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

11 KARL AUERBACH, an)
individual,)

12)
13 Petitioner,)

14)
15 v.)

16 INTERNET CORPORATION)
FOR ASSIGNED NAMES AND)
NUMBERS, a California Nonprofit)
Public Benefit Corporation,)

17)
18 Respondent.)

Case No. BS 074771

PETITIONER KARL AUERBACH'S
SEPARATE STATEMENT OF
UNDISPUTED MATERIAL FACTS IN
SUPPORT OF MOTION FOR
SUMMARY JUDGMENT

[THE HONORABLE DZINTRA JANAVS]

DATE: June 21, 2002
TIME: 9:30 a.m.
DEPT: 85

19
20 Petitioner KARL AUERBACH ("Auerbach") hereby submits his Separate Statement of
21 Undisputed Material Facts in support of his Motion for Summary Judgment against Respondent
22 INTERNET CORPORATION FOR ASSIGNED NAMES AND NUMBERS ("ICANN").
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1 **A. Introductory Matters.**

3 **Undisputed Material Facts**

3 **Supporting Evidence**

4 1. Respondent Internet Corporation for
5 Assigned Names and Numbers ("ICANN") is a
6 California Nonprofit Public Benefit
7 Corporation.

ICANN Articles of Incorporation, ¶ 3
(Auerbach Decl. ¶ 4 and Ex. 1).

8 2. Petitioner Karl Auerbach ("Auerbach")
9 is, and since late November 2000 has been, a
10 member of ICANN's Board of Directors.

Auerbach Decl. ¶ 2.

11 3. ICANN currently has 18 Board
12 members (19 prior to the recent resignation of
13 Philip Davidson) who are located around the
14 world, not just across the United States.

Auerbach Decl. ¶ 9.

15 4. The use of e-mail for ICANN Board
16 communications is a customary and usual
17 practice of ICANN, including, but not
18 necessarily limited to, e-mail sent to <[icann-](mailto:icann-board@icann.org)
19 [board@icann.org](mailto:icann-board@icann.org)>, an e-mail distribution list
20 which sends copies of e-mails to all Board
21 members and certain other persons (the "Board
22 List"). Article V, Section 20 of ICANN's
23 Bylaws expressly provides for e-mail
24 communications, as follows:

Auerbach Decl. ¶s 9, 14 and Ex. 2 (ICANN
Bylaws, Article V.)

25 "If permitted under applicable law,
26 communication by electronic mail shall be
27 considered equivalent to any communication
28 otherwise required to be in writing. The
Corporation shall take such steps as it deems

1 appropriate under the circumstances to assure
2 itself that communications by electronic mail
are authentic."

3 5. When Auerbach became a Director of Auerbach Decl. ¶ 7.
4 ICANN, Michael Roberts ("Roberts") was the
5 President and CEO of ICANN, and a member
6 of ICANN's Board of Directors.

7 6. On or about March 13, 2001, M. Stuart Auerbach Decl. ¶s 16, 18.
8 Lynn ("Lynn") succeeded Roberts as the
9 President and CEO of ICANN, and a member
10 of ICANN's Board of Directors.

11 7. Article V, Section 8 of ICANN's Auerbach Decl. ¶ 5 and Ex. 2 (ICANN Bylaws,
12 Bylaws provides that: Article V.)

13 "Directors shall serve as individuals who have
14 the duty to act in what they reasonably believe
15 are the best interests of the Corporation and
16 not as representatives of the subordinate entity
that selected them, their employers, or any
other organizations or constituencies."

17 8. Article V, Section 21 of ICANN's Auerbach Decl. ¶ 6 and Ex. 2 (ICANN Bylaws,
18 Bylaws provides that: Article V.)

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

23 9. Each section of ICANN's Bylaws Auerbach Decl. ¶ 5.
24 quoted above (Article V, Sections 8, 20 and
25 21) has remained unchanged from when
26 ICANN first adopted Bylaws in 1998 through
27 the present.
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2 **B. November 2000 Through August 2001.**
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4 10. Shortly after the November 2000 Auerbach Decl. ¶ 8.
5 ICANN Annual Meeting, Auerbach made an
6 oral request of Roberts to inspect and copy
7 ICANN's General Ledger.

8 11. Auerbach followed up his oral request Auerbach Decl. ¶ 8 and Ex. 3.
9 by e-mailing a letter to Roberts on December
10 3, 2000, in which Auerbach requested to
11 inspect and copy ICANN's General Ledger.

12 12. Roberts responded by e-mail dated Auerbach Decl. ¶ 10 and Ex. 4.
13 December 6, 2000, stating in part that "we
14 need to establish a written procedure and
15 related agreement" and that "Louis [Touton,
16 ICANN's Vice President, Secretary and
17 General Counsel] will be in touch sometime in
18 the next couple of weeks."

