Defendant Internet Corporation for Assigned Names and Numbers ("ICANN") hereby submits its Separate Statement of Undisputed Material Facts in support of its motion for summary judgment dismissing Auerbach's Petition for Writ of Mandate.
Supporting Statement: ICANN's Inspection Procedures Are Reasonable.

Undisputed Material Facts:

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

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

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

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

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

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

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

   Lynn decl., 2:15-21; Inspection Procedures, Ex. 2 to Lynn decl.
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 rights to inspect, as
reflected in California law and Article V,
Section 21 of the Corporation's bylaws . . . ."

5. ICANN's Inspection Procedures outline basic arrangements to be made for any director request for inspection, including that requests for inspection shall be made in writing and that the records be made available during normal business hours on a date convenient to the inspecting director.

6. Section 5 of ICANN's Inspection Procedures provides that "[t]o the extent the Chief Executive Officer, in consultation with the General Counsel of the Corporation, determines that compliance with any request for records necessarily involves issues of confidentiality, privilege, or privacy of a nature which require limitation of or conditions on the Director's access or use of the requested
records, the Chief Executive Officer shall
advise the requesting Director of the issues
which require the restrictions and the nature of
any proposed restrictions on access or use."

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

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

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

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

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

12. Auerbach's request for records was the first request by a member of ICANN's Board of Directors to inspect corporate records raising significant issues of confidentiality and ICANN had not yet developed its Inspection Procedures.
13. On September 3, 2001, Auerbach sent Touton an e-mail in reference to his inspection request that stated, "[t]hat some of this, perhaps even all of this, is confidential is understood by me. In fact I embrace the thought that there is a clear statement of what such concerns may be so that mistakes may be avoided."

14. On September 23, 2001 Auerbach expanded his written request for access to ICANN's corporate records to include documentation concerning ICANN's funds, financial obligations, and ICANN's relationships with its lawyers.

15. Lynn determined that Auerbach's September 23, 2001 request for access to corporate records necessarily involved issues of confidentiality, privilege, or privacy.

16. Lynn advised Auerbach, by letter dated October 5, 2001, of the proposed arrangements for Auerbach's access or use of the corporation's records.

17. The proposed arrangements for Auerbach's inspection of the corporate records were substantively similar to the arrangements proposed for Director Phil Davidson's subsequent request for inspection of the
corporate records.

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


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

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

22. The letters to the directors also provided Arrangements, Ex. 16 to Touton decl.;
that if, during the Inspection, the director has any questions regarding the extent of confidentiality of any item, the director should direct the inquiry in writing to Lynn and maintain the utmost confidentiality until receiving a response from Lynn relaxing the confidentiality.

23. The letters requested that the directors countersign the proposed arrangements in acknowledgement of their duties as directors to preserve confidentiality.

24. Section 5 of ICANN's procedures provides that if the director countersigns the statement concerning the arrangements, the records shall be made available to the director or the inspection scheduled as soon as possible.

25. Lynn's October 5, 2001 letter to Auerbach provided space for Auerbach to countersign it.


27. Davidson, on the other hand, promptly acknowledged the proposed inspection arrangements by countersigning the letter and proceeded to conduct his review of the requested records at ICANN's corporate headquarters in Marina del Rey, California.

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

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

31. In an October 27, 2001 letter to Lynn, Auerbach stated objections to the proposed arrangements. Lynn decl., 5:11-14; letter, Ex. 13 to Lynn decl.

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

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

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

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

36. After determining that one category of documents in Auerbach's September 23, 2001 request relating to an international travel log for certain ICANN officers did not involve matters that the corporation would wish to claim as confidential, Lynn e-mailed Auerbach the log on November 10, 2001. Lynn decl., 5:25-6:2; e-mail, Ex. 15 to Lynn decl.

37. On November 15, 2001, the Audit Committee considered Lynn's referral of Auerbach's request for inspection of the corporate records. Minutes, Ex. 14 to Touton decl.
38. On November 17, 2001, the Audit Committee informed Auerbach, via an e-mail from Phil Davidson, then Chair of the Committee, that, on November 15, 2001, the Audit Committee had considered the referral of Auerbach’s request for inspection of the corporate records and the lack of agreement on the arrangements for access or use.

