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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. BS 074771

**DEFENDANT ICANN'S MEMORANDUM
OF POINTS AND AUTHORITIES IN
SUPPORT OF ITS MOTION FOR
SUMMARY JUDGMENT WITH RESPECT
TO PLAINTIFF'S PETITION FOR WRIT
OF MANDATE**

(THE HONORABLE DZINTRA JANAVS)

Date: June 21, 2002

Time: 9:30 a.m.

Dept.: 85

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1 **INTRODUCTION**

2 The real issue here is quite simple: is Auerbach entitled to make unilateral decisions as to
3 the confidentiality of corporate records? Auerbach says that the law gives him an "absolute right"
4 to inspect and copy (and apparently to distribute as he sees fit) any and all corporate records.
5 ICANN, by contrast, has offered to make all corporate records freely available to Auerbach,
6 provided he agrees to abide by the reasonable conditions that the corporation has established to
7 ensure that such requests do not unnecessarily interfere with the ongoing operations of the
8 corporation or present undue risks of inappropriate breaches of confidentiality.

9 Auerbach's position is that ICANN can impose NO conditions on his access and use of
10 ANY corporate records, but that ICANN "shouldn't worry" because Auerbach understands his
11 fiduciary responsibilities and the corporation (and its eighteen other directors) can rely on his
12 good judgment and good faith to make proper decisions about the treatment of those records. For
13 the reasons detailed below, the corporation and its other directors have good reasons to be
14 concerned that Auerbach's views on these matters might not be consistent with either the
15 corporation's interests or the law. But even more relevantly, the corporation has the right, and
16 under its bylaws the obligation, to establish procedures for inspection of records that are
17 consistent with both the law and the corporation's interest in sound operations. It has done so,
18 and those conditions are both reasonable and binding on Auerbach, as a matter of law.

19 Auerbach contends that ICANN is not complying with California law unless ICANN
20 allows Auerbach access to ICANN's records at times and places of his unilateral choosing, and
21 with no constraints, reasonable or otherwise, that limit in any way who Auerbach can disclose the
22 records to, or under what conditions he can make such disclosure. Auerbach bases this position
23 on his view that a director's right of inspection is "absolute" under California Corporations Code
24 section 6334.

25 Auerbach's characterization of the law is simply wrong: California courts have
26 consistently held that a director's right of inspection is not "absolute," in the sense that it does
27 permit the establishment of reasonable procedures for inspections in order to protect the interests
28 of the corporation. Because ICANN's inspection procedures are reasonable, particularly in light

1 of Auerbach's longstanding and well-publicized goal of acting out his idiosyncratic goals without
2 regard to the best interests of the corporation, the Court should grant summary judgment with
3 respect to Auerbach's Petition.

4 Auerbach's Petition should also be dismissed as a matter of law because it is not ripe for
5 adjudication. ICANN has invited Auerbach to inspect ICANN's corporate records on multiple
6 occasions, but Auerbach has not accepted those invitations. Auerbach claims that he has not
7 conducted his inspection because he does not want to comply with ICANN's procedures for
8 director inspection, but unless and until Auerbach demonstrates that he has suffered a concrete
9 and particularized harm by ICANN's insistence that he follow procedures that were duly
10 established by ICANN's Audit Committee and that were already in fact followed by the chair of
11 that committee in connection with his own inspection, there is no case or controversy for this
12 Court to resolve.

13 Auerbach's appropriate course here is to conduct his inspection pursuant to the
14 corporation's procedures. If Auerbach then determines that those procedures inhibit his ability to
15 act in accordance with his perception of his fiduciary duties as a director, Auerbach can seek
16 redress from ICANN's Board of Directors (as set forth in Section 6 of the Inspection Procedures
17 attached to the Petition as Exhibit 2). If, and only if, Auerbach is not satisfied with the decision
18 of ICANN's Board would he actually have a ripe controversy that could possibly support the
19 filing of a lawsuit. At this point, since ICANN has offered him access to every record that he has
20 requested to see and Auerbach's refusal to accept that offer is the only reason he has not yet
21 reviewed those records, Auerbach can show nothing but self-inflicted harm. Self-inflicted harm
22 cannot support a cause of action.

23 Alternatively, Auerbach's claim is moot. Where a defendant shows that it will perform
24 without coercion, the writ may be denied as unnecessary; if the defendant shows actual
25 compliance, the proceeding will be dismissed as moot. ICANN has repeatedly invited Auerbach
26 to review any and all of the requested records and that invitation remains open. Because the
27 coercion of a writ is not necessary for Auerbach to obtain access to the records and ICANN's
28 procedures for inspection comply with California law, Auerbach's Petition should be dismissed as

1 a matter of law.

2 BACKGROUND FACTS

3 ICANN

4 ICANN was formed in October 1998 by a broad coalition of the Internet's business,
5 technical, academic, and user communities. [Touton Decl., at ¶ 2.] ICANN has been recognized
6 by the United States and other governments as the global private sector, consensus-development
7 entity appropriate to coordinate the technical management of the Internet's domain name system,
8 the allocation of IP address space, the assignment of protocol parameters, and the management of
9 the root server system. [Id.] With a staff of seventeen, ICANN is funded through the various
10 registries and registrars that comprise the global domain name and Internet addressing systems.
11 [Id. at ¶ 3.] ICANN has a nineteen member volunteer Board of Directors.¹ [Id.] With the
12 exception of the Chief Executive Officer, who serves as an *ex officio* director, these directors are
13 chosen by a variety of means: some (including Auerbach) were chosen through an experimental
14 on-line voting process; others have been selected by each of three "Supporting Organizations"
15 that, according to ICANN's bylaws, are entitled to select directors to ICANN's Board. Roughly
16 two-thirds of the Board members reside outside of the United States. Together with the Board of
17 Directors and its Advisory Committees, ICANN carries out its work through three supporting
18 organizations – the Domain Name, Address, and Protocol Supporting Organizations – which
19 collectively represent a broad cross-section of the global Internet's business, technical, academic,
20 non-commercial, and user communities. [Id.]

21 Plaintiff

22 Auerbach is one member of ICANN's Board of Directors. A self-described radical,
23 Auerbach is one of five ICANN directors who were chosen to become members of the ICANN
24 Board of Directors through an experimental on-line voting process in October 2000. [Touton
25 Decl., at ¶ 4; Ex. 4 (Oct. 16, 2000 Salon.com article).] Auerbach campaigned on a platform based
26 on criticism of ICANN and its staff and existing directors; he made it clear that his goal if

27 _____
28 ¹ All of the directors except the CEO are volunteers and unpaid.

1 selected was to change ICANN dramatically. During the process leading up to the selections,
2 Auerbach made it clear that he did not want ICANN to grow [Touton Decl., Ex. 3 (cyber.law
3 article)], and that he viewed ICANN as a loathsome, secretive body that desperately needed to be
4 "remodeled," "overhauled," "dismembered," and "reformed." [Touton Decl., Exs. 1 and 3.]
5 Auerbach was explicit that, if selected, Auerbach would be on a crusade to harm, not support,
6 ICANN. For example, Auerbach stated:

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

16 [Touton Decl., Ex. 3 (cyber.law article).]

17 Since becoming a director, Auerbach has generally taken the position that as an individual
18 director he has unilateral authority to direct the corporation. As a result, Auerbach is often the
19 lone dissenting vote on ICANN Board decisions. [Lynn Decl., at ¶ 33; Touton Decl., Ex. 5
20 (tally).] Auerbach generally seems far more interested in being quoted in news stories or
21 testifying before Congress than in seeking collective solutions on the Board. Despite having
22 accepted a position as a Board member of an organization that is designed to seek consensus
23 policy development whenever possible, Auerbach admittedly "[does not] like consensus."

24 [Touton Decl., Ex. 3 (cyber.law article).]

25 In short, Auerbach has chosen to assert his "right" to have his views prevail over the
26 collective wisdom of the Board whenever he does not agree with the consensus result. And he
27 has continued, sporadically, to attempt to utilize what he obviously feels is the sword of his
28 "absolute" right to inspect and copy corporate records, despite the inherent risks to the
29 corporation of public disclosure of confidential corporate materials.

