that
15 he should put his specific request in writing. Roberts received an e-mail from Auerbach on
16 December 3, 2000, requesting a copy of ICANN's General Ledger from November 1998 through
17 December 3, 2000 and copies of the report each month thereafter. ICANN further admits that its
18 Board members and corporate officers frequently communicate by means of electronic mail.
19 ICANN further admits that on December 6, 2000, Roberts responded to Auerbach's December 3,
20 2000 e-mail, and that e-mail speaks for itself. Except as expressly admitted, ICANN denies each
21 and every allegation contained in Paragraph 6.

22 10. With respect to the allegations contained in Paragraph 7 of the Petition, ICANN
23 admits that Roberts sent an e-mail to an e-mail list used by ICANN Board members and others
24 relating to ICANN's finances in early March 2001. ICANN further admits that Auerbach
25 responded to this e-mail with a written request to Roberts and the Board e-mail list to see
26 statements of account for all financial matters related to the DNSO. ICANN alleges that
27 statements of account for the DNSO have been available to Auerbach and to the public generally
28 on the DNSO website both before and after Auerbach's March 2001 request. ICANN admits the

1 accuracy of the description of the DNSO in footnote 2. With respect to the remaining allegations
2 in Paragraph 7, ICANN does not have knowledge or information sufficient to form a belief as to
3 the truth of the allegations therein, and on that basis, denies those allegations.

4 11. With respect to the allegations contained in Paragraph 8 of the Petition, ICANN
5 denies the allegation that Roberts advised Auerbach to take his request to the Audit Committee on
6 March 4, 2001. ICANN admits that Roberts informed Auerbach in an e-mail that if Auerbach
7 wished to review the corporate records, Auerbach should contact Louis Touton ("Touton"), Vice
8 President and General Counsel of ICANN, so that Touton could seek guidance from the Audit
9 Committee. ICANN further admits that Roberts sent an e-mail to Auerbach and the Board on
10 March 4, 2001, as quoted in Paragraph 8 of the Petition and that any March 4, 2001 e-mail from
11 ICANN's Chairman of the Board, Vinton Cerf ("Cerf"), speaks for itself. ICANN further alleges
12 that, as stated in ICANN's Amended Bylaws: "The Corporation shall establish reasonable
13 procedures to protect against the inappropriate disclosure of confidential information." Article V,
14 Section 21. Auerbach was the first Director to request access to confidential corporate records,
15 and ICANN had not at that time established procedures to protect the confidentiality of its
16 records. Except as expressly admitted, ICANN denies each and every allegation contained in
17 Paragraph 8.

18 12. With respect to the allegations contained in Paragraph 9 of the Petition, ICANN
19 admits that Auerbach was instructed on December 6, 2000, three days after his written request,
20 how to proceed if he wished to inspect ICANN's corporate records, and Auerbach took no action
21 until March 2001. ICANN admits that, after receiving Auerbach's March 3, 2001 e-mail, Roberts
22 wrote Auerbach and requested that, if Auerbach wished to resume his effort to inspect corporate
23 records, Auerbach should contact Touton so that Touton could seek guidance from the Audit
24 Committee of the Board of Directors. Except as expressly admitted, ICANN denies each and
25 every allegation contained in Paragraph 9.

26 13. With respect to the allegations contained in Paragraph 10 of the Petition, ICANN
27 admits that Auerbach sent the quoted e-mail on March 6, 2001 to the Board e-mail list. ICANN
28 admits that an ICANN Board meeting took place on March 13, 2001 in Melbourne, Australia.

1 ICANN does not have knowledge or information sufficient to form a belief as to the reason
2 Auerbach sent the quoted e-mail. Except as expressly admitted, ICANN denies the allegations
3 contained in Paragraph 10.

4 14. With respect to the allegations contained in Paragraph 11 of the Petition, ICANN
5 admits that in June 2001 Auerbach spoke with Board Member Linda Wilson regarding his
6 inspection request in the lobby of a hotel in Stockholm. ICANN admits Auerbach's December 3,
7 2001 request stated a preference, not a demand, for electronic records. ICANN alleges that
8 Auerbach's request for inspection of corporate records has never been rejected and that Auerbach
9 has been repeatedly invited to, and remains invited to, access and use the records pursuant to the
10 proposed Inspection Procedures. Except as expressly admitted, ICANN denies the allegations
11 contained in Paragraph 11.

12 15. With respect to the allegations contained in Paragraph 12 of the Petition, ICANN
13 generally admits the allegations.

14 16. With respect to the allegations contained in Paragraph 13 of the Petition, ICANN
15 admits that the Audit Committee was heavily involved in the development of ICANN's Inspection
16 Procedures. ICANN admits that on August 6, 2001, Lynn initiated contact with Auerbach to
17 update Auerbach on the Audit Committee's progress and the status of Auerbach's request. With
18 respect to the remaining allegations of Paragraph 13, ICANN admits the allegations.