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

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

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

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

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

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

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

42. Section 6 of the Inspection Procedures provides that “[i]f the Director disagrees with the resolution of the issue by the Audit Committee, the Director may appeal this decision by notice to the Chairman of the...”

Inspection Procedures, Ex. 2 to Lynn decl.
Board of the Corporation, and the entire Board (other than the requesting Director) shall make a final and binding decision concerning the production of the records involved or the timing of any inspection of the Corporation's properties."

43. Auerbach has not requested full Board review of the Audit Committee's determination regarding the proposed arrangements for his inspection.

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

**Undisputed Material Facts:**

44. In an e-mail to Touton dated September 3, 2001, Auerbach stated: "That some of this, perhaps even all of this, is confidential is understood by me."

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

**Supporting Evidence:**

E-mail, Ex. 13 to Touton decl.

Article, Ex 3 to Touton decl.
sanctions for 501(c)'s. That's a big hammer
against a corporation and its board members."

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

**Undisputed Material Facts:**

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

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

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

49. In an interview the year he was selected
for ICANN's Board, Auerbach stated: "ICANN
is governance with a vengeance. The worst
form of governance. Arbitrary, capricious,
imposed without any input from those who
have to pay the taxes and suffer its regulations.
It is an oligarchy. It is a business-run
oligarchy. It is a secret society. Do I support ICANN? I support the concept. Do I support ICANN as it is? No, I think it should be dismembered, right down to the ground."

50. Auerbach's At-Large Nomination Application states that Auerbach desired "deep, substantial, and fundamental reform" of ICANN.

51. An October 16, 2000 interview with Auerbach begins: "For the past two years, Karl Auerbach has made a hobby of criticizing ICANN, the Internet Corporation for Assigned Names and Numbers. He has called the Net's controlling authority over domain names everything from inept to 'an organ of the trademark lobby.' But on Tuesday the 50 year-old 'wild-eyed radical', as he often calls himself, became part of that which he loathes: one of five new members of ICANN's board of directors."

52. When asked how he would like to see ICANN changed, Auerbach responded: "We're talking about a California remodeling job, where you knock 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 . . . I'm now just downright angry
that it continues to exist."

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

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

55. Auerbach stated: "Well . . . my family
has a history of radicalism. Being arrested for various protests is a mark of honor in my family. Unfortunately, I do not have this mark of honor. I have never been arrested for a protest. I've been beaten up by the police. So, the long history of being troublemakers, and asking questions, questioning authorities, has been ingrained from day one."

56. Auerbach stated "Oh boy. I don't like consensus . . . because you can't define it. When you are getting to hard decisions, I think people have to stand up and be counted because the consensus-taker - the person who is counting or measuring consensus - can become a tyrant."

57. Auerbach is one of five ICANN Directors who was selected for the ICANN Board of Directors through an experimental process involving an on-line vote of Internet users in October 2000.

58. Auerbach was chosen for ICANN's Board after receiving only 1,738 votes from all of the United States and Canada.

59. Auerbach's initial written request for access to ICANN's corporate records was made on December 3, 2000.

60. Auerbach stated that he intends to
"make copies and to take them to my offices for examination."

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

Levy note, Ex. 15 to Touton decl.

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

Comment, Ex. 19 to Lynn decl.

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

Petition, ¶ 21.

64. Auerbach responded to a November 17, E-mail, Ex. 17 to Lynn decl.
2001 e-mail letter from the Phil Davidson of ICANN's Audit Committee regarding Auerbach's request for access to ICANN's corporate records on November 17, 2001.

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

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

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

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

69. Of the five Board members who had been previously selected through the on-line voting process, three voted in favor of the
resolution to defer any action to extending At
Large director terms and one other abstained.

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

71. On March 14, 2002, this comment on Posting, Ex. 17 to Touton decl.
the Internet was posted in Auerbach's name:
"My board seat, and those of the other four
elected board members will simply vaporize
this fall, with no replacements, no elections . . .
no nothing. ICANN will be reduced a body run
by those who have today proclaimed
themselves to be our self-designated 'betters',
who know better than we do what is best for
you and me."

