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

12
13 KARL AUERBACH, an) Case No. _____
individual,)
14)
Petitioner,)
15)
v.) VERIFIED PETITION FOR WRIT OF
16) MANDATE TO COMPEL INSPECTION
INTERNET CORPORATION) AND COPYING OF BOOKS, RECORDS
17 FOR ASSIGNED NAMES AND) AND DOCUMENTS OF CALIFORNIA
NUMBERS, a California Nonprofit) NONPROFIT PUBLIC BENEFIT
18 Public Benefit Corporation,) CORPORATION
(Cal. Code of Civil Procedure § 1085; Cal.
19 Respondent.) Corporations Code § 6334)
)
20 _____)

21
22 Every director shall have the absolute right at any reasonable time to inspect and copy
all books, records and documents of every kind and to inspect the physical properties
of the corporation of which such person is a director.
23 California Corporations Code § 6334.

24 Petitioner KARL AUERBACH, a Director of Respondent INTERNET CORPORATION
25 FOR ASSIGNED NAMES AND NUMBERS, petitions this Court for a peremptory Writ of Mandate
26 or other extraordinary Writ or Order to the Respondent, ordering and directing Respondent
27 immediately to make available to Petitioner for inspection and copying all corporate records of
28

1 Respondent which Petitioner sets forth in this Petition, or which Petitioner may request access to
2 from time to time. Petitioner alleges:

3 INTRODUCTION

4 1. Indirectly, this Petition goes to the core of how major functions of the Internet are and
5 should be governed, a matter of great public interest to the millions of Internet users. However, the
6 Court need not concern itself with arcane technical standards or with matters which no state court
7 may have jurisdiction to adjudicate. Rather, this is an age-old tale of a California corporation refusing
8 access to corporate records to a member of its Board of Directors, or seeking to impose improper
9 and unlawful conditions on the Director before allowing such access. The laws that establish the
10 rights and duties of directors of California corporations in the "brick and mortar" world do not change
11 when the corporation exists solely to deal with Internet issues. The general principle that directors
12 oversee corporate activity and undertake ultimate responsibility for that activity is invariant. The law
13 is clear: the corporation must allow its directors to make informed and intelligent decisions. A
14 corporation must allow a director the "absolute right at any reasonable time to inspect and copy all
15 books, records and documents of every kind and to inspect the physical properties of the
16 corporation." Petitioner here seeks nothing other than access to key corporate records which the
17 Respondent unlawfully has refused to provide to him.

18 THE PARTIES

19 2. Respondent INTERNET CORPORATION FOR ASSIGNED NAMES AND
20 NUMBERS (hereinafter simply "ICANN") is a nonprofit public benefit corporation organized and
21 existing under the California Nonprofit Public Benefit Corporation Law (California Corporations
22 Code §§ 5110 *et seq.*). A true and complete copy of ICANN's Articles of Incorporation, as revised
23 November 21, 1998, is attached hereto as Exhibit 1 and incorporated herein by this reference.
24 ICANN's principal place of business is at 4676 Admiralty Way, Suite 330, Marina Del Rey, California
25 90292. According to the "About ICANN" page on ICANN's web site, available at
26 <http://www.icann.org/general/abouticann.htm>, ICANN is:

1 the non-profit corporation that was formed to assume responsibility for the IP address
2 space allocation, protocol parameter assignment, domain name system management,
3 and root server system management functions previously performed under U.S.
4 Government contract by IANA and other entities.

5 3. During most of the relevant time period, including the present, ICANN has acted
6 primarily through M. STUART LYNN ("Lynn"), who became the President and CEO of ICANN,
7 and a member of ICANN's Board of Directors, in March 2001. From the inception of ICANN and
8 until Lynn assumed office, the position was held by MICHAEL M. ROBERTS ("Roberts").

9 4. Petitioner KARL AUERBACH ("Petitioner" or "Auerbach") is a resident of Santa
10 Cruz, California and is a member in good standing of the California State Bar. Auerbach is, and at
11 all times relevant to this Petition has been, a duly selected member of ICANN's Board of Directors,
12 and has acted in his capacity as a member of ICANN's Board of Directors, not in any other capacity.
13 Auerbach's term as a Director of ICANN commenced at the conclusion of ICANN's November 2000
14 annual meeting, and will continue until the conclusion of ICANN's November 2002 annual meeting.