19 17. With respect to the allegations contained in Paragraph 14 of the Petition, ICANN
20 admits that the full Board has not adopted, approved or otherwise voted on the Procedures, and
21 states further that a full Board vote was not necessary. The Board of Directors lawfully delegated
22 to the Audit Committee and ICANN's CEO certain authority, including the authority to act on
23 matters concerning audits and other reviews of the corporation's records. The Audit Committee,
24 in exercise of this authority, was actively involved in the development of and formally endorsed
25 the Inspection Procedures on August 21, 2001. ICANN admits that the Inspection Procedures
26 apply equally to all Board members who may wish to inspect or copy ICANN corporate records.
27 ICANN further admits that Lynn, pursuant to the authority delegated to him by the Board, sought
28 Auerbach's compliance with the Inspection Procedures. ICANN further admits that the

1 Inspection Procedures have been an agenda item, not at Board meetings, but at multiple meetings
2 of the Board's Audit Committee, to which the Board delegated authority in this area. Except as
3 expressly admitted, ICANN denies the allegations contained in Paragraph 14.

4 18. With respect to the allegations contained in Paragraph 15 of the Petition, ICANN
5 admits that Sections 5 and 6 of the Inspection Procedures contain the language quoted in
6 Paragraph 15 of the Petition. ICANN notes that the Procedures also contain many other
7 provisions, Section 1 in particular, which are as important or more important, and therefore denies
8 the allegations of the first two lines of Paragraph 15.

9 19. With respect to the allegations contained in Paragraph 16 of the Petition, ICANN
10 alleges that Auerbach's September 23, 2001 letter contains the quoted language, which speaks for
11 itself. ICANN further alleges that, as part of the "discussion" that ensued between Auerbach and
12 others on the Board e-mail list, ICANN's General Counsel Touton sent Auerbach an e-mail noting
13 that the Inspection Procedures ensure director access in a way that is designed to avoid misuse of
14 any inspected materials. On September 3, 2001, Auerbach responded to Touton's e-mail, with a
15 copy to the Board list, by saying "I personally am very happy that there are now clearly specified
16 procedures. . . . That some of this, perhaps even all of this, is confidential is understood by me.
17 In fact I embrace the thought that there is a clear statement of what such concerns may be so that
18 mistakes may be avoided." ICANN admits the remaining allegations of Paragraph 16.

19 20. With respect to the allegations contained in Paragraph 17 of the Petition, ICANN
20 admits that, on October 5, 2001, Lynn sent a letter by e-mail to Auerbach. A copy of that letter,
21 which speaks for itself, is attached hereto as Exhibit 1. ICANN admits that Lynn proposed
22 appropriate arrangements for Auerbach's inspection of the records and asked Auerbach to
23 countersign and return a copy of the letter before inspecting the corporate records. ICANN
24 further alleges that the arrangements in Lynn's October 5, 2001 letter were proposed after Lynn
25 determined that Auerbach's request involved issues of confidentiality, privacy, and/or privilege.
26 ICANN further alleges that if Auerbach believed that the proposed arrangements for Auerbach's
27 inspection of corporate records were unreasonable, Lynn was obligated to under the Inspection
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1 Procedures, and did, refer the matter to the Audit Committee. Except as expressly admitted
2 herein, ICANN denies each and every allegation contained in Paragraph 17.

3 21. With respect to the allegations contained in Paragraph 18 of the Petition, ICANN
4 admits that Auerbach is a member of the Conflicts of Interest Committee and that that Committee
5 is responsible for tasks delegated to that Committee by the Board. ICANN further admits that
6 certain of the documents referenced in Auerbach's request may have relevance to the work of that
7 Committee and that neither Auerbach, nor any other member of that Committee, has made a
8 written request to inspect records on behalf of the Committee. ICANN denies Auerbach's
9 allegation that no member of the Audit Committee has been required to agree to the Inspection
10 Procedures prior to inspecting documents. Phil Davidson ("Davidson"), then Chair of the Audit
11 Committee, in compliance with the Inspection Procedures, requested in writing to inspect the
12 same corporate records that Auerbach requested to inspect. In response to Davidson's request,
13 Lynn required that Davidson comply with the same Inspection Procedures to protect the
14 confidentiality, privacy, and privilege of ICANN's records. Lynn also required that Davidson
15 countersign a letter from Lynn, similar to the letter Lynn sent Auerbach, prior to inspecting the
16 documents. Davidson did, under these conditions, inspect the documents on January 31, 2002
17 under the same arrangements offered for Auerbach's request. Davidson thereafter advised the
18 President and CEO that he did not see any problems with the records. Except as expressly
19 admitted, ICANN denies the allegations contained in Paragraph 18.

20 22. With respect to the allegations contained in Paragraph 19 of the Petition, ICANN
21 admits that in an e-mail to Lynn dated October 15, 2001, Auerbach stated his objections to Lynn's
22 October 5, 2001 letter, including his objection that the proposed arrangements would "improperly
23 subordinate my right of independent action and judgment to that of Corporate management and to
24 other Directors. . . . But the decision as [to] what material is confidential, and confidential from
25 whom, and how I may use such materials, is not in your discretion; it is subject to my own
26 discretion" ICANN admits that Auerbach refused to countersign the letter, and requested to
27 inspect the records by November 1, 2001, prior to the next ICANN Annual Meeting in Marina del
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1 Rey in mid-November. Except as expressly admitted, ICANN denies the allegations contained in
2 Paragraph 19.