30 **Director Duties and Rights**

31 As a director, Auerbach's duties to ICANN include a fiduciary duty of loyalty, pursuant to
32 California Corporations Code section 5231, to act in the best interests of the corporation. It is

1 clear from the jurisprudence interpreting this standard that the duty is to the best interests of the
2 corporation, not an individual director's idiosyncratic view of those interests. As spelled out in
3 ICANN's Guidelines for Directors, which Auerbach received upon taking his Board seat at the
4 end of the November 2000 Annual Meeting, "[i]n discharging the duty of loyalty, the Director
5 must observe those policies which are established by the Board of Directors or the Officers which
6 are intended to protect the legitimate interests of the corporation. For example, policies
7 concerning confidentiality of corporate information and employee relations must be strictly
8 observed even if a Director may personally disagree with the policy, since violations of these
9 policies may cause damage to the corporation and subject all directors to liability." [Touton
10 Decl., Ex. 8 at p. 4.]

11 Being a director also confers upon Auerbach certain rights, including the right to inspect
12 ICANN's corporate records. ICANN has always respected this right and has, indeed,
13 incorporated the right into its bylaws. Specifically, the right of inspection is conferred upon
14 Auerbach by sections 6334 and 6336(a) of the California Corporations Code and by Article V,
15 Section 21 of ICANN's amended corporate bylaws, which states that "[t]he Corporation shall
16 establish reasonable procedures to protect against the inappropriate disclosure of confidential
17 information." [Lynn Decl., Ex. 1 (bylaws).]

18 **Request for Inspection**

19 Soon after becoming a new Board member, Auerbach made an oral request to inspect
20 corporate records to Mike Roberts, then President and Chief Executive Officer of ICANN.
21 [Petition, at ¶ 6.] Roberts requested that Auerbach submit his specific requests in writing, so they
22 could be addressed concretely. [Id.] Auerbach, in an e-mail letter dated December 3, 2000
23 requested to view ICANN's General Ledger. [Touton Decl., Ex. 9.] Auerbach's request was the
24 first such request by a member of the Board of Directors to inspect confidential records, and
25 ICANN had not yet implemented procedures for such inspections. [Touton Decl., at ¶ 11.]

26 On December 6, 2000, Roberts informed Auerbach that his was the first request for
27 director access and that the corporation needed to establish procedures for the inspection.

28 [Petition, at ¶ 6.] Auerbach did not pursue his request any further until March 2001. [Petition, at

¶ 7.] On March 3, 2001, Auerbach e-mailed Roberts, who instructed Auerbach to take his request to Touton, who would seek guidance from the Chair of the Audit Committee. [Petition, at ¶¶ 8, 9.]

ICANN Inspection Procedures

On March 11, 2001, the Audit Committee of the Board of Directors met in conjunction with ICANN's quarterly meeting in Melbourne, Australia. [Lynn Decl., Ex. 3 (Melbourne Audit Minutes).] At this meeting, the Committee discussed the need to develop a process by which directors could access corporate records. [Id.] The Audit Committee requested that the General Counsel make a recommendation and report back to the Committee. [Id.] On June 1, 2001, the Audit Committee met in Stockholm and discussed for a second time key points for the provision of access to corporate records to interested directors. [Touton Decl., at ¶ 14.]

On August 21, 2001, the Audit Committee discussed the details of proposed director inspection procedures for a third time, and voted to endorse the implementation of the "ICANN Procedures Concerning Director Inspection of Records and Properties" (the "Inspection Procedures"). [Touton Decl., Ex. 12 (August 21, 2001 Audit Minutes); Petition, at Ex. 2; Lynn Decl., Ex. 2 (Inspection Procedures).] On September 2, 2001, Lynn e-mailed the Board Members, including Auerbach, informing them that the Audit Committee had been working with the staff to develop, and had endorsed, procedures for director access to corporate records. [Lynn Decl., Ex. 6.] Lynn also e-mailed Auerbach separately and invited him to pursue his request for access to the corporate records. [Lynn Decl., Ex. 7.]

Section 1 of the Inspection Procedures states: "[t]hese procedures balance the Directors' interest in inspecting records and corporate properties with the legitimate interests of the Corporation in ensuring that requests are addressed in a reasonable fashion without undue burden on management, and with the protection of the security of corporate information against inappropriate disclosure and the protection of privacy interests. These procedures do not diminish a Director's right to inspect, as reflected in California Law in Article V, Section 21 of the Corporation's bylaws" [Lynn Decl., Ex. 2 (Inspection Procedures).]

Section 5 of ICANN's Inspection Procedures provides that "[t]o the extent the Chief

1 Executive Officer, in consultation with the General Counsel of the Corporation, determines that
2 compliance with any request for records necessarily involves issues of confidentiality, privilege,
3 or privacy of a nature which require limitation of or conditions on the Director's access or use of
4 the requested records, the Chief Executive Officer shall advise the requesting Director of the
5 issues which require the restrictions and the nature of any proposed restrictions on access or use."

6 [Lynn Decl., Ex. 2 (Inspection Procedures).]

7 Section 6 of ICANN's Inspection Procedures provides a mechanism for the Chief
8 Executive Officer to submit to the Audit Committee of the Board any disputes with a director
9 concerning an inspection request. [Lynn Decl., Ex. 2 (Inspection Procedures).] Specifically,
10 Section 6 of ICANN's procedures provides that "[i]f the Director believes that any restrictions
11 proposed by the Chief Executive Officer are unreasonable, the Chief Executive Officer shall
12 submit the request to the Audit Committee of the Board of Directors of the Corporation for
13 resolution." [Lynn Decl., Ex. 2 (Inspection Procedures).]

14 **Auerbach Welcomes Procedures But Expands Request**

15 Auerbach responded to Lynn's September 2, 2001 e-mail the next day, informing Lynn
16 that he intended to forward Lynn a copy of Auerbach's previous letter to Roberts, in which he
17 requested to inspect the General Ledger. Auerbach also sent an e-mail to Touton and the Board
18 in which he stated: "I personally am very happy that there are now clearly specified procedures."
19 [Lynn Decl., Ex. 8.]

20 On September 23, 2001, Auerbach sent a letter to Lynn, in which he enclosed his
21 December 3, 2000 request for inspection to Roberts, and submitted a different and substantially
22 expanded request. [Lynn Decl., Ex. 9 (Sept. 23, 2001 letter).] Pursuant to Section 5 of the
23 Inspection Procedures, Lynn determined that Auerbach's September 23, 2001 request for access
24 to corporate records necessarily involved issues of confidentiality, privilege, or privacy, which
25 required arrangements for ensuring the confidentiality of the requested records. [Lynn Decl., at
26 ¶ 15.]

27 Following Section 5 of the Inspection Procedures, Lynn advised Auerbach by letter, dated
28 October 5, 2001, of the proposed arrangements for Auerbach's access or use. [Lynn Decl., Ex. 10

1 (Oct. 5, 2001 letter).] The arrangements proposed included the time and place of inspection,
2 procedures for obtaining copies of confidential records, and procedures for inquiring about the
3 extent of confidentiality of any item and seeking a relaxation of confidential status. [Id.] Section
4 5 of ICANN's procedures provides that if the director accepts the arrangements by countersigning
5 the statement concerning them, the records shall be made available to the director or the
6 inspection scheduled as soon as possible. [Lynn Decl., Ex. 2 (Inspection Procedures).] Lynn's
7 October 5, 2001 letter to Auerbach requested that Auerbach countersign the letter in
8 acknowledgment of the proposed arrangements so that the records could promptly be made
9 available to him. [Lynn Decl., Ex. 10 (Oct. 5, 2001 letter).]

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

11 Auerbach did not accept ICANN's invitation to review the corporate records. [Lynn
12 Decl., at ¶ 17.] Instead, Auerbach responded to Lynn's October 5, 2001 letter by objecting to the
13 proposed arrangements. [Lynn Decl., Ex. 11 (Oct. 15, 2001 letter).]

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

24 Lynn responded immediately to Auerbach's objections to the proposed arrangements for
25 inspection. [Lynn Decl., Ex. 12 (Oct. 21, 2001 letter).] Lynn informed Auerbach in writing that,
26 based on the objections to the proposed inspection arrangements stated in Auerbach's October 15,
27 2001 letter and pursuant to Section 6 of the Inspection Procedures, Lynn was referring Auerbach's
28 letter to the Audit Committee for its consideration. [Id.] In the October 21, 2001 letter, Lynn

1 reiterated his invitation to Auerbach to come to ICANN to inspect the records according to the
2 proposed inspection arrangements, as contemplated by Section 5 of the Inspection Procedures.