15 THE ICANN BYLAWS

16 5. Two provisions of ICANN's corporate Bylaws, which are available on ICANN's web
17 site at <<http://www.icann.org/general/bylaws.htm>>, are relevant:¹ Article V, Section 8 states:

18 Section 8. DUTIES OF DIRECTORS

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

23 And Article V, Section 21 states:

24 Section 21. RIGHTS OF INSPECTION

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

¹The Bylaws were amended on February 12, 2002, but those amendments did not change
or affect the two provisions cited in the text. Compare the text cited above to the same sections
of the July 16, 2000 amended Bylaws (the ones in effect when Auerbach became a Director),
archived at <<http://www.icann.org/general/archive-bylaws/bylaws-16jul00.htm>>.

1 **THE FACTS**

2 6. Shortly after Auerbach became a Director of ICANN in November 2000, Auerbach
3 made an oral request of Roberts, then the President of ICANN, to inspect and copy certain corporate
4 records of ICANN. Receiving no response, on December 3, 2000, Auerbach e-mailed a letter to
5 Roberts, in which he requested a copy of ICANN's General Ledger from November 1998 through
6 the date of the letter. Auerbach also requested that, in the future, he get a copy of the General
7 Ledger report every month. As was and is typical for ICANN corporate matters, communications
8 were made by e-mail, either by plain text e-mail messages, or, as in this instance and some others, by
9 attaching to an e-mail an electronic file, such as a letter. On December 6, 2000, in an e-mail to
10 Auerbach and others, Roberts acknowledged receipt of Auerbach's letter, stating:

11 Thanks for your reminder note about access to financial records. Because we haven't
12 had this type of Director access request before, and because there are legal interests
13 involved, both the corporation's and yours as a serving Director, we need to establish
14 a written procedure and related agreement. As you note, there are other things on
15 our plate at the moment, but Louis [Touton, ICANN's General Counsel] will be in
16 touch sometime in the next couple of weeks. Since financial records are involved, I've
17 also discussed your verbal request to me at the annual meeting with Linda Wilson,
18 Chair of the Audit Committee, which has oversight responsibility for financial matters,
19 and will include her in future correspondence on your request.

20 7. Between December 2000 and early March, 2001, Auerbach heard nothing about his
21 request, the establishment of any sort of procedures, or any agreement from Roberts or anyone else
22 speaking on behalf of ICANN. However, in early March, 2001 Roberts sent an e-mail about
23 ICANN's finances to an e-mail list used by ICANN Board Members and others. That e-mail raised
24 a question in Auerbach's mind, as a result of which, on March 3, he sent an e-mail to Roberts and the
25 Board e-mail list, stating, in part:

26 I, for one, would like to see the detailed statements of account for all financial matters
27 related to the DNSO. Consider this a request for that material.²

28 ²The DNSO is the Domain Name Supporting Organization, an advisory group within
ICANN, responsible to ICANN's Board for policy advice about the Domain Name System and
which selects three ICANN Board Members, see <<http://www.dnsso.org/dnsso/aboutdnso.html>>.

1 8. Much discussion ensued on the ICANN Board e-mail list. Roberts did not agree to
2 produce or make available the requested records, or any other materials, instead telling Auerbach that
3 he should take it up with the Audit Committee of the Board. Vinton Cerf, the Chairman of ICANN's
4 Board, wrote in a March 4, 2001 e-mail to Auerbach and the Board e-mail list:

5 i agree you have a right to see financial records - and I will advise Mike (or perhaps
6 more appropriately, Stuart) that this is the case.³

7 After Cerf's e-mail, Roberts sent an e-mail on March 4 to Auerbach and the Board list in which he
8 stated, in part:

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

13 I did this shortly after the November Board meeting at which you took office and
14 during which you mentioned your desire for access to financial records to me. I was
15 advised by Vint, following his conversation with Linda, that he would have further
16 conversation with you about the need for such access. I have had no further contact
17 with this issue until the last day or so. In my message earlier today, I indicated to you
that if you wish to resume this effort, you should contact Louis, who will seek
guidance from the Chair of the Audit Committee, which has oversight of the financial
records of the corporation, and you will be advised of the manner in which you may
gain access to the records you wish to review.