3 23. With respect to the allegations contained in Paragraph 20 of the Petition, ICANN
4 admits that Lynn responded to Auerbach's October 15, 2001 letter in an e-mailed letter dated
5 October 21, 2001. ICANN admits that Lynn's letter speaks for itself and that a portion of it is
6 accurately quoted. ICANN admits that in an effort to resolve the matter, Lynn informed
7 Auerbach of ICANN's legal position, including case citations, with respect to the issues raised in
8 Auerbach's October 15, 2001 letter. ICANN denies Auerbach's allegation that Lynn asserted,
9 with no proof other than Auerbach's perseverance, that Auerbach might be acting in violation of
10 his fiduciary duties. Lynn's letter specifically referenced Auerbach's statements to Lynn and to
11 others that Auerbach believes it is Auerbach, and not the corporation, who has discretion to
12 determine the confidentiality of the corporation's records. Except as expressly admitted, ICANN
13 denies the allegations contained in Paragraph 20.

14 24. With respect to the allegations contained in Paragraph 21 of the Petition, ICANN
15 admits that Auerbach e-mailed Lynn his objections to complying with ICANN's inspection
16 procedures on October 27, 2001, and states that that this e-mail speaks for itself. ICANN admits
17 that rather than agree to the arrangements set forth in Lynn's October 5, 2001 letter, Auerbach
18 proposed his own set of arrangements for his inspection of documents – arrangements that had
19 not been proposed to the Audit Committee. Auerbach proposed that Auerbach provide ICANN
20 seven days written notice of any disclosure of data that he intended to disclose to individuals
21 beyond his self-defined "inner circle of advisors." ICANN further admits that Lynn responded to
22 Auerbach's October 27, 2001 letter in an e-mail dated October 31, 2001, a portion of which is
23 quoted. Lynn noted that the issues in dispute had been narrowed, and informed Auerbach that the
24 corporation was not willing to agree to Auerbach's proposal to give advanced notice of a
25 prospective disclosure, because such a system would require ICANN to be prepared to go to court
26 each time it wished to prevent an unwarranted disclosure. With respect to the allegation that
27 Auerbach was unwilling to give up all of his rights, ICANN denies ever having requested that
28 Auerbach give up any of his rights. ICANN further admits to forwarding ICANN's international

1 travel log for officers other than its President to Auerbach after a determination was made that the
2 log did not contain any confidential information. ICANN denies Auerbach's allegation that the
3 Audit Committee has never acted upon Auerbach's request. ICANN alleges that at the November
4 15, 2001 meeting of the Audit Committee, the Committee considered Auerbach's request for
5 inspection of the records and concluded that the conditions set forth in Lynn's October 5, 2001
6 letter provided reasonable safeguards for the confidentiality of the corporation's information.
7 ICANN further alleges that in an e-mail dated November 17, 2001 Davidson, then Chair of the
8 Audit Committee, informed Auerbach of the Audit Committee's decision, and requested that
9 Auerbach reconsider his position. ICANN further alleges that Auerbach e-mailed a response to
10 Davidson's e-mail, by copy to the entire Audit committee, on November 17, 2001. Except as
11 expressly admitted, ICANN denies each and every allegation of Paragraph 21.

12 25. With respect to the allegations contained in Paragraph 22 of the Petition, ICANN
13 admits that Auerbach has accurately quoted California Corporations Code section 6334, and that
14 that provision applies to ICANN. ICANN also admits that Article V, Section 21 of its Bylaws
15 states:

16 Every Director shall have the right at any reasonable time to inspect
17 and copy all books, records and documents of every kind, and to
18 inspect the physical properties of the Corporation. The Corporation
shall establish reasonable procedures to protect against the
inappropriate disclosure of confidential information.

19 ICANN admits that Auerbach has not requested to inspect all of ICANN's corporate records, but
20 specifically denies that it has substantively restricted Auerbach's right to access ICANN records.
21 ICANN has the right to take reasonable efforts to preserve the confidentiality of its corporate
22 records, and accordingly has requested that Auerbach follow reasonable arrangements, including
23 but not limited to timing, with regard to his inspection of corporate documents and his use of that
24 information after the inspection. ICANN denies the remainder of the allegations contained in
25 Paragraph 22.

26 26. With respect to the allegations contained in Paragraph 23 of the Petition, ICANN
27 admits that Auerbach has quoted sections of the California Corporations Code and a portion of
28 Article V, Section 8 of ICANN's Bylaws, and that the quoted provisions apply to ICANN.

1 ICANN admits that Auerbach has a duty to act in the best interests of the corporation. ICANN
2 denies the remaining allegations of Paragraph 23.

3 27. With respect to the allegations contained in Paragraph 24 of the Petition, ICANN
4 admits that the full Board of Directors has not voted on the Inspection Procedures, but notes that
5 the Board of Directors lawfully delegated authority for certain tasks to the Audit Committee,
6 including authority concerning reviews of the corporation's records. The Audit Committee, in
7 exercise of this authority, formally endorsed the Inspection Procedures on August 21, 2001. The
8 Inspection Procedures were circulated to the Board on September 2, 2001, and no other Director
9 expressed concern over the procedures. Auerbach, as a member of the Board, is required to
10 comply with the Procedures. ICANN denies the remainder of the allegations contained in
11 Paragraph 24.