3 [Id.]

4 In an October 27, 2001 letter to Lynn, Auerbach restated his objection to the proposed
5 arrangements. [Lynn Decl., Ex. 13 (Oct. 27, 2001 letter).] Auerbach also proposed a
6 "compromise" in which Auerbach would give ICANN seven days notice before "any disclosure"
7 of ICANN's confidential information. [Id.]

8 Lynn again responded promptly to Auerbach. In an October 31, 2001 letter, Lynn
9 informed Auerbach that his proposal to provide seven days advance notice was unworkable and
10 improper under the applicable law:

11 Your proposal merely to give the corporation notice of a
12 prospective disclosure would require that we be prepared to go to
13 court to prevent unwarranted disclosure. Since you are not entitled
14 to make these determinations in the first place, it seems
15 inappropriate to force ICANN to vindicate its rights, rather than
16 your being obligated to seek permission for disclosures.

17 [Lynn Decl., Ex. 14 (Oct. 31, 2001 letter).] Lynn also re-invited Auerbach to inspect the records
18 according to the proposed arrangements. [Id.]

19 To date, Auerbach has not conducted his inspection. [Lynn Decl., at ¶ 17.] ICANN has
20 already forwarded to Auerbach that portion of his broad request for corporate materials that
21 ICANN has determined was not confidential, privileged, or private. [Lynn Decl., Ex. 15
22 (Nov. 10, 2001 e-mail).] Specifically, on November 10, 2001, Lynn e-mailed Auerbach the
23 requested log of international travel expenses reimbursed by ICANN for ICANN officers other
24 than its President. [Id.]

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

26 The Audit Committee met on November 15, 2001 and, under Section 6 of the Inspection
27 Procedures, discussed Auerbach's inspection request and the propriety of the proposed
28 arrangements. [Touton Decl., Ex. 14 (November 15, 2001 Audit Minutes).] Auerbach's Petition
states that no one ever told him whether the Audit Committee had considered his request, but this
is not correct. [Petition at ¶ 21.] On November 17, 2001, the Audit Committee informed

1 Auerbach by e-mail letter that, on November 15, 2001, the Audit Committee had considered the
2 referral of Auerbach's request for inspection of the corporate records and the lack of agreement on
3 the arrangements for access or use. [Lynn Decl., Ex. 16 (Nov. 17, 2001 e-mail).] The letter
4 informed Auerbach that the Audit Committee, after considering Auerbach's objections,
5 determined that the arrangements requested by Lynn were reasonable and urged Auerbach to
6 reconsider his refusal to proceed with the inspection according to those arrangements. [Id.] Later
7 the same day, on November 17, 2001, Auerbach responded to the Audit Committee. [Lynn Decl.,
8 Ex. 17 (Nov. 17, 2001 Auerbach e-mail).]

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

10 Although Section 6 of the Inspection Procedures explicitly provides that a director can
11 appeal a decision of the Audit Committee to the full Board of Directors, Auerbach has never done
12 so. [Cerf Decl., at ¶ 2.] Indeed, other than various public complaints about ICANN staff's
13 behavior (falsely implying or stating that this was solely a staff position), ICANN received no
14 further communication from Auerbach on this topic for the next four months. In fact, the next
15 communication it received was notice of the commencement of this lawsuit, and even that came
16 through a press release from the special interest organization that is apparently funding this
17 litigation, the Electronic Frontier Foundation.

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

19 In the meantime, Davidson, then chair of the Audit Committee, exercised without incident
20 his own right to inspect ICANN's corporate records. [Lynn Decl., at ¶ 29.] Davidson, who
21 resides in London, England (and has since retired from the Board), inspected ICANN's corporate
22 records after signing essentially the same letter that ICANN has asked Auerbach to sign.²

23 ² Davidson e-mailed Lynn on January 2, 2002, in advance of one of his trips to the United
24 States and requested to inspect the same ICANN corporate records that Auerbach had requested
25 to inspect. [Lynn Decl., Ex. 20 (Davidson Request).] Lynn responded that ICANN "would be
26 delighted to make the records available for your inspection following the established procedures."
27 [Lynn Decl., Ex. 21.] As with Auerbach's identical request, Davidson's request for access to
28 corporate records necessarily involved issues of confidentiality, privilege, or privacy and required
conditions on Davidson's access to and use of the requested records. [Lynn Decl., at ¶ 31.]
Pursuant to Section 5 of the Inspection Procedures, Lynn therefore asked Touton to prepare a
letter to Davidson that set forth the proposed conditions for access. This was essentially the same
as the letter sent to Auerbach for the same purpose. [Lynn Decl., at ¶ 31.] Davidson promptly

1 [Touton Decl., at ¶ 19; Lynn Decl., at ¶¶ 29, 31.]

2 **Auerbach Files This Lawsuit**

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

8 The timing of Auerbach's lawsuit, four months after the last communication on this issue,
9 is further evidence of Auerbach's real motive here. Auerbach filed this lawsuit only when it
10 became clear that on substantive matters (unrelated to the inspection) his views and those of the
11 Board were becoming increasingly divergent. At the March 14, 2002 ICANN Board of Directors
12 meeting in Accra, Ghana, for example, the Board voted on ten substantive resolutions (i.e. other
13 than resolutions expressing thanks, etc.). [Lynn Decl., at ¶ 34.] Throughout the meeting, the
14 Board members worked hard to reach consensus positions, and ultimately versions of all ten
15 resolutions were passed. [Id.] In the end, no director other than Auerbach voted against any of
16 the ten consensus resolutions; he cast opposing votes to five of them. [Id.] Auerbach abstained
17 on two of the other five. [Id.]

18 One illustration of how Auerbach's views are widely divergent from the views held by his
19 colleagues on the Board involves the Board's consideration of the process by which directors are
20 chosen to represent the public interest. After considering lengthy studies sounding reservations
21 about the validity and practicality of global on-line voting (the process that resulted in Auerbach
22 being chosen in 2000 after receiving only 1,738 votes from all of the United States and Canada,
23 where there are over 150,000,000 Internet users), the Board rejected, by a vote of 14-1 (with 2
24 abstentions), an effort by Auerbach and others to repeat the process of direct on-line voting to

25 _____
(continued...)

26 countersigned Lynn's letter in acknowledgement of the proposed conditions. [Touton Decl.,
27 Ex. 16 (January 31, 2002 letter).] Davidson then inspected the corporate records on January 31,
28 2002 at ICANN's corporate headquarters in Marina del Rey, California. [Touton Decl., at ¶ 21.]

1 choose certain ICANN directors. Instead, the Board resolved to search for another mechanism
2 for meaningful, informed participation by Internet users. Auerbach was the only dissenting vote.
3 [Lynn Decl., at ¶ 35.] During the Board debate on the resolution at the Accra, Ghana, meeting,
4 Auerbach made clear his view that the Board's proposed action was illegitimate: "What this
5 resolution does very clearly, it says to the world that ICANN is not a democratic public institution
6 but it's a paternalistic oligarchy. We return to the day when we assume the white man's burden."
7 [Lynn Decl., Ex. 22 (Transcript).]

8 The Board also rejected an effort to commit on March 14, 2002 to extending the length of
9 the terms on the Board of Auerbach and the eight other At Large directors by a 13-3 vote (with 1
10 abstention), leaving that issue to be decided at a subsequent meeting. [Lynn Decl., at ¶ 36.] Of
11 the four other Board members (in addition to Auerbach) who were selected by the 2000 on-line
12 voting process, three voted in favor of the latter resolution to defer any action on extending At
13 Large director terms, and one abstained. [Id.] Auerbach was the only such director who voted
14 for that proposal. [Id.]

15 Later that day, March 14, 2002, Auerbach posted the following statement on the Internet:
16 "My board seat, and those of the other four elected board members will simply vaporize this fall,
17 with no replacements, no elections . . . no nothing. ICANN will be reduced [to] a body run by
18 those who have today proclaimed themselves to be our self-designated 'betters', who know better
19 than we do what is best for you and me." [Touton Decl., Ex. 17.] This statement is not correct,
20 and does not reflect the actual Board decision, which simply postponed for later consideration the
21 issue of what (if any) extensions of At Large director terms should take place. [Lynn Decl., at
22 ¶ 36.] But it does reflect Auerbach's unhappiness, and thus it is unlikely to be a mere coincidence
23 that Auerbach signed the Verification for the Petition in this action on Friday, March 15, just one
24 day after the Board meeting in Accra. After the weekend passed, Auerbach filed this case.