18 9. In other words, through March 4, 2001, three months after Auerbach's first written
19 request for records, and three months after Roberts wrote that he was referring the matter to the
20 Audit Committee of the Board, no action had been taken to fulfill Auerbach's request. Rather,
21 Roberts wrote to Auerbach that if he still wished to inspect corporate records – Auerbach never
22 having indicated to Roberts or anyone else that he did not still wish to do so – he should "resume"
23 the process, so that Louis Touton ("Touton"), ICANN's General Counsel, Vice President and
24 Secretary, who is not a Board member, could seek guidance from Linda Wilson, a Board Member
25

27 ³Roberts was on his way out at the time, set to be replaced by Stuart Lynn.
28

1 and the Chair of the Audit Committee. Further, through March 4, Roberts never explained what he
2 meant by the "related agreement" referred to in his December 6, 2000 e-mail.

3 10. The flurry of e-mail exchanges ended on March 6, as those concerned were getting
4 ready to leave for an ICANN meeting in Melbourne, Australia. In response to an e-mail from Touton
5 (which, like all of the referenced e-mails, also was sent to the Board e-mail list), Auerbach wrote, so
6 that there would be no doubt:

7 Given that the we are all heading towards airplanes, I'm not expecting the GL
8 [General Ledger] data until a reasonable time after we get back. But I am still
9 expecting the GL data - the chart of accounts, the statement of current balances of all
10 accounts, and the detailed ledger of transactions - preferable in electronic form,
11 particularly if that form can be Microsoft Excel 2000 compatible.

12 11. During the Board's March meeting in Melbourne, Auerbach spoke with fellow Board
13 member Linda Wilson, the Chair of the Board's Audit Committee. She told Auerbach that his request
14 for financial records had been rejected, because Auerbach had requested the records in electronic
15 form. However, no one had ever communicated such rejection to Auerbach, or said that the records
16 would be made available in paper form. Further, it was clear from Auerbach's request that while he
17 preferred to receive the records in electronic form, he was not demanding any particular format.

18 12. After the Melbourne meeting in March, things were quiet for a while, at least partially
19 due to Lynn having just replaced Roberts as ICANN's President. On June 22, 2001, Auerbach e-
20 mailed a short note to Lynn, saying that he still wanted to look at the general ledger and asking how
21 best to arrange it. Lynn responded by e-mail on June 26, stating that, at a meeting in Stockholm in
22 early June, the Audit Committee wanted changes made to the "governing document", without saying
23 what that document was, and without Auerbach ever having seen such a document. Lynn stated that
24 the document should be ready in two to three weeks, depending on peoples' schedules.

25 13. Eight weeks later, on August 6, 2001, Lynn e-mailed a message to Auerbach in which
26 Lynn stated that the policy (still undefined) might be finalized by the end of August. Then, finally,
27 on September 2, 2001, nine months after Auerbach's first written request to Roberts, Lynn notified
28 Auerbach and the other Board members by e-mail that, working with the Audit Committee of the

1 Board, he, Touton and Diane Schroeder (an ICANN staff member, but not a Board member) finished
2 the procedures governing Directors' access to corporate records. In a separate e-mail of that date,
3 Lynn attached a copy of those procedures. The document was a two page document entitled
4 "Procedures Concerning Director Inspection of Records and Properties" (hereinafter simply the
5 "Procedures"). A true and complete copy of the Procedures is attached hereto as Exhibit 2 and
6 incorporated herein by this reference.

7 14. Though Auerbach does not concede that the Procedures would be lawful if adopted
8 by the full Board, at no time has the full ICANN Board adopted, approved or otherwise voted on the
9 Procedures. The Procedures have never even been an agenda item at any Board meeting, whether
10 held in person or telephonically. Yet, despite the fact that the Procedures affect not only Auerbach
11 but also all Board members who may wish to inspect or copy ICANN corporate records, Lynn sought
12 to impose them on Auerbach as if they were Board policy.