12 28. With respect to the allegations contained in Paragraph 25 of the Petition, the
13 allegations call for legal conclusions to which no response is required, and, on that basis, ICANN
14 denies the allegations.

15 29. With respect to the allegations contained in Paragraph 26 of the Petition, ICANN
16 denies the allegations. Auerbach is misinterpreting California law, which provides that ICANN
17 has the right to determine the confidentiality of its records and to protect itself against the
18 potential for improper disclosure of those records. ICANN's Bylaws similarly provide that, while
19 Auerbach has the right to inspect the records, the Corporation has the obligation to establish
20 reasonable procedures to protect against the inappropriate disclosure of confidential information.
21 ICANN's Director Guidelines likewise advise all Directors that "[i]t is not within the province of
22 an individual Director to abuse the privileges of access to or use of information in a manner
23 which damages the corporation, and this is especially true where the motivation of the Director is
24 private or self-interested. Decisions concerning the use and the disclosure of corporate
25 information and records to outsiders must necessarily be made by the entire Board of Directors."

26 30. ICANN denies the allegations contained in Paragraph 27 of the Petition, except
27 that it admits that Auerbach has quoted California Corporations Code section 1085(a). ICANN
28 alleges that long before Auerbach brought this action it established procedures pursuant to which

1 Auerbach may, and has repeatedly been invited to, inspect the corporate records. If Auerbach
2 determines that those procedures inhibit his ability to act in accordance with his perception of his
3 fiduciary duties, Auerbach can seek redress from the Audit Committee and the full Board, as
4 detailed in Section 6 of the Inspection Procedures.

5 **ICANN'S ALLEGATIONS COMMON TO ALL DEFENSES**

6 ICANN provides the following additional allegations that are designed to assist the Court
7 in understanding ICANN's position in this litigation and the reasons why Auerbach's Petition
8 should be summarily dismissed.

9 **ICANN**

10 31. ICANN was formed in October 1998 by a broad coalition of the Internet's
11 business, technical, academic, and user communities. ICANN has been recognized by the U.S.
12 and other governments as the global private sector, consensus-development entity appropriate to
13 coordinate the technical management of the Internet's domain name system, the allocation of IP
14 address space, the assignment of protocol parameters, and the management of the root server
15 system.

16 32. With a small staff of 14, ICANN is funded through the various registries and
17 registrars that comprise the global domain name and Internet addressing systems. ICANN has a
18 volunteer Board of Directors.¹ With the exception of the Chief Executive Officer, who serves as
19 an *ex officio* Director, these Directors are chosen by a variety of means: some (including
20 Auerbach) were chosen through experimental on-line voting processes; others have been selected
21 by each of three "Supporting Organizations" that, according to ICANN's Bylaws, are entitled to
22 select Directors to ICANN's Board. Roughly two-thirds of the Board members reside outside of
23 the United States. Together with the Board of Directors and its Advisory Committees, ICANN
24 carries out its work through the three supporting organizations -- the Domain Name, Address, and
25 Protocol Supporting Organizations -- which collectively represent a broad cross-section of the
26 global Internet's business, technical, academic, non-commercial, and user communities.

27
28 ¹ All of the Directors, except the CEO, are volunteers and unpaid.

1 **Petitioner**

2 33. Auerbach is one member of ICANN's Board of Directors. A self-described
3 radical, Auerbach is one of five ICANN Directors who were chosen to become members of the
4 ICANN Board of Directors through an experimental on-line voting process in October 2000.
5 Auerbach campaigned on a platform based on criticism of ICANN and its staff and existing
6 Directors; he made it clear that his goal if selected was to change ICANN dramatically. During
7 the process leading up to the selections, Auerbach made it clear that he did not want ICANN to
8 grow, and that he viewed ICANN as a loathsome, secretive body that desperately needed to be
9 "remodeled," "overhauled," "dismembered," and "reformed." Auerbach was explicit that, if
10 selected, Auerbach would be on a crusade to harm, not support, ICANN. For example, Auerbach
11 stated:

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

21 34. Since becoming a Director, Auerbach has generally taken the position that as an
22 individual Director he has unilateral authority to direct the corporation. As a result, Auerbach has
23 often refused to accept collective decisions of the Board even though he is often the lone
24 dissenting vote on ICANN Board decisions. Auerbach generally seems far more interested in
25 being quoted in news stories or testifying before Congress than in seeking collective solutions on
26 the Board. Despite having accepted a position as a Board member of an organization that is
27 designed to seek consensus policy development whenever possible, Auerbach admittedly "[does
28 not] like consensus."

29 35. In short, Auerbach has chosen to assert his "right" to have his views prevail over
30 the collective wisdom of the Board as a whole whenever he does not agree with the consensus
31 result. And he has continued, sporadically, to attempt to utilize what he obviously feels is the
32 sword of his "absolute" right to inspect and copy corporate records, apparently certain (without

1 ever actually taking the opportunities afforded him to look at the documents) that they will
2 contain scandalous material that he will be able to publicize widely and thus overcome his
3 inability to otherwise persuade his Board peers of the wisdom of his positions.