25 **Lawsuit is Aimed at Public, Not Director, Access to Confidential Records**

26 In the days immediately after Auerbach filed his Petition, Auerbach granted multiple
27 interviews in which he wildly exaggerated the scope of this lawsuit and its potential impact on
28 public access to ICANN activities and records. [See, e.g., Touton Decl., Ex. 18 (Salon.com

1 Interview).] In addition, one of the co-founders of the organization providing Auerbach
2 representation in this lawsuit, John Gilmore, contributed significant funding to the lawsuit and has
3 warned that, in his view, ICANN "is going down, one way or another. Either it will go down like
4 East Germany, with a peaceful transition to governance responsive to the public will, or it will go
5 down like Japan, with big bombs dropped on it." [Cerf Decl., at ¶ 3.] Gilmore's statements and
6 Auerbach's course of conduct both before and after the filing of this lawsuit make it clear that the
7 ostensible purpose of this lawsuit – a routine inspection of documents – is clearly not the
8 underlying motivation for the Petition.

9 ARGUMENT

10 I. SUMMARY JUDGMENT STANDARD

11 A defendant is entitled to summary judgment if all the papers submitted show that there is
12 no triable issue as to any material fact and that the defendant is entitled to judgment as a matter of
13 law. Cal. Code of Civ. Proc. § 437c(c); *Aguilar v. Atlantic Richfield Co.*, 25 Cal. 4th 826, 855-56
14 (2001). The moving party bears the burden of production to make a prima facie showing of the
15 nonexistence of any triable issue of material fact. *Id.* Once the moving party has met that burden,
16 the burden switches to the non-moving party to show that a triable issue of material fact exists
17 concerning that cause of action or defense. *Id.* "An issue of fact is not created by speculation,
18 conjecture, imagination, or guesswork; it can be created only by a conflict in the evidence
19 submitted to the trial court in support of and in opposition to the motion." *Lewis v. County of*
20 *Sacramento*, 93 Cal. App. 4th 107, 116 (2002) (citations omitted); *see* Cal. Code of Civ. Proc.
21 § 437c(o)(2). A defendant is entitled to judgment as a matter of law if the defendant has shown
22 that one or more elements of the cause of action in question cannot be established or that there is
23 a complete defense to the claim. Cal. Code of Civ. Proc. § 437c(o)(2); *Aguilar*, 25 Cal. 4th at 850.

24 II. A DIRECTOR'S RIGHT TO INSPECT DOCUMENTS UNDER 25 CORPORATIONS CODE SECTION 6334 IS NOT ABSOLUTE.

26 A director's right of inspection under California Corporations Code section 6334 is not
27 "absolute." *See Havlicek v. Coast to Coast Analytical Services*, 39 Cal. App. 4th 1844, 1855
28 (1995) (concluding that, despite Legislature's choice of words, "'absolute' cannot mean

1 'absolute"). A corporation may place reasonable conditions on a director's right of inspection in
2 order to protect the interests of the corporation. *Havlicek*, 39 Cal. App. 4th at 1855; *Chantiles v.*
3 *Lake Forest II Master Homeowners Ass'n*, 37 Cal. App. 4th 914, 925-26 (1995). Reading
4 Corporations Code section 6334 in conjunction with section 6336(a) confirms the legislature's
5 intent in this regard. Cal. Corp. Code §§ 6334, 6336(a); see *City of Huntington Beach v. Board of*
6 *Admin.*, 4 Cal. 4th 462, 468 (1992) (related sections of a statute must "be read together and
7 construed in a manner that gives effect to each, yet does not lead to disharmony with the others").
8 Section 6336 subdivision (a) provides that "[u]pon refusal of a lawful demand for inspection" the
9 superior court "may enforce the demand or right of inspection with just and proper conditions."
10 The California courts have held that because "just and proper conditions" on a director's right of
11 inspection are provided for in the statutory scheme, the right of inspection is not "absolute." See
12 *Havlicek*, 39 Cal. App. 4th at 1856 (interpreting the for-profit General Corporations Code analogs
13 to sections 6334 and 6336(a) of the Nonprofit Public Benefit Corporations Code); *Chantiles*, 37
14 Cal. App. 4th at 925 (interpreting the Nonprofit Mutual Benefit Corporations Code analogs to
15 sections 6334 and 6336(a) of the Nonprofit Public Benefit Corporations Code).³

16 **A. A Corporation Can Design Just and Proper Procedures For A**
17 **Director's Inspection In Order To Guard Against The Improper**
18 **Disclosure Of Confidential, Private, and/or Privileged Information.**

19 A director's right of inspection pursuant to Corporations Code section 6334 must be
20 balanced against the corporation's rights to protect privacy, confidentiality, and privilege interests.
21 See *Chantiles*, 37 Cal. App. 4th at 925. Courts have upheld the placement of conditions on a
22 director's right to inspect records where unfettered access and use by the director would result in a
23 tort against the corporation (*Havlicek*, 39 Cal. App. 4th at 1855) or impinge competing privacy
24

25 ³ Cases interpreting the for-profit General Corporations Code and Nonprofit Mutual Benefit
26 Corporations Code analogs to sections 6334 and 6336(a) of the Nonprofit Public Benefit
27 Corporations Code are instructive; the relevant language of the for-profit statutes (sections 1602
28 and 1603(a)) and the Nonprofit Mutual Benefit statutes (sections 8334 and 8336(a)) are materially
identical to the Nonprofit Public Benefit statutes (sections 6334 and 6336(a)) at issue here. See
Havlicek, 39 Cal. App. 4th at 1855 n.5 (analogizing section 1602 to section 8334).

1 interests. *See Chantiles*, 37 Cal. App. 4th at 926. Conditions on the right to inspect and use have
2 also been applied where the director seeking access was engaged in litigation against the
3 corporation. *National Football League Properties, Inc. v. Superior Court of Santa Clara County*,
4 65 Cal. App. 4th 100, 109-110 (1998).

5 In *Havlicek*, two directors requested to inspect the corporation's records shortly after they
6 were constructively terminated as officers and employees of the corporation and shortly before
7 the closing of a merger that they opposed. *See Havlicek*, 39 Cal. App. 4th at 1849-50. The
8 corporation allowed the directors access to some but not all of the requested records because the
9 corporation was concerned that the directors would use the records to establish a competing
10 business. *Id.* The court found that while the absolute right to inspect documents under section
11 1602 is the general rule in California, that right must be read in conjunction with the expansive
12 language of section 1603(a), which permits just and proper conditions on a director's inspection.
13 *Id.* at 1855-56. The court held that the relevant evidence must be examined and, if necessary to
14 prevent a tort against the corporation, just and proper conditions should be placed on the directors'
15 inspection. *Id.* at 1856.