13 15. Of the seven numbered paragraphs in the Procedures, the most important to this
14 Petition are paragraphs 5 and 6, set forth here in full:

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

16 To the extent that the Chief Executive Officer, in consultation with the General
17 Counsel of the Corporation, determines that compliance with any request for records
18 necessarily involves issues of confidentiality, privilege, or privacy of a nature which
19 require limitation of or conditions on the Director's access or use of the requested
20 records, the Chief Executive Officer shall advise the requesting Director of the issues
21 which require the restrictions and the nature of any proposed restrictions on access
22 or use. Similarly, if permitting an inspection of the Corporation's properties
23 necessarily involves such issues, the Chief Executive Officer shall advise the
24 requesting Director in writing of any restrictions on access to the Corporation's
25 properties. If the Director accepts the restrictions by countersigning the statement
26 concerning limitations, the records shall be made available to the Director or the
27 inspection scheduled as soon as possible.

28 **6. Appeal of Restrictions.**

If 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. The Audit
Committee shall consider the request and respond to the Director not more than 20
days following submission of the request by the Chief Executive Officer. If 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.

1
2 16. Some discussion ensued between Auerbach and others on the Board e-mail list. On
3 September 23, 2001, Auerbach e-mailed to Lynn a letter, which included another copy of Auerbach's
4 December 3, 2000 letter to Roberts, and stated the following, among other things:

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

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

25 Toward the end of the letter, Auerbach specifically stated that "It is my intention to exercise my right
26 to make copies and to take them to my offices for examination."
27
28

1 17. Lynn responded to Auerbach by an e-mailed letter dated October 5, 2001. Lynn
2 proposed dates when Auerbach could inspect the requested materials at ICANN's office, but he also
3 imposed additional restrictions which are beyond both the law and the Procedures.

- 4 ● Lynn required Auerbach to sign and return a copy of Lynn's three page letter as a
5 condition of Auerbach's inspection;
- 6 ● Lynn required that, to the extent there were any concerns about the confidentiality of
7 a document, Auerbach make a written inquiry to Lynn about same, and that Auerbach
8 maintain the utmost confidentiality until Lynn responded;
- 9 ● Lynn allowed Auerbach to be accompanied by his attorney or other advisor, but
10 reserved to himself the right to veto the person(s) selected by Auerbach;
- 11 ● Lynn determined that, though Auerbach would be allowed to inspect paper copies of
12 the records requested, he would not be given electronic copies as requested of at least
13 some of them;
- 14 ● Finally, only after Auerbach had inspected the records could he designate those for
15 which he wanted copies made. Auerbach's "request" for copies then would be
16 considered by Lynn, with the advice of Touton and in consultation with the Audit
17 Committee, at which point copies of the records might or might not be provided to
18 Auerbach.

19 Lynn concluded the letter by stating that Auerbach's refusal to countersign the letter would be
20 "inconsistent with the Procedures endorsed by the Board's Audit Committee" and that if Auerbach
21 believed that anything in Lynn's letter was unreasonable, Auerbach should refer the matter to the
22 Audit Committee.

23 18. Lynn's references to the Audit Committee of the Board (in the preceding paragraph,
24 and in ones to follow) are particularly interesting. The Audit Committee presumably has access to
25 all the financial records Auerbach seeks, and would need access to any other records he seeks in order
26 to properly evaluate his request. Yet, to Auerbach's knowledge, no member of the Audit Committee
27 has been required to agree to the Procedures. Further, Auerbach is a member of the Board's Conflicts
28

1 of Interest Committee, which is charged with insuring that no one who deals with ICANN – whether
2 a Board member, an Officer or an independent contractor, such as ICANN's outside counsel – has
3 any conflicts of interest with respect to ICANN. Part 4 of Auerbach's document request, set forth
4 in paragraph 16 above, goes specifically to Auerbach's duties not just as a Board member in general,
5 but as a member of the Board's Conflicts Committee in particular.

6 19. Auerbach responded by e-mailed letter dated October 15, 2001. He pointed out the
7 matters alleged in paragraph 17 above, and stated that Lynn's letter and the Procedures contained
8 unacceptable limitations on the rights of a corporate Director. Auerbach declined to sign Lynn's
9 letter, but stated that he wanted to have the records made available by no later than November 1,
10 2001 - the next annual ICANN meeting was set for Marina Del Rey in mid-November, and Auerbach
11 wanted to access the records before that meeting.