4 **Director Duties and Rights**

5 36. As a Director, Auerbach's duties to ICANN include a fiduciary duty of loyalty,
6 pursuant to California Nonprofit Corporation Law ("CNCL") section 5231, to act in the best
7 interests of the corporation. It is clear from the jurisprudence interpreting this standard that the
8 duty is to the best interests of the corporation, not the idiosyncratic view of those interests from
9 any individual director. As spelled out in ICANN's Guidelines for Directors, which Auerbach
10 received upon taking his Board seat at the end of the November 2000 Annual Meeting, "[i]n
11 discharging the duty of loyalty, the Director must observe those policies which are established by
12 the Board of Directors or the Officers which are intended to protect the legitimate interests of the
13 corporation. For example, policies concerning confidentiality of corporate information and
14 employee relations must be strictly observed. . . ."

15 37. Being a Director also confers upon Auerbach certain rights, including the right to
16 request to inspect ICANN's corporate records. ICANN has always respected this right and has,
17 indeed, incorporated the right into its Bylaws. Specifically, the right of inspection is conferred
18 upon Auerbach by section 6334 of the CNCL, and the cases interpreting it, and by Section 21 of
19 ICANN's Amended Corporate Bylaws, which states that "[t]he Corporation shall establish
20 reasonable procedures to protect against the inappropriate disclosure of confidential information."
21 Article V, Section 21.

22 **Request for Inspection**

23 38. Soon after becoming a new Board member, Auerbach made an oral request to
24 inspect corporate records to Mike Roberts, then President and Chief Executive Officer of ICANN.
25 Roberts requested that Auerbach submit his specific request in writing, so it could be addressed
26 concretely. Auerbach, in an e-mail dated December 3, 2000 requested in writing to view
27 ICANN's General Ledger. Auerbach's request was the first such request by a member of the
28 Board of Directors to inspect confidential records, and ICANN had not yet implemented

1 procedures for such inspections. On December 6, 2000, Roberts informed Auerbach that his was
2 the first request for Director access and that the Corporation needed to establish procedures for
3 the inspection. Auerbach did not pursue his request any further until March 2001. In March
4 2001, Auerbach e-mailed Roberts, who instructed Auerbach to take his request to Touton, who
5 would seek guidance from the Chair of the Audit Committee.

6 **ICANN Inspection Procedures**

7 39. On March 11, 2001, the Audit Committee of the Board of Directors met in
8 conjunction with ICANN's quarterly meeting in Melbourne Australia. At this meeting, the
9 Committee discussed the need to develop a process by which Directors could access corporate
10 records. The Audit Committee requested that the General Counsel make a recommendation and
11 report back to the Committee. On June 1, 2001, the Audit Committee met in Stockholm and
12 discussed for a second time key points for the provision of access to corporate records to
13 interested directors.

14 40. On August 21, 2001, the Audit Committee discussed the details of proposed
15 director inspection procedures for a third time, and, pursuant to the authority vested in it by the
16 Board of Directors, the Audit Committee voted to endorse the implementation of the "ICANN
17 Procedures Concerning Director Inspection of Records and Properties" (the "Inspection
18 Procedures"). On September 2, 2001, Lynn e-mailed the Board Members, including Auerbach,
19 informing them that the Audit Committee, with assistance from the staff, was actively involved in
20 the development of and had endorsed procedures for director access to corporate records.
21 Section 1 of the Inspection Procedures states "[t]hese procedures balance the Directors' interest in
22 inspecting records and corporate properties with the legitimate interests of the Corporation in
23 ensuring that requests are addressed in a reasonable fashion without undue burden on
24 management, and with the protection of the security of corporation information against
25 inappropriate disclosure and the protection of privacy interests. These procedures do not
26 diminish a Director's rights to inspect, as reflected in California law and Article V, Section 21 of
27 the Corporation's bylaws"
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1 41. Section 5 of ICANN's Inspection Procedures provides that "[t]o the extent the
2 Chief Executive Officer, in consultation with the General Counsel of the Corporation, determines
3 that compliance with any request for records necessarily involves issues of confidentiality,
4 privilege, or privacy of a nature which require limitation of or conditions on the Director's access
5 or use of the requested records, the Chief Executive Officer shall advise the requesting Director
6 of the issues which require the restrictions and the nature of any proposed restrictions on access
7 or use."

8 42. Section 6 of ICANN's Inspection Procedures provides a mechanism for a Director
9 who does not agree with any restrictions proposed by the Chief Executive Officer to appeal to the
10 Audit Committee of the Board. Specifically, Section 6 of ICANN's procedures provides that "[i]f
11 the Director believes that any restrictions proposed by the Chief Executive Officer are
12 unreasonable, the Chief Executive Officer shall submit the request to the Audit Committee of the
13 Board of Directors of the Corporation for resolution."

14 **Auerbach Welcomes Procedures But Expands Request**

15 43. Auerbach responded to Lynn's September 2, 2001 e-mail later that day, informing
16 Lynn that he intended to forward Lynn a copy of Auerbach's previous letter to Roberts, in which
17 he requested to inspect the General Ledger. Auerbach also sent an e-mail to Touton and the
18 Board in which he stated: "I personally am very happy that there are now clearly specified
19 procedures."

20 44. On September 23, 2001, Auerbach sent a letter to Lynn, in which he enclosed his
21 December 3, 2000 request for inspection, and submitted a different and substantially expanded
22 request. Pursuant to Section 5 of the Inspection Procedures, Lynn determined that Auerbach's
23 September 23, 2001 request for access to corporate records necessarily involved issues of
24 confidentiality, privilege, or privacy, which required that ICANN place certain conditions on
25 Auerbach's access to and use of the requested records.