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

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

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

**Undisputed Material Facts:**

74. In Auerbach's October 15, 2001 letter to Letter, Ex. 11 to Lynn decl.
Lynn he states "[t]he decision as what material
is confidential, and from whom, and how I may
use such materials, is not in your discretion; it
is subject to my own discretion, carefully
exercised as Director, and defined and limited solely by the laws of California and the United States. I am of course, very happy to review and will seriously consider a statement from corporate management that describes, with particularity, your concerns for confidentiality in a particular body of information."

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

76. In his October 27, 2001 letter, Auerbach proposed to provide seven days advance notice to the corporation before "any disclosure of data that I learn solely from the corporate materials I have inspected to parties beyond my inner circle of advisors."
77. In Lynn's October 31, 2001 response to Auerbach's proposal to provide seven days advance notice to the corporation before any such disclosure, Lynn told Auerbach "[y]our proposal merely to give the corporation notice of a prospective disclosure would require that we be prepared to go to court to prevent unwarranted disclosure. Since you are not entitled to make these determinations in the first place, it seems inappropriate to force ICANN to vindicate its rights, rather than your being obligated to seek permission for disclosures."

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

Undisputed Material Facts: Supporting Evidence:

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

79. Section 1 of ICANN's Inspection Procedures provides that "[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 rights to inspect, as
reflected in California law and Article V,
Section 21 of the Corporation's bylaws . . . ."

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

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

82. Auerbach alleges ICANN's procedures unlawfully interfere with the rights of a Director of a California Nonprofit Public Benefit Corporation.

83. Auerbach has not shown how the procedures have in fact prevented him from performing his duties as a director.

84. ICANN has repeatedly invited Auerbach to inspect the corporate records according to the Inspection Procedures.

85. In an October 21, 2001 letter, Lynn informed Auerbach that based on the objections to the proposed arrangements stated in Auerbach's October 15, 2001 letter and pursuant to Section 6 of the Inspection Procedures, Lynn was referring Auerbach's letter to the Audit Committee for its consideration.

86. In the October 21, 2001 letter, Lynn reiterated his invitation to Auerbach to come to ICANN to inspect the records according to the proposed arrangements.

87. In an October 27, 2001 letter to Lynn, Auerbach stated objections to the proposed arrangements.
88. In his October 27, 2001 letter, Auerbach proposed to provide seven days advance notice to the corporation before "any disclosure of data that I learn solely from the corporate materials I have inspected to parties beyond my inner circle of advisors."

89. In Lynn's October 31, 2001 response to Auerbach's proposal to provide seven days advance notice to the corporation before any such disclosure, Lynn told Auerbach "[y]our proposal merely to give the corporation notice of a prospective disclosure would require that we be prepared to go to court to prevent unwarranted disclosure. Since you are not entitled to make these determinations in the first place, it seems inappropriate to force ICANN to vindicate its rights, rather than your being obligated to seek permission for disclosures."

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

91. Auerbach never signed an acknowledgement of the proposed arrangements and provided it to ICANN.

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

93. On November 15, 2001, the Audit Committee considered Lynn's referral of Auerbach's request for inspection of the corporate records.

94. On November 17, 2001, the Audit Committee informed Auerbach, via an e-mail from Phil Davidson, then Chair of the Committee, that, on November 15, 2001, the Audit Committee considered the referral of Auerbach's request for inspection of the corporate records and the lack of agreement on the arrangements for access or use.

95. The Audit Committee informed Auerbach that it determined that the arrangements requested by Lynn, in his October 5, 2001, letter provided reasonable safeguards for the confidentiality of ICANN information.

96. The Audit Committee urged Auerbach to reconsider his refusal to accept the proposed arrangements proposed in Lynn's October 5, 2001 letter so that he might proceed with the
97. On November 17, 2001, Auerbach e-mailed a response to the Audit Committee's November 17, 2001 e-mail letter from Davidson.

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

99. Auerbach has not requested full Board review of the Audit Committee's determination regarding the proposed arrangements for his inspection.

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

**Undisputed Material Facts:**

100. ICANN's procedures for Director access to its corporate records and properties are called "ICANN Procedures Concerning"
Director Inspection of Records and Properties" (the "Inspection Procedures").

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

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

Dated: May 17, 2002

Respectfully submitted,

JONES, DAY, REAVIS & POGUE

By: ________________________________

Jeffrey A. LeVee

Attorneys for Defendant
INTERNET CORPORATION FOR ASSIGNED NAMES AND NUMBERS