16 In *Chantiles*, a director of a homeowners' association filed a petition for writ of mandamus
17 to obtain access to proxy ballots cast by the association's members. *See* 37 Cal. App. 4th at 918.
18 The court balanced the director's "absolute" right to inspect and copy all corporate records with
19 the association's right to protect its voters' privacy. *See id.* at 922. The court held that the
20 absolute right to inspect under section 8334 does not mean that "this right need not yield to any
21 other right." *Id.* at 925. Quoting from section 8.53 of "Advising California Nonprofit
22 Corporations," the Court noted that "[a] director's right of inspection may be subordinate to other
23 statutes specifically protecting confidential, private, or privileged records against inspection,
24 although there is no such express provision." *Id.* at 925. The association had proposed that the
25 director review the protected records with the association's counsel present, but the director never
26 did. *Id.* at 919. The trial court had also ordered that the director's attorney could review the
27 ballots, so long as he agreed not to disclose the voters' names or how they voted without a further
28 court order. *Id.* at 926. The director refused these conditions and appealed instead. The

1 reviewing court, after determining that the trial court had provided a "reasonable resolution,"
2 found that the director had passed up his opportunity to review the records and affirmed the lower
3 court's judgment. *Id.*

4 *Havlicek* and *Chantiles* demonstrate that, where a corporation's need to prevent
5 disclosures of confidential and/or privileged information is involved, a director's right of
6 inspection is properly balanced with protection of those interests. The corporation is entitled to,
7 while respecting the right of access and use, take reasonable steps to ensure that its confidences
8 are maintained. Auerbach does not deny that the ICANN records he seeks may be confidential
9 and/or privileged: In an e-mail to Touton on September 3, 2001, Auerbach stated "[t]hat some of
10 this, perhaps even all of this, is confidential is understood by me." [Touton Decl., Ex. 13.]
11 Nonetheless Auerbach contends that, contrary to *Havlicek* and *Chantiles*, there is no circumstance
12 under which it would be proper for ICANN to place reasonable conditions on Auerbach's access
13 to and use of the corporation's records. Auerbach's view of the law is that he should be able to
14 inspect and take copies of the corporation's confidential records, and that the corporation must
15 depend solely on his good faith and his personal perception of his legal obligation to ensure that
16 he treats those documents properly. In his October 15, 2001 letter Auerbach insisted: "what
17 material is confidential, and confidential from whom, and how [Auerbach] may use such
18 materials, is not in [ICANN's] discretion; it is subject to my own discretion" [Lynn Decl.,
19 Ex. 11 (Oct. 15 2001 letter).] This is not the law.

20 **B. ICANN's Procedures Are Just and Proper Because They Are**
21 **Narrowly Tailored To Further ICANN's Legitimate Interest in**
22 **Preventing the Improper Disclosure By A Director of Private,**
23 **Confidential and Privileged Information.**

24 California's courts have upheld efforts to balance the rights of inspection and legitimate
25 competing interests through procedural conditions that are narrowly designed to address the
26 competing interests without unduly hampering the inspection. *See Chantiles*, 37 Cal. App. 4th at
27 918 (privacy interest was protected by procedures that permitted director's attorney to conduct the
28 inspection; attorney could take notes (not including names) and was barred from disclosing voters

1 names or how they voted); *see also Bruce v. Gregory*, 65 Cal. 2d 666, 671 (1967) (in an
2 analogous context, state Supreme Court found custodian of tax records could, to protect
3 legitimate interests, impose narrowly formulated rules on public's otherwise unqualified statutory
4 right to inspect certain tax records). Where private, confidential, or privileged records are
5 concerned, the procedures may address the manner and extent of inspection, as well as the time
6 and place of inspection. *Chantiles*, 37 Cal. App. 4th at 925. ICANN's Inspection Procedures, and
7 the arrangements proposed for Auerbach's inspection and use of ICANN's records pursuant to
8 those Inspection Procedures, are narrowly tailored to protect ICANN's legitimate interest in
9 preventing improper disclosure of confidential and/or privileged information by a director of the
10 corporation.

11 ICANN's Inspection Procedures, attached as Exhibit 2 to the Petition, provide all directors
12 with general guidelines for inspection, including reasonable instructions regarding the manner for
13 making the request (in writing) and general terms regarding the time and place for inspections.
14 The Inspection Procedures provide that if the CEO determines that a director's request necessarily
15 involves issues of confidentiality, privilege, or privacy of a nature that require arrangements
16 concerning the director's access or use of the requested records, the CEO will advise the director,
17 in writing, of the proposed manner for review of those records. If the director accepts the
18 proposed arrangements by countersigning the CEO's statement concerning the arrangements, the
19 records are made available to the director as soon as possible at a time and place of mutual
20 convenience. [Lynn Decl., Ex. 2 (Inspection Procedures).]

21 ICANN employed these Inspection Procedures to respond to the records inspections
22 requests made by Directors Auerbach and Davidson. ICANN's CEO reviewed both of these
23 requests and determined that they necessarily involved issues of privacy, confidentiality, and
24 privilege. In both cases, the CEO then provided to the director, in a letter, details regarding the
25 time and place that the records would be made available. The letters stated that the director was
26 required to be present at the inspection and provided that the director could be accompanied by
27 counsel or another advisor, so long as information regarding that person's identity and proposed
28 function during the request was provided to ICANN in advance. The letters identified the

1 specific documents that would be made available and the form in which they would be made
2 available. The directors were also advised that if copies were desired, a request for copies could
3 be made at the conclusion of the inspection and that the CEO would, in conjunction with
4 ICANN's General Counsel, promptly consider whether the request for copies implicated
5 confidentiality or privilege concerns. The letters specifically stated that much of the material the
6 two directors requested to review contained non-public and confidential information and
7 reminded the directors of their duties to maintain the confidences of the corporation. If a director
8 had a question regarding the extent of confidentiality of any item during the inspection, the
9 director could seek a relaxation of the confidentiality. The letters requested that the directors
10 countersign them in acknowledgement of their duties as directors to preserve confidentiality.
11 [Lynn Decl., Ex. 10 (Oct. 5, 2001 letter); Touton Decl., Ex. 16 (January 31, 2002 letter).]

12 As stated in the CEO's letters, the procedures outlined in the letters were the *only*
13 procedures that ICANN proposed for their inspections of ICANN's documents. [Id.] These
14 procedures do not in any way restrict the *scope* of a director's review. Rather, they are
15 specifically designed to guard against the inappropriate disclosure or dissemination of sensitive
16 information. Any intrusion on the director's right to inspect or use the corporate records under
17 ICANN's Inspection Procedures, and the arrangements that have been proposed by the CEO
18 under those Inspection Procedures, is, thus, extremely minimal.⁴

19 ICANN's Inspection Procedures represent a "just and proper" balance between the
20 directors' interest in inspecting records and the legitimate interests of the corporation in:
21 (1) ensuring that requests are addressed in a reasonable fashion without undue burden on
22 management, and (2) protecting against inappropriate disclosure of private, confidential, and
23 privileged information. Since ICANN's Inspection Procedures are specifically designed to further
24 these interests, the procedures are valid under California law. Because they are valid, Auerbach's

25 _____
26 ⁴ Indeed, these conditions are far less restrictive than those upheld in *Chantiles*. See 37 Cal.
27 App. 4th 914, 920. As noted, in *Chantiles*, the trial court appointed the petitioner's attorney to
28 review the requested documents. *Id.* at 920. And, although the court allowed petitioner's attorney
to take notes, the attorney was completely barred from disclosing any protected information
without a further court order. See *id.*

1 refusal to comply with these procedures is fatal to his claims.

2 **C. ICANN's Procedures Are Just And Proper As To All Directors And**
3 **Particularly As To Auerbach.**

4 In fashioning "just and proper" conditions for a director's inspection of private,
5 confidential, or privileged material, courts are required to examine the circumstances surrounding
6 the particular director and his request. *See Havlicek*, 39 Cal. App. 4th at 1856 (court must
7 consider the potential for the inspection to result in a tort against the corporation); *Chantiles*, 37
8 Cal. App. 4th at 926 (noting that the director's refusal of the reasonable resolution proposed
9 "strongly suggests his motive was not simply to check the [vote count], but to find out how his
10 neighbors actually voted.") An examination of the circumstances surrounding Auerbach and his
11 request demonstrates that ICANN's Inspection Procedures are particularly appropriate here given
12 Auerbach's conduct and the confidential and privileged nature of the requested material.⁵

13 **1. Auerbach's Campaign Platform for Selection to ICANN's**
14 **Board Was to Damage ICANN by Becoming Part of That Which He**
15 **Loathes.**

16 ICANN engaged in its first-ever experimental on-line voting process for the selection of
17 members of its Board of Directors from October 1-10, 2000. Auerbach, among others,
18 campaigned for a seat on ICANN's Board. As part of Auerbach's campaign, Auerbach agreed to
19 be interviewed and created a "Campaign Platform" section on his personal website,
20 www.cavebear.com. [Touton Decl., Ex. 1 (Platform).]

21 Auerbach's platform was not predicated on furthering the success of ICANN. In fact,
22 Auerbach specifically stated in an interview that *what he was afraid of* was ICANN succeeding.
23 [Touton Decl., Ex. 3 (cyber.law article).] Auerbach campaigned on a platform of stalling that
24 success by supporting proposals that would make it more difficult for ICANN to be effective.
25 Auerbach made no secret of the fact that his ultimate objective was to see ICANN dismantled.
26 Among the comments Auerbach made on his website during his campaign were that "the larger

27 ⁵ Auerbach's request seeks access to and copies of documentation concerning ICANN's
28 General Ledger, funds, financial obligations, and ICANN's relationship with its lawyers.