26 45. Under Section 5 of the Inspection Procedures, Lynn advised Auerbach by letter,
27 dated October 5, 2001, of the proposed arrangements for Auerbach's access or use. Section 5 of
28 ICANN's procedures provides that if the director accepts the arrangements by countersigning the

1 statement concerning limitations, the records shall be made available to the Director or the
2 inspection scheduled as soon as possible. Lynn's October 5, 2001 letter to Auerbach requested
3 that Auerbach countersign the letter in acknowledgment of the proposed arrangements.

4 **Auerbach Repeatedly Rejects Invitations to Review ICANN's Corporate Records**

5 46. Auerbach did not accept ICANN's invitation to review the corporate records.
6 Instead, Auerbach responded to Lynn's October 5, 2001 letter by objecting to the proposed
7 arrangements for inspection that Lynn had determined were necessary to protect the Corporation.

8 47. In his October 15, 2001 response to Lynn, after articulating how "glad" he was that
9 "Corporate management has set forth what they believe constitutes reasonable times and places"
10 for Auerbach's inspection, Auerbach protested that the remainder of the proposed arrangements
11 constituted improper substantive limitations on his right of access. Specifically, Auerbach
12 complained that under the Inspection Procedures the Corporation, and not Auerbach, has the right
13 to determine whether information is confidential or not. In his letter, Auerbach insisted that such
14 decisions were his alone, and could not be subject to any determination by the corporation or his
15 fellow Directors: "what material is confidential, and confidential from whom, and how
16 [Auerbach] may use such materials, is not in [ICANN's] discretion; it is subject to my own
17 discretion"

18 48. Lynn responded immediately to Auerbach's objections to the proposed
19 arrangements for inspection. In an October 21, 2001 letter, Lynn informed Auerbach that, based
20 on the objections to the proposed inspection arrangements stated in Auerbach's October 15, 2001
21 letter and pursuant to Section 6 of the Inspection Procedures, Lynn was referring Auerbach's
22 letter to the Audit Committee for its consideration. In the October 21, 2001 letter, Lynn reiterated
23 his invitation to Auerbach to come to ICANN to inspect the records after Auerbach signs the
24 acknowledgement of the inspection arrangements, as contemplated by Section 5 of the Inspection
25 Procedures.

26 49. In an October 27, 2001 letter to Lynn, Auerbach restated his objection to the
27 proposed arrangements. Lynn again responded promptly to Auerbach and, in an October 31,
28

1 2001 letter, Lynn re-invited Auerbach to inspect the records after signing the acknowledgement
2 of the proposed arrangements.

3 50. To date, Auerbach has not signed an acknowledgement of the proposed
4 arrangements for the inspection and provided it to ICANN. ICANN, in an attempt to assist
5 Auerbach, forwarded to Auerbach that portion of the materials he requested that did not
6 necessarily involve confidentiality, privilege, or privacy issues. Specifically, on November 10,
7 2001, Lynn e-mailed Auerbach the requested log of international travel expenses reimbursed by
8 ICANN for ICANN officers other than the President.

9 **Audit Committee Reviews Proposed Arrangements and Informs Auerbach of its Decision**

10 51. The Audit Committee met on November 15, 2001 and, under Section 6 of the
11 Inspection Procedures, discussed Auerbach's inspection request and the propriety of the proposed
12 arrangements. Auerbach's Petition states that nobody ever told him whether the Audit
13 Committee had considered his request, but this is not correct. On November 17, 2001, the Audit
14 Committee informed Auerbach by e-mail letter that, on November 15, 2001, the Audit Committee
15 had considered the referral of Auerbach's request for inspection of the corporate records and the
16 lack of agreement on the arrangements for access or use. The letter informed Auerbach that the
17 Audit Committee, after considering Auerbach's objections, determined that the arrangements
18 requested by Lynn were reasonable and urged Auerbach to reconsider his refusal to proceed with
19 the inspection according to those arrangements. Later the same day, on November 17, 2001,
20 Auerbach responded to the Audit Committee.

21 **Auerbach Fails to Appeal to the Full Board**

22 52. Although Section 6 of the Inspection Procedures explicitly provides that a Director
23 can appeal a decision of the Audit Committee to the full Board of Directors, Auerbach has never
24 done so. Indeed, other than various public complaints about ICANN staff's behavior (falsely
25 implying or stating that this was solely a staff position), ICANN received no further
26 communication from Auerbach on this topic for the next four months. In fact, the next
27 communication it received was notice of the commencement of this lawsuit, and as is common
28

1 with Auerbach, even that came through a press release from the special interest organization that
2 is apparently funding this litigation, the Electronic Frontier Foundation.

3 **Director Davidson Finds ICANN Inspection Procedures Routine**

4 53. In the meantime, Davidson, then Chair of the Audit Committee, exercised without
5 incident his own right to inspect ICANN's corporate records. Davidson, who resides in London,
6 England and who recently retired from the Board, inspected ICANN's corporate records after
7 signing essentially the same letter that ICANN has asked Auerbach to sign.