12 20. Lynn responded in an e-mailed letter dated October 21, 2001, writing as if he was an
13 attorney, including citation to no less than eight cases. Indeed, the first paragraph of Lynn's letter
14 states that he would "set forth in some detail the corporation's legal position on these points."
15 According to Lynn, Auerbach's actions raised "legitimate questions about whether this inspection is
16 truly in furtherance of [Auerbach's] duties, as opposed to a private agenda," when all Auerbach ever
17 had tried to do was exercise his rights as a Director of ICANN. With no proof other than Auerbach's
18 perseverance in pursuing for eleven months a right vested in Auerbach as a Director of ICANN, Lynn
19 asserted that Auerbach might be acting in violation of his fiduciary duties as a Director of ICANN.
20 Lynn concluded his letter as follows:

21 Since I must interpret your letter as disagreeing with the arrangements contained in
22 my letter to you of October 5, I am referring the matter to the Audit Committee under
23 Paragraph 6 of the Procedures Concerning Director Inspection of Records and
24 Properties. The Audit Committee will advise you once it has considered this matter.
25 If, in the interim, you wish to proceed with the inspection according to the
26 arrangements of my October 5 letter, please let me know and we can proceed with the
27 inspection on that basis without the need for action by the Audit Committee.
28 However, since the original dates proposed by me in that letter are now moot, we will
now need to set the date to occur after November 15 because of the ICANN meetings
in Marina del Rey.

1 21. Lynn and Auerbach traded one further set of e-mailed letters, Auerbach writing to
2 Lynn on October 27, 2001, Lynn responding on October 31. Auerbach contended that, through the
3 combination of delay and restrictions at odds with Auerbach's rights. ICANN management effectively
4 was preventing Auerbach from exercising his right to inspect and copy ICANN corporate records.
5 To allay Lynn's (unfounded) concerns that Auerbach might disclose the records to the wrong people
6 – a concern which had and has no basis in fact – Auerbach voluntarily agreed that if, hypothetically,
7 he was contemplating a disclosure other than to advisors named in his letter, he would give ICANN
8 seven days advance notice, so that, prior to any (hypothetical) disclosure, ICANN could discuss with
9 Auerbach alternatives, make suggestions, or take other appropriate action. Lynn, however,
10 interpreted Auerbach's offer as inappropriate. Lynn denied that ICANN management was stalling,
11 but perhaps the best evidence of management conduct, in light of the established record, comes from
12 the first paragraph of Lynn's own letter:

13 While I think we have narrowed the issues in dispute, your letter indicates continuing
14 dissatisfaction with the present state of affairs, and accordingly, we have referred this
 matter to the Audit Committee, which has until November 12, 2001 to act.

15 Lynn was correct that the disputed issues were narrowed, but only because Auerbach, voluntarily and
16 in the spirit of compromise, was willing to relinquish some of the rights granted to him by California
17 law. However, Auerbach was unwilling to give up all of his rights. It is now March 2002, but either
18 the Audit Committee never has acted, or if it has, ICANN management never bothered to inform
19 Auerbach of the action. With only one exception, Auerbach still has not received any of the
20 information he requested and to which, as an ICANN Director, he has an absolute right.⁴
21
22
23
24

25 ⁴Despite Lynn's insistence that the Procedures be followed and that Auerbach countersign
26 Lynn's letter before copies of any documents would be provided, and despite Auerbach's declining
27 to agree to those terms, on or about November 11, 2000, Lynn e-mailed to Auerbach a document
28 containing the information requested by Auerbach in point 5 of his September 23, 2001 letter
(international travel), quoted in paragraph 16 above.