1 part of my platform is the reformation of ICANN and its procedures" and that "ICANN was in
2 need of reformation before it was even created." [Lynn Decl., Ex. 1 (Platform).]

3 Interviews with Auerbach from the year he was selected to ICANN's Board demonstrate
4 that Auerbach's agenda of "deep, substantial, and fundamental reform" was aimed not at engaging
5 other Board members in meaningful, constructive reform efforts, but was instead aimed at taking
6 matters into his own hands to pursue a complete dismantling of the corporation. [Touton Decl.,
7 Ex. 2 (ICANN at Large Nomination Application).] In an interview with Auerbach published just
8 after Auerbach was selected in October 2000 Auerbach stated:

9 ICANN is governance with a vengeance. The worst form of
10 governance. Arbitrary, capricious, imposed without any input from
11 those who have to pay the taxes and suffer its regulations. It is an
12 oligarchy. It is a business-run oligarchy. It is a secret society. Do I
13 support ICANN? I support the concept. Do I support ICANN as it
14 is? No, I think it should be dismembered, right down to the ground.

15

16 I'm now just downright angry that [ICANN] continues to exist.
17 [Touton Decl., Ex. 3 (cyber.law article).] And another interview elaborated on Auerbach's
18 "dismemberment" plans:

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

26 When asked how he would like to see ICANN changed, Auerbach responded:

27 We're talking about a California remodeling job, where you knock
28 down the whole house but for one wall and build a new house
around it, then tear down the remaining wall. Essentially that's
what ICANN needs. It needs a fundamental, ground-up
restructuring. I'm talking about a restructuring to the point where
the supporting organizations -- such as its law firm -- need to be
redefined, if not eliminated; where the board members come
exclusively from the at-large membership votes; where everything
that ICANN has done so far is subject to a very short sunset
provision and has to be reenacted lest it expire. I'm talking about a
major overhaul.

[Touton Decl., Ex. 4 (Oct. 16, 2000 Salon.com article).]

1 Auerbach even articulated his goal of using the corporation's records not to help the
2 corporation, but to hurt it:

3 Mike Roberts had better know that when I come in there, I am
4 going to exercise every power given to a director under California
5 law to review every single document that ICANN has and every
6 process. California law gives directors very strong authority to
7 direct a corporation. In fact they're obligated to direct the
8 corporation, and I suspect that we will find things that could very
9 well trigger things like the IRS intermediate sanctions for 501(c)'s.
10 That's a big hammer against a corporation and its board members.

11 [Touton Decl., Ex. 3 (cyber.law article).]

12 Thus, Auerbach has made it clear that his vision of his fiduciary duty to ICANN is very
13 different from that of its other directors. Because of that, ICANN has ample reason to be
14 concerned about the risk that Auerbach would not maintain his duty of loyalty to the corporation
15 and keep the corporation's confidences. Indeed, under these circumstances it might well be a
16 breach of fiduciary duty by ICANN's other directors if they allowed Auerbach unfettered access
17 to ICANN's records, since they have been placed on notice that Auerbach's goal is to dismantle,
18 not protect, the corporation.

19 **2. Auerbach's Dissent is not the Constructive Dissent that Well-**
20 **Functioning Boards Should Encourage.**

21 Auerbach has been a (and frequently the sole) Board dissenter since becoming a director
22 in November 2000. [See Lynn Decl., at ¶ 33; Touton Decl., Ex. 5 (Vote Tally).] Independent
23 thinking can, of course, be extremely valuable to the overall functioning of a Board and the
24 corporation when it is geared toward actually improving the functioning of the corporation. But
25 when a director's primary goal, as it appears to be with Auerbach, is merely to disrupt the normal
26 operations of the corporation, there is good reason to believe the best interests of the corporation
27 are not that director's foremost concern. Indeed, Auerbach has characterized himself as a
28 "radical" and a "troublemaker" who admits, "Oh boy. I don't like consensus. . . ." [Touton Decl.,
Ex. 3 (cyber.law article).] For an entity that was established as a consensus policy development
entity, this is not a comfortable fit.

Auerbach seems more interested in generating publicity than in working with his

1 colleagues on the Board to resolve the very complex issues facing this unique institution.
2 Generating global consensus is not easy, and ICANN's mission – as a private sector, non-
3 governmental body charged with coordination of the Domain Name System, an important
4 element of the Internet – is an extremely difficult one. ICANN's limited resources need to be
5 devoted to that effort, and not to responding to initiatives (such as this lawsuit) brought by a
6 director whose interest is in impeding ICANN's accomplishment of its mission, not helping.
7 Auerbach was offered the opportunity to inspect the corporation's records on no less than three
8 occasions during the month of October 2001 alone. The fact that Auerbach has been offered the
9 opportunity to inspect the corporate records on multiple occasions (in fact, the invitation is still
10 open), and has chosen instead to initiate this litigation, is a prime example of Auerbach's mis-
11 perception of his fiduciary responsibility.

12 Auerbach has repeatedly opted not to pursue his request in a manner truly consistent with
13 his fiduciary responsibility to ICANN. When, for example, in November 2001, the Audit
14 Committee communicated its determination that it agreed with Lynn's arrangements, Auerbach
15 chose not to appeal that decision to his colleagues on the Board, but instead to publish
16 unproductive e-mails on the Internet. As one Internet user put it:

17 Karl could use the standard procedure of bringing the matter to the
18 full ICANN Board Karl is not the first director of a non-profit
19 corporation to have a conflict with the corporation's staff. Such
20 matters are not usually resolved by resorting to public outcry.
21 There are more typical and productive paths. But no, rather than
22 pursue the matter along such a path, he insists on playing in a
23 public sandbox, where he can have fun without doing anything
24 productive.

25 [Lynn Decl., Ex. 19 (Crocker comment).] Indeed, as Paul Alan Levy from the Public Citizen
26 Litigation Group commented on an Internet list:

27 I must say, if Auerbach is insisting he has the right to go public
28 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. On the other hand, if there
were other restrictions, his best bet would be to call their bluff,
agree not to disclose TO THE PUBLIC (as opposed to other board
members) without their consent, subject of course to this right to go
to court over a particular piece of info, and then see if they still
deny him access.

1 [Touton Decl., Ex. 15 (Levy comment).]

2 Auerbach's stance as the "dissenter-for-the-sake-of dissenting" shows the risks that
3 ICANN would encounter in relying on Auerbach's personal perceptions of the scope and extent of
4 his fiduciary responsibility and of which ICANN corporate materials should be kept confidential.

5 **3. Auerbach Filed This Lawsuit Immediately after ICANN's**
6 **Board Voted Not to Establish On-Line Selections for Directors.**

7 The timing of Auerbach's lawsuit also suggests Auerbach's goal for the records inspection
8 is not to further his fiduciary duties to the corporation, but to view and copy those records before
9 his term on the Board expires so that he can use them for other purposes after his term has ended.
10 ICANN's last communication with Auerbach on the inspection issue was on November 17, 2001.
11 Several months passed during which Auerbach did not raise the issue with the Board, the Audit
12 Committee, or Lynn before filing this suit.

13 The events that transpired at the March 14, 2002 Board meeting appear to have sent
14 Auerbach into a panic about the issue. Auerbach apparently perceived (incorrectly) that the
15 Board's decision meant that "his" Board seat had been eliminated. The day after the Board vote,
16 on a Friday, Auerbach signed the Verification for his Petition against ICANN. [Verification to
17 Auerbach Petition.] The following Monday, Auerbach filed the Petition and served it on ICANN.
18 The timing of Auerbach's filing is additional cause for reasonable concern that Auerbach will
19 employ an idiosyncratic interpretation of his fiduciary responsibility to justify the use of any
20 records he obtains for his personal purposes, both before and (if applicable) after his term ends.