8 54. Davidson e-mailed Lynn on January 2, 2002, in advance of one of his trips to the
9 United States and requested to inspect the same ICANN corporate records that Auerbach had
10 requested to inspect. Lynn responded that ICANN "would be delighted to make the records
11 available for your inspection following the established procedures." As with Auerbach's identical
12 request, Davidson's request for access to corporate records necessarily involved issues of
13 confidentiality, privilege, or privacy and required conditions on Davidson's access to and use of
14 the requested records. Pursuant to Section 5 of the Inspection Procedures, Lynn therefore asked
15 Touton to prepare a letter to Davidson that set forth the proposed arrangements for access. This
16 was essentially the same as the letter sent to Auerbach for the same purpose. Davidson promptly
17 countersigned Lynn's letter in acknowledgement of the proposed arrangements. Then, pursuant
18 to the arrangements that Lynn determined were necessary and pursuant to Davidson's written
19 acknowledgement of those arrangements, Davidson inspected certain ICANN corporate records
20 on January 31, 2002 at ICANN's corporate headquarters in Marina del Rey, California.

21 **After Marginalizing Himself Repeatedly, Auerbach Files This Lawsuit**

22 55. As the factual recitation above indicates, Auerbach plainly is more interested in
23 damaging ICANN's ability to function than in the inspection of any particular records. The large
24 amounts of time that have passed between various communications, and the refusal to exercise his
25 administrative remedy of seeking Board review makes it clear that the object of this exercise is to
26 injure ICANN, not to carry out Auerbach's fiduciary duty in any meaningful way.

27 56. The timing of Auerbach's lawsuit, four months after the last communication on
28 this issue, is further evidence of Auerbach's real motive here. Auerbach filed this lawsuit after

1 that long silence only when it became clear that on substantive matters (unrelated to the
2 inspection) his views and those of the Board were becoming increasingly divergent. By
3 tradition, the ICANN Board works hard to achieve consensus resolutions on the often-contentious
4 policy matters it addresses. This process involves persuasion, deliberation, and compromise.
5 Auerbach, however, often behaves in a strident manner not compatible with the building of
6 consensus. As a result, he has seen his influence in Board decisions wane. At the March 14,
7 2002, ICANN Board of Directors meeting in Accra, Ghana, for example, the Board voted on ten
8 substantive resolutions (other than resolutions expressing thanks, etc.). Throughout the meeting,
9 the Board members worked hard to reach consensus positions and ultimately versions of all ten
10 resolutions were passed. In the end, no Director other than Auerbach voted against any of the ten
11 consensus resolutions; he cast opposing votes to five of them. Auerbach abstained on two of the
12 other five.

13 57. One illustration of Auerbach's marginalization involves the Board's consideration
14 of the process by which directors are chosen to represent the public interest. After considering
15 lengthy studies sounding reservations about the validity and practicality of global on-line voting
16 (the process that resulted in Auerbach being chosen in 2000 after receiving only 1,738 votes from
17 all of the United States and Canada where there are over 150,000,000 Internet users), the Board
18 rejected an effort by Auerbach and others to repeat the process of direct on-line voting to choose
19 certain directors of ICANN by a vote of 14-1 (with 2 abstentions), instead resolving to search for
20 another mechanism for meaningful, informed participation by Internet users. Auerbach was the
21 only dissenting vote. During the Board debate on the resolution at the Accra, Ghana, meeting,
22 Auerbach made clear his view that the Board's proposed action was illegitimate: "What this
23 resolution does very clearly, it says to the world that ICANN is not a democratic public institution
24 but it's a paternalistic oligarchy. We return to the day when we assume the white man's burden."

25 58. The Board also rejected an effort to commit to extending the terms on the Board of
26 Auerbach and the eight other At Large Directors by a 13-3 vote (with 1 abstention), leaving that
27 issue to be decided at a subsequent meeting. Of the four other Board members (in addition to
28 Auerbach) who were selected by the 2000 on-line voting process, three voted in favor of the latter

1 resolution to defer any action on extending At Large Director terms, and one abstained.

2 Auerbach was the only such Director who voted for that proposal.

3 59. The next day, Friday, March 15, 2002, Auerbach posted the following statement
4 on the Internet: "My board seat, and those of the other four elected board members will simply
5 vaporize this fall, with no replacements, no elections . . . no nothing. ICANN will be reduced [to]
6 a body run by those who have today proclaimed themselves to be our self-designated "betters",
7 who know better than we do what is best for you and me." This statement is not correct, and does
8 not reflect the actual Board decision, which simply postponed for later consideration the issue of
9 what (if any) extensions of At Large Director terms should take place. But it does reflect
10 Auerbach's unhappiness, and thus it is unlikely to be a mere coincidence that Auerbach signed the
11 Verification for the Petition in this action just one day after the Board meeting in Accra. After the
12 weekend passed, Auerbach filed this case.