1 **PETITIONER'S CONTENTIONS AND ISSUES PRESENTED**

2 22. California Corporations Code § 6334, which governs the conduct of California
3 Nonprofit Public Benefit Corporations such as ICANN, states:

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

7 Auerbach contends, simply enough, that the code section means what it says: that as a Director of
8 ICANN, he has the absolute right (at any reasonable time) to inspect, and to copy, any and all of
9 ICANN's corporate records. Of course, Auerbach has not asked to see them all, only a small amount,
10 but both by its actions and in its words, ICANN, primarily through Lynn, contends that it can impose
11 not only "reasonable time" restraints on Auerbach's rights, but also substantive restrictions on his
12 right. In acting on its contentions, ICANN has denied Auerbach his legal right to inspect and copy
13 ICANN records. Indeed, in denying Auerbach the right to inspect and copy records as he sees fit,
14 ICANN has acted contrary to its own Bylaws, as well as § 6334. As quoted in paragraph 5 above,
15 Article V, Section 21 of the ICANN Bylaws provides that "[e]very Director shall have the right at
16 any reasonable time to inspect and copy all books, records and documents of every kind"

17 23. California Corporations Code § 5231(a), which also governs the conduct of California
18 Nonprofit Public Benefit Corporations such as ICANN, provides:

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

24 Auerbach contends, also simply, that it is not only his right but also his duty under the law to exercise
25 his own independent judgment, in good faith, as to what constitutes the best interests of ICANN. He
26 further contends that it is not the right of ICANN management to tell him how he should or should
27 not act, or impose upon him their view of what is in ICANN's best interest. Auerbach also contends
28 that, at all times, he has done exactly what his duties require of him; that he has attempted to exercise
his independent judgment and make informed decisions to further ICANN's interests. By its actions

1 and in its words, including, but not limited to, the Procedures and Lynn's letters, ICANN management
2 contends that they, not he, are the ultimate arbiters of what Auerbach can or cannot do, at least with
3 respect to inspection and copying of corporate records. Further, the actions of ICANN's management
4 are counter to ICANN's own Bylaws, as set forth in paragraph 5 above. Article V, Section 8
5 provides that "Directors shall serve as individuals who have the duty to act in what they reasonably
6 believe are the best interests of the Corporation."

7 24. The Procedures which ICANN management seek to impose on Auerbach never have
8 been voted on or otherwise approved by ICANN's Board of Directors. Auerbach contends that
9 procedures devised solely by ICANN's management cannot govern the conduct of him, or of any
10 ICANN Director, save only for reasonable time and place restrictions.

11 25. However, Auerbach also contends that, even if the Procedures had been or were to
12 be adopted by ICANN's Board of Directors, the Procedures unlawfully interfere with the rights of
13 a Director of a California Nonprofit Public Benefit Corporation. Paragraph 5 of the Procedures (Exh.
14 2) expressly addresses conditions or limitations on a Director's access rights, in contravention of
15 Corporations Code § 6334. Among its other flaws, paragraph 6 of the Procedures seeks to make any
16 decision of the Board of Directors "final and binding" on a Director seeking access to corporate
17 records, thus depriving that Director of the right to judicial review of the corporation's actions.

18 26. In short: as a Director of ICANN, Auerbach has an absolute right to inspect and copy
19 ICANN corporate records, according to both the law and ICANN's own Bylaws; but through
20 obfuscation, delay and attempts to impose unlawful conditions on Auerbach's right for more than a
21 year, ICANN has prevented Auerbach from acting in good faith as a Director of ICANN according
22 to what he believes to be in ICANN's best interests. ICANN is not special in the eyes of California
23 corporate law, it is to be run according to the law by its Board of Directors, not management.
24 Management, however, has prevented Auerbach from performing his duties as they should be
25 performed.

1 27. California Code of Civil Procedure § 1085(a) provides:

2 A writ of mandate may be issued by any court, except a municipal court, to any
3 inferior tribunal, corporation, board, or person, to compel the performance of an act
4 which the law specially enjoins, as a duty resulting from an office, trust, or station, or
5 to compel the admission of a party to the use and enjoyment of a right or office to
6 which the party is entitled, and from which the party is unlawfully precluded by such
7 inferior tribunal, corporation, board, or person.

8 Auerbach has exhausted every means at his disposal to gain access to records to which he is legally
9 entitled as a matter of absolute right, short of agreeing to the unlawful conditions that ICANN seeks
10 to impose. ICANN should be compelled to make available to Auerbach all corporate records which
11 he chooses to inspect and copy. After hearing on Auerbach's motion to be made, the peremptory writ
12 should issue.