21 **4. Auerbach Believes That He, and Not the Corporation, is the**
22 **Sole Arbiter of What Records Should Remain Confidential.**

23 Perhaps the most compelling reason ICANN has to be concerned about whether Auerbach
24 will maintain the confidentiality of its documents is that Auerbach believes that he is the sole
25 arbiter of what should remain confidential. Auerbach's belief that he, and not the corporation, can
26 decide whether records are confidential is of obvious concern, particularly in light of Auerbach's
27 repeated statements that he wants to make copies of the corporation's records and that he wants to
28 take those copies to his office. [See, e.g., Lynn Decl., Ex. 11 (Oct. 15, 2001 letter).] In

1 Auerbach's October 15, 2001 letter protesting ICANN's Inspection Procedures, Auerbach made
2 his position clear:

3 [Y]our letter imposes vague obligations of 'confidentiality' on my
4 use of whatever it is that I might see. But the decision as what
5 material is confidential, and confidential from whom, and how I
6 may use such materials, is not in your discretion; *it is subject to my
own discretion*, carefully exercised as a Director, and defined and
7 limited solely by the laws of California and the United States.

8 [Lynn Decl., Ex. 11 (emphasis added).]

9 Likewise, in his October 27, 2001 letter responding to Lynn's October 21, 2001 invitation
10 to inspect the corporate records, Auerbach reiterated that, while he might take management's view
11 of confidentiality into consideration, Auerbach's independent judgment will prevail:

12 I have expressed my willingness to receive from corporate
13 management statements that describe with precision and
14 particularity any concerns that they may have about the sensitivity
or confidentiality of any information that I may inspect or copy. I
would, of course, take those statements into consideration. But I
cannot, consistent with my duties, allow corporate management to
bind me in advance in the performance of my duties, particularly
my duty to exercise my own independent judgment.

15 [Lynn Decl., Ex. 13 (Oct. 27, 2001 letter).] Auerbach has stated that, in his own independent
16 judgment, all of ICANN's decisions, with the exception of only matters pertaining to personnel
17 and litigation, "must be made public." [Touton Decl., Ex. 1 (Platform).]

18 Auerbach's view of his "rights" and obligations as a director is contrary to basic principles
19 of California law, which provide that it is the corporation, and *not* an individual director, that has
20 the authority to determine what is confidential, from whom, and how that information may be
21 used. *Bushnell v. Vis Corp.*, 1996 WL 506914, *7 (N.D. Cal. 1996); *Chantiles*, 37 Cal. App. at
22 914. A director's fiduciary duty of loyalty is to the best interests of the corporation, not the
23 idiosyncratic view of those interests from any individual director. Indeed, a director's self-interest
24 cannot be pursued at the expense of the corporation's interests. *Professional Hockey Corp. v.*
25 *World Hockey Ass'n*, 143 Cal. App. 3d 410, 414 (1983) (where the court found there was no
26 breach of fiduciary duties because the Board had ratified the decision made by the accused
27 director). The "duty of loyalty requires directors . . . not to act in their own self-interest when the
28 interest of the corporation will be damaged thereby." *Id.* In *Bancroft-Whitney Co. v. Glen*, 64

1 Cal. 2d 327, 345 (1966), the California Supreme Court found a breach of fiduciary duties and, in
2 doing so, detailed that a corporate director has the fiduciary duty "not only affirmatively to
3 protect the interests of the corporation committed to his charge, but also to refrain from doing
4 anything that would work injury to the corporation" (Citation omitted.) *Id.* See also Cal.
5 Corp. Code section 5231; *Raven's Cove Townhomes, Inc. v. Knuppe Development Co., Inc.*, 114
6 Cal. App. 3d 783, 799 (1981) (interpreting section 820, the predecessor to section 5231, and
7 finding a breach of fiduciary duty because the directors made "decisions for the association that
8 benefit[ted] their own interests at the expense of the association and its members"). It would be
9 not only improper, but also impractical and unworkable for ICANN, which has nineteen directors,
10 to attempt to maintain the confidentiality of any given record if each individual director had
11 separate authority to determine whether that document could be disclosed.

12 The untenability of Auerbach's position was a focus of Lynn's October 31, 2001 letter to
13 Auerbach. Auerbach had proposed, in his October 27, 2001 letter, a "compromise" in which he
14 would review the corporation's confidential records, decide for himself whether the each record
15 was confidential, and provide ICANN seven days advance notice before "any disclosure." As
16 Lynn told Auerbach, the proposal would require ICANN to run into court on an *ex parte* basis
17 each time Auerbach threatened a disclosure of the corporation's confidential records:

18 Your proposal merely to give the corporation notice of a
19 prospective disclosure would require that we be prepared to go to
20 court to prevent unwarranted disclosure. Since you are not entitled
21 to make these determinations in the first place, it seems
22 inappropriate to force ICANN to vindicate its rights, rather than
23 your being obligated to seek permission for disclosures.

24 [Lynn Decl., Ex. 14 (Oct. 31, 2001 letter).]

25 ICANN has every reason to suspect that Auerbach will simply replace the corporation's
26 confidentiality determinations with his own if he is not required to acknowledge ICANN's
27 Inspection Procedures. ICANN's Inspection Procedures appropriately protect the corporation
28 against this possibility. As detailed in Lynn's October 5, 2001 letter outlining the proposed
arrangements, if Auerbach has any questions regarding the confidentiality of any item reviewed,
he should direct his inquiry to Lynn in writing and maintain the utmost confidentiality until

1 receiving a response from Lynn relaxing the confidentiality designation. ICANN's Inspection
2 Procedures are not only prudent, they are essential in order for ICANN to protect its interests.

3 **5. Auerbach's Conduct Entitles ICANN to Provide Reasonable**
4 **Arrangements for His Inspection.**

5 "Where the corporation determines that an unfettered inspection will result in a tort
6 against the corporation, it may decline the request for inspection" in its entirety. *Havlicek*, 39
7 Cal. App. 4th 1856. Taken together, Auerbach's clear lack of support for ICANN and its
8 objectives and his belief that he has the final word regarding the confidentiality and use of
9 ICANN's corporate documents entitle ICANN to, at a minimum, provide reasonable
10 arrangements for Auerbach's inspection of the requested records. Although under these
11 circumstances the law may even allow ICANN to deny Auerbach's request outright, ICANN has
12 instead invited Auerbach to look at the records so long as he complies with established
13 procedures to the extent that Lynn, in conjunction with ICANN's General Counsel (whom
14 Auerbach considers fair-minded)⁶ has determined that issues of confidentiality, privacy, and
15 privilege are involved. As the court in *Chantiles, supra*, explained, it is precisely under these
16 circumstances that the "absolute" right to inspect may be properly limited. ICANN's procedures
17 can indeed be viewed as generous where, as here, a director has given the corporation numerous
18 reasons to believe that the director is willing to breach his fiduciary duty of loyalty to the
19 corporation.

20 **III. AUERBACH'S CLAIM IS NOT RIPE BECAUSE HE HAS NOT AVAILED**
21 **HIMSELF OF THE OPPORTUNITY TO INSPECT ICANN'S**
22 **DOCUMENTS.**

23 Auerbach contends that ICANN's "procedures unlawfully interfere with the rights of a
24

25 ⁶ In his "Decision Diary," Auerbach expressed that "[Touton, ICANN's General Counsel,]
26 has done an excellent job during these meetings in presenting balanced statements of fact and
27 professional opinions." [Touton Decl., Ex. 7.] On another occasion, Auerbach wrote "I am very
28 pleased to find [Touton's] interactions with me are very professional. Although I may not always
agree with him, I have come to appreciate his imaginative and constructive attitude and his
willingness to work incredibly long hours." [Touton Decl., Ex. 6.]

1 Director of a California Nonprofit Public Benefit Corporation." [Petition at ¶ 25.] Yet, Auerbach
2 offers no examples of how these procedures have in fact "prevented [him] from performing his
3 duties as they should be performed." [Id. at ¶ 26.] Indeed, he cannot because, despite ICANN's
4 repeated invitations to inspect [Lynn Decl., Exs. 10, 12 and 14 (Oct. 5, 21 and 31, 2001 letters)],
5 Auerbach has, thus far, *unilaterally refused* to exercise his right to inspect. [Lynn Decl., at ¶ 28.]
6 Because Auerbach has voluntarily chosen to not inspect the records at issue, his Petition does not
7 concern a specific application of ICANN's proposed arrangements for access and it is "merely a
8 general challenge on statutory ... grounds" to ICANN's access policies. *See Pacific Legal*
9 *Foundation v. California Coastal Comm'n*, 33 Cal. 3d 158, 169 (1982). Absent "definite, and
10 concrete" facts and a "real and substantial controversy" his claim is not ripe for adjudication. *See*
11 *id.* (citing *Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227, 240-241 (1937)).