13 **Auerbach's Lawsuit is Aimed at Public, Not Director, Access to Confidential Records**

14 60. In the days immediately after Auerbach filed his Petition, Auerbach has granted
15 multiple interviews in which he has wildly exaggerated the scope of this lawsuit and its potential
16 impact on public access to ICANN activities and records. In addition, one of the co-founders of
17 the organization providing representation to Auerbach in this lawsuit, John Gilmore, contributed
18 significant funding to this lawsuit and has warned that, in his view, ICANN "is going down, one
19 way or another. Either it will go down like East Germany, with a peaceful transition to
20 governance responsive to the public will, or it will go down like Japan, with big bombs dropped
21 on it." Gilmore's statements and Auerbach's course of conduct both before and after the filing of
22 this lawsuit make it clear that the ostensible purpose of this lawsuit --a routine inspection of
23 documents -- is clearly not the underlying motivation for the Petition.

24 **AFFIRMATIVE DEFENSES**

25 **FIRST AFFIRMATIVE DEFENSE**

26 **(Failure to Exhaust Internal Remedies)**

27 As a first and separate affirmative defense, ICANN alleges that Auerbach's claims are
28 barred and/or estopped by Auerbach's failure to exhaust appropriate internal remedies within

1 ICANN before filing this action, thereby rendering the Petition premature. Auerbach has yet to
2 inspect a single document. Auerbach should conduct his inspection pursuant to the corporation's
3 procedures and if Auerbach then determines that those procedures inhibit his ability to act in
4 accordance with his perception of his fiduciary duties as a Director, Auerbach can seek redress
5 from ICANN's Board of Directors (as set forth in Section 6 of the procedures attached to the
6 Petition as Exhibit 2).

7 **SECOND AFFIRMATIVE DEFENSE**

8 **(Ripeness)**

9 As a second and separate affirmative defense, ICANN alleges that Auerbach's claims
10 against ICANN are barred because the issues raised in the Petition are not ripe. Unless and until
11 Auerbach demonstrates that he has suffered a concrete and particularized harm by ICANN's
12 insistence that he follow procedures that were duly established by ICANN's Audit Committee
13 and that were already in fact followed by the Chair of that Committee in connection with his own
14 inspection, there is no case or controversy for this Court to resolve.

15 **THIRD AFFIRMATIVE DEFENSE**

16 **(Laches)**

17 As a third and separate affirmative defense, ICANN alleges that, by his conduct,
18 Auerbach is guilty of laches, which bars in whole or in part, the relief sought herein. Long before
19 Auerbach brought this action ICANN established procedures pursuant to which Auerbach may,
20 and has been repeatedly been invited to, inspect the corporate records. Auerbach has not
21 inspected the corporate records.

22 **FOURTH AFFIRMATIVE DEFENSE**

23 **(Waiver)**

24 As a fourth and separate affirmative defense, ICANN alleges that by conduct,
25 representations and omissions, Auerbach has waived, relinquished, and/or abandoned, and is
26 equitably estopped to assert, any claim for relief against ICANN respecting the matters which are
27 the subject matter of the Petition. Among other instances of waiver, by stating that the
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1 determination of what material is confidential is within his own discretion, Auerbach has waived
2 any claim for relief against ICANN.

3 **FIFTH AFFIRMATIVE DEFENSE**

4 **(Unclean Hands)**

5 As a fifth and separate affirmative defense, ICANN alleges that no relief may be obtained
6 under the Petition by reason of the doctrine of unclean hands. Auerbach's repeated statements
7 that the determination of what material is confidential is within his own discretion demonstrates
8 that compliance with ICANN's Inspection Procedures is of particular importance with respect to
9 Auerbach.

10 **SIXTH AFFIRMATIVE DEFENSE**

11 **(Adequacy of Remedy at Law)**

12 As a sixth and separate affirmative defense, ICANN alleges that the injury or damage
13 suffered by Auerbach, if any there be, would be adequately compensated in an action at law.

14 **SEVENTH AFFIRMATIVE DEFENSE**

15 **(Mootness)**

16 As a seventh and separate affirmative defense, ICANN alleges that Auerbach's claims
17 against ICANN raised in the Petition are moot inasmuch as ICANN is and always has been
18 willing to allow Auerbach to inspect and copy corporate records.

19 **PRAYER FOR RELIEF**

20 WHEREFORE, ICANN prays for judgment as follows:

- 21 1. That judgment be entered in favor of ICANN and against Auerbach;
- 22 2. That Auerbach take nothing by his action;
- 23 3. That the Court declare that the full Board, not just Auerbach, has the right to
24 decide what materials should be treated as confidential;
- 25 4. That the Court declare that the Inspection Procedures are appropriate and that
26 Auerbach should exhaust internal remedies before seeking redress from this Court;
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- 5. That ICANN recover its costs of suit incurred herein, including attorneys' fees; and
- 6. For such other and further relief as the Court deems just and proper.

Dated: May 1, 2002

Respectfully submitted,
JONES, DAY, REAVIS & POGUE

By: _____
Jeffrey A. LeVee

Attorneys for Defendant
INTERNET CORPORATION FOR
ASSIGNED NAMES AND NUMBERS

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VERIFICATION

STATE OF CALIFORNIA)
) SS.
COUNTY OF LOS ANGELES)

I, the undersigned, certify and declare that I have read the foregoing Amended Answer and know its contents. I am an officer of the Internet Corporation for Assigned Names and Numbers, a party to this action, and am authorized to make this verification for that reason. I am informed and believe and on that ground allege that the matters stated in the document described above are true.

Executed on May 1, 2002, at Amsterdam, The Netherlands.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

M. Stuart Lynn