13 WHEREFORE, Petitioner respectfully prays that:

14 1. After hearing on the motion to be made in support of this Petition, that this Court
15 issue its peremptory Writ of Mandate or other extraordinary Writ or Order to the Respondent,
16 ordering and directing Respondent immediately to make available to Petitioner for inspection and
17 copying all corporate records of Respondent which Petitioner sets forth in this Petition, or which
18 Petitioner may request access to from time to time;

19 2. Petitioner be awarded costs of this action;

20 3. Petitioner be awarded reasonable attorneys' fees; and

21 4. Petitioner be awarded such other relief as the Court considers just and proper.

22 MARCH 18, 2002

23 James S. Tyre, State Bar Number 083117
24 LAW OFFICES OF JAMES S. TYRE

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

27 BY: _____
28 JAMES S. TYRE,
Attorneys for Petitioner KARL AUERBACH

ICANN

Articles of Incorporation (As Revised)

ARTICLES OF INCORPORATION OF INTERNET CORPORATION FOR ASSIGNED NAMES AND NUMBERS

As Revised November 21, 1998

1. The name of this corporation is Internet Corporation for Assigned Names and Numbers (the "Corporation").
2. The name of the Corporation's initial agent for service of process in the State of California, United States of America is C T Corporation System.
3. This Corporation is a nonprofit public benefit corporation and is not organized for the private gain of any person. It is organized under the California Nonprofit Public Benefit Corporation Law for charitable and public purposes. The Corporation is organized, and will be operated, exclusively for charitable, educational, and scientific purposes within the meaning of § 501 (c)(3) of the Internal Revenue Code of 1986, as amended (the "Code"), or the corresponding provision of any future United States tax code. Any reference in these Articles to the Code shall include the corresponding provisions of any further United States tax code. In furtherance of the foregoing purposes, and in recognition of the fact that the Internet is an international network of networks, owned by no single nation, individual or organization, the Corporation shall, except as limited by Article 5 hereof, pursue the charitable and public purposes of lessening the burdens of government and promoting the global public interest in the operational stability of the Internet by (i) coordinating the assignment of Internet technical parameters as needed to maintain universal connectivity on the Internet; (ii) performing and overseeing functions related to the coordination of the Internet Protocol ("IP") address space; (iii) performing and overseeing functions related to the coordination of the Internet domain name system ("DNS"), including the development of policies for determining the circumstances under which new top-level domains are added to the DNS root system; (iv) overseeing operation of the authoritative Internet DNS root server system; and (v) engaging in any other related lawful activity in furtherance of items (i) through (iv).
4. The Corporation shall operate for the benefit of the Internet community as a whole, carrying out its activities in conformity with relevant principles of international law and applicable international conventions and local law and,

to the extent appropriate and consistent with these Articles and its Bylaws, through open and transparent processes that enable competition and open entry in Internet-related markets. To this effect, the Corporation shall cooperate as appropriate with relevant international organizations.

5. Notwithstanding any other provision (other than Article 8) of these Articles:

a. The Corporation shall not carry on any other activities not permitted to be carried on (i) by a corporation exempt from United States income tax under § 501 (c)(3) of the Code or (ii) by a corporation, contributions to which are deductible under § 170 (c)(2) of the Code.

b. No substantial part of the activities of the Corporation shall be the carrying on of propaganda, or otherwise attempting to influence legislation, and the Corporation shall be empowered to make the election under § 501 (h) of the Code.

c. The Corporation shall not participate in, or intervene in (including the publishing or distribution of statements) any political campaign on behalf of or in opposition to any candidate for public office.

d. No part of the net earnings of the Corporation shall inure to the benefit of or be distributable to its members, directors, trustees, officers, or other private persons, except that the Corporation shall be authorized and empowered to pay reasonable compensation for services rendered and to make payments and distributions in furtherance of the purposes set forth in Article 3 hereof.

e. In no event shall the Corporation be controlled directly or indirectly by one or more "disqualified persons" (as defined in § 4946 of the Code) other than foundation managers and other than one or more organizations described in paragraph (1) or (2) of § 509 (a) of the Code.