12 "A controversy is 'ripe' when it has reached, but has not passed, the point that the facts
13 have sufficiently congealed to permit an intelligent and useful decision to be made." *California*
14 *Water & Telephone Co. v. County of Los Angeles*, 253 Cal. App. 2d 16, 22 (1967). In this case,
15 not only are the facts not sufficiently congealed, there simply are no facts that present a justiciable
16 controversy. Auerbach has not been refused the right to inspect the records; to the contrary,
17 ICANN has repeatedly offered him the opportunity to inspect. Auerbach has refused to accept
18 the invitation to inspect, instead merely voicing his disagreement with ICANN's proposed
19 arrangements and contending that he should not have to comply with them. "As far as the parties
20 to this action are concerned, the most significant effect of [ICANN's conditions] thus far has been
21 to generate a difference of opinion as to their validity, and that is obviously not enough by itself
22 to constitute an actual controversy." *See Pacific Legal Foundation*, 33 Cal. 3d at 173.

23 Unless and until Auerbach actually inspects ICANN's documents – or is told that he
24 cannot inspect certain documents – there is no way to know whether ICANN and Auerbach will
25 ever have an actual dispute about a document's confidentiality or whether Auerbach will have
26 suffered some arguable injury.⁷ To render a decision on the Petition, this Court would be

27 ⁷ Indeed, Lynn's October 5, 2001 letter made clear that much of the material requested
28 contains non-public and confidential information. It is possible that, upon inquiry pursuant to the
proposed arrangements, ICANN would not object to the disclosure of some portion of the

1 required to conjure up a hypothetical document, speculate as to Auerbach's desire to copy that
2 document, speculate as to whether ICANN, in its discretion, will deny Auerbach the right to copy
3 that document and, speculate as to whether that denial will negatively impact Auerbach's ability
4 to perform his duties as a director. Such a "contrived inquiry" is inappropriate. *See id.* at 170. In
5 short, his Petition is nothing more than an improper request for an advisory opinion. *See id.* at
6 169 ("The ripeness requirement, a branch of the doctrine of justiciability, prevents courts from
7 issuing purely advisory opinions.").

8 The absence of a ripe controversy is reinforced by the fact that, although Auerbach has
9 expressed his disagreement with ICANN's procedures, he has failed to exhaust the available
10 remedies set forth in those procedures.⁸ Auerbach has not appealed the Audit Committee's
11 determination that the proposed arrangements are appropriate (which was communicated to him
12 within two days of that determination) to the full Board, and thus, Auerbach has never been
13 denied redress by ICANN's Board itself. No doubt the principal reason that Auerbach has never
14 pursued his remedies is that he cannot explain why the procedures are inappropriate or would
15 inhibit his conduct in any respect. Auerbach's failure to exhaust his available remedies likewise
16 renders his petition not ripe.

17 The appropriate remedy here is for the Court to deny Auerbach's Petition as premature, at
18 which point Auerbach should conduct his inspection pursuant to the procedures that ICANN has
19 established. If he then determines that those procedures inhibit his ability to act in accordance
20

21 (continued...)

22 requested records (*e.g.*, through redaction) but, because Auerbach has failed to conduct his
23 inspection, no such inquiries or responses have occurred to date.

24 ⁸ Section 6 of the Inspection Procedures provides that if a director disagrees with the
25 resolution of an issue by the Audit Committee (in this case, the Audit Committee's determination
26 that the arrangements are reasonable safeguards for the confidentiality of ICANN information),
27 the director may appeal this decision by notice to the Chairman of the Board of the Corporation
28 and the entire Board (other than the requesting director) shall make a final, binding decision.
[Lynn Decl., Ex. 2 (Inspection Procedures)]. Auerbach has never requested full Board review of
the Audit Committee's determination regarding the arrangements for his review of the
corporation's records. [Cerf Decl., at ¶ 2].

1 with his perception of his fiduciary duties as a director, Auerbach can then seek redress from
2 ICANN's Board of Directors as set forth in Section 6 of ICANN's Inspection Procedures. If he
3 still is not satisfied with the proposed resolution of his concerns, he can *then* file a lawsuit. Only
4 then will the facts be sufficiently congealed and the issues sufficiently concrete. *See California*
5 *Water & Telephone*, 253 Cal. App. 2d at 22. Only then will the Court be able to determine if
6 ICANN has prevented Auerbach from fulfilling his duties as a director.

7 **IV. ALTERNATIVELY, AUERBACH'S CLAIM IS MOOT BECAUSE ICANN**
8 **IS AND ALWAYS HAS BEEN WILLING TO ALLOW AUERBACH**
9 **ACCESS TO ICANN'S CORPORATE RECORDS, AND ICANN'S**
10 **PROCEDURES ARE APPROPRIATE AS A MATTER OF LAW.**

11 Alternatively, Auerbach's Petition is properly denied as moot because ICANN is and
12 always has been willing to perform its obligations under California Corporations Code section
13 6334 without the coercion of a writ. *See Bruce v. Gregory*, 65 Cal. 2d 666, 671 (1967) ("[The]
14 remedy of mandamus will not be employed where the respondents show that they are willing to
15 perform the duty without the coercion of the writ") (alteration in original). Where the defendant
16 "shows a willingness to perform without coercion, the writ may be denied as unnecessary; and if
17 he shows actual compliance, the proceeding will be dismissed as moot." *Cooke v. Superior Court*,
18 213 Cal. App. 3d 401, 417 (1989) (denying petition for writ of mandate because respondent
19 adopted resolution that showed "a good faith willingness to perform sufficient to make our
20 issuance of a writ inappropriate"); *see also Braude v. City of Los Angeles*, 226 Cal. App. 3d 83,
21 87 (1990) (stating "a writ will not issue to enforce a technical, abstract, or moot right").

22 Because ICANN has not refused Auerbach the opportunity to inspect or use the corporate
23 records but has provided reasonable conditions for the inspection in order to protect its legitimate
24 interests, Auerbach's Petition is analogous to that considered and denied by the California
25 Supreme Court in *Bruce v. Gregory*, 65 Cal. 2d 666 (1967). Bruce, a citizen and taxpayer,
26 petitioned for a writ of mandate to enforce his unqualified statutory right to inspect certain tax
27 documents. *See id.* at 673. Although not explicitly authorized to do so by statute, the custodian
28 of the tax records established rules governing the time and place for the public's inspection of the

1 records in order to avoid chaos in his office. *See id.* at 677. The trial court denied the Petition
2 after ordering the custodian to amend his rules to somewhat broaden the available times for
3 inspection. *See id.* at 669-70. The writ was denied because, after the rules were amended, it
4 would have served no purpose; the Petition was therefore moot. *Id.* at 670-71.

5 On appeal, the Supreme Court commended the trial court's actions. *Id.* at 670-71. It
6 specifically found that the tax collector's amended rules were "reasonably necessary to assure the
7 orderly operation of his office" and affirmed the lower court's decision. *See id.* at 678. It also
8 rejected Bruce's argument that the custodian's rules should not have been formulated until the
9 evidence showed an actual interference with the custodian's office. *Id.* at 676. The Supreme
10 Court found that rules that will prevent impingement on legitimate interests "in the future and
11 still, in the meanwhile, not unnecessarily hamper [a records inspection] are permissible." *Id.*

12 As with the amended rules in *Bruce v. Gregory*, the procedures ICANN already has in
13 place are designed to and do protect legitimate interests without unnecessarily hampering
14 statutory rights of inspection. Without the necessity of a writ, ICANN has done all that California
15 law requires of it in connection with Auerbach's request to inspect ICANN's records.
16 Accordingly, Auerbach's request for access to ICANN's corporate records should be denied as
17 moot.

18 CONCLUSION

19 For all of the foregoing reasons, ICANN respectfully requests that the Court grant
20 ICANN's Motion for Summary Judgment.

21 Dated: May 17, 2002

Respectfully submitted,

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27 INTERNET CORPORATION FOR
28 ASSIGNED NAMES AND NUMBERS