6. To the full extent permitted by the California Nonprofit Public Benefit Corporation Law or any other applicable laws presently or hereafter in effect, no director of the Corporation shall be personally liable to the Corporation or its members, should the Corporation elect to have members in the future, for or with respect to any acts or omissions in the performance of his or her duties as a director of the Corporation. Any repeal or modification of this Article 6 shall not adversely affect any right or protection of a director of the Corporation existing immediately prior to such repeal or modification.

7. Upon the dissolution of the Corporation, the Corporation's assets shall be distributed for one or more of the exempt purposes set forth in Article 3 hereof and, if possible, to a § 501 (c)(3) organization organized and operated exclusively to lessen the burdens of government and promote the global public interest in the operational stability of the Internet, or shall be distributed to a governmental entity for such purposes, or for such other charitable and public purposes that lessen the burdens of government by providing for the operational stability of the Internet. Any assets not so disposed of shall be disposed of by a court of competent jurisdiction of the county in which the principal office of the Corporation is then located, exclusively for such purposes or to such organization or organizations, as such court shall determine, that are organized and operated exclusively for such purposes, unless no such corporation exists, and in such case any assets not disposed of shall be distributed to a § 501(c)(3) corporation chosen by such court.

8. Notwithstanding anything to the contrary in these Articles, if the Corporation determines that it will not be treated as a corporation exempt from federal income tax under § 501(c)(3) of the Code, all references herein to § 501(c)(3) of the Code shall be deemed to refer to § 501(c)(6) of the Code and Article 5(a)(ii), (b), (c) and (e) shall be deemed not to be a part of these Articles.

9. These Articles may be amended by the affirmative vote of at least two-thirds of the directors of the Corporation. When the Corporation has members, any such amendment must be ratified by a two-thirds (2/3) majority of the members voting on any proposed amendment.

Please send comments on this web site to: webmaster@icann.org

Page Updated 23-November-98.

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**INTERNET CORPORATION FOR
ASSIGNED NAMES AND NUMBERS**

Procedures Concerning Director Inspection of Records and Properties

1. Purpose.

These procedures will apply to requests by Directors of the Internet Corporation for Assigned Names and Numbers (the "Corporation") for inspection of records or of the physical properties of the Corporation. These 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:

Section 21. RIGHTS OF INSPECTION

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

2. Requests for Records or Inspection.

Director requests for inspection of records or properties shall be made in writing and submitted to the Chief Executive Officer of the Corporation. The request shall describe any requested records in terms which are sufficiently particular to permit compliance with the request. A Director seeking to inspect an extensive volume of records should exercise restraint by making a series of lesser requests for information over a period of time, where feasible and prudent, rather than a single burdensome request.

3. Responses to Requests for Inspection of Records.

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

4. Responses to Requests for Inspection of Properties.

Within 10 business days after receipt of a Director request for inspection of properties, the Chief Executive Officer will advise the Director as to the time or times when the Director may inspect the Corporation's properties. Any such inspection shall be made during normal business hours of the Corporation, consistent with the conduct of the Corporation's business.

5. Restrictions on Access or Use.

To the extent that 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. Similarly, if permitting an inspection of the Corporation's properties necessarily involves such issues, the Chief Executive Officer shall advise the requesting Director in writing of any restrictions on access to the Corporation's properties. If the Director accepts the restrictions by countersigning the statement concerning limitations, the records shall be made available to the Director or the inspection scheduled as soon as possible.

6. Appeal of Restrictions.

If 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. The Audit Committee shall consider the request and respond to the Director not more than 20 days following submission of the request by the Chief Executive Officer. If 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.

7. Violations of Procedures.

If the Chief Executive Officer or the Audit Committee has reasonable cause to believe that a Director has or intends to violate the procedures, he or it shall inform the Director of its belief and afford the Director an opportunity to explain the apparent violation. If after hearing the response of the Director, and making such investigation as may be warranted under the circumstances, the Audit Committee determines that the Director has violated these procedures, it shall recommend to the Board of Directors appropriate disciplinary and corrective action, which may include authorizing a lawsuit to prevent violation of these procedures. A violation of these procedures is a serious matter and may lead to further action by the Board.