19 13. In that same e-mail, Roberts also stated Auerbach Decl. ¶ 10 and Ex. 4.
20 that because Auerbach's request involved
21 financial records, he had discussed the matter
22 with Linda Wilson, then-Chair of the Board's
23 Audit Committee, and that he would include
24 her in future related correspondence.

25 14. A true and complete copy of the Auerbach Decl. ¶ 11 and Ex. 5.
26 Charter of the Audit Committee of ICANN's
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1 Board is attached to Auerbach's Declaration as
2 Exhibit 5.

3 15. Neither Touton, Roberts, Wilson nor Auerbach Decl. ¶ 14.
4 any other representative of ICANN contacted
5 Auerbach about Auerbach's records request.
6 None mentioned it until a series of e-mail
7 exchanges beginning on March 3, 2001.

8 16. Exhibits 6 through 15 to Auerbach's Auerbach Decl. ¶s 14 - 17 and Exs. 6 - 15.
9 Declaration are true and complete copies of a
10 series of e-mail exchanges from March 3, 2001
11 to March 6, 2001 between Auerbach, Roberts,
12 Touton and Dr. Vinton Cerf ("Cerf"), the
13 Chairman of ICANN's Board of Directors. In
14 the e-mails from Auerbach, among other things
15 he made clear that he had not withdrawn his
16 request to inspect and copy ICANN's General
17 Ledger, and that he was requesting additional
18 documents. Roberts in effect conceded that
19 nothing had been done towards developing the
20 written procedure or related document referred
21 to three months previously in Roberts'
22 December 6, 2000 e-mail. Cerf stated, among
23 other things, that "i agree that you have a right
24 to see financial records - and I will advise Mike
25 (or perhaps more appropriately, Stuart) that
26 this is the case." (Mike Roberts was departing
27
28

1 ICANN, and was scheduled to be replaced
2 later in March by M. Stuart Lynn ("Lynn")).

3 17. After giving Lynn a settling-in period of Auerbach Decl. ¶ 18 and Ex. 16.
4 about three months, Auerbach renewed his
5 records request by e-mail to Lynn on June 22,
6 2001.

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8 **C. September 2001 Through November 2001.**

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10 18. On September 2, 2001 (nine months Auerbach Decl. ¶ 19 and Exs. 19, 20.
11 after Auerbach's first records request to
12 Roberts, and more than two months after
13 Auerbach's June 22 e-mail to Lynn), by e-mails
14 to Auerbach and to the other ICANN Board
15 members, Lynn presented a two page
16 document entitled "Procedures Concerning
17 Director Inspection of Records and Properties"
18 (hereinafter simply the "Inspection
19 Procedures").

20 19. At no time prior to Lynn's circulation of Auerbach Decl. ¶ 32.
21 the Inspection Procedures had Auerbach been
22 allowed to inspect or copy the records he had
23 requested.

24 20. Paragraph 3 of the Inspection Auerbach Decl. ¶ 20 and Ex. 20.
25 Procedures provides that:

1 **3. Responses to Requests for Inspection of**
2 **Records.**

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

19 21. Paragraph 5 of the Inspection
20 Procedures provides that:

Auerbach Decl. ¶ 20 and Ex. 20.

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

22 To the extent that the Chief Executive Officer,
23 in consultation with the General Counsel of the
24 Corporation, determines that compliance with
25 any request for records necessarily involves
26 issues of confidentiality, privilege, or privacy of
27 a nature which require limitation of or
28 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.

29 22. Paragraph 6 of the Inspection
30 Procedures provides that:

Auerbach Decl. ¶ 20 and Ex. 20.

31 **6. Appeal of Restrictions.**

1 If the Director believes that any restrictions
2 proposed by the Chief Executive Officer are
3 unreasonable, the Chief Executive Officer shall
4 submit the request to the Audit Committee of
5 the Board of Directors of the Corporation for
6 resolution. The Audit Committee shall
7 consider the request and respond to the
8 Director not more than 20 days following
9 submission of the request by the Chief
10 Executive Officer. If the Director disagrees
11 with the resolution of the issue by the Audit
12 Committee, the Director may appeal this
13 decision by notice to the Chairman of the
14 Board of the Corporation, and the entire Board
15 (other than the requesting Director) shall make
16 a final and binding decision concerning the
17 production of the records involved or the
18 timing of any inspection of the Corporation's
19 properties.

20 23. At no time have the Inspection
21 Procedures been adopted or approved by
22 ICANN's Board.

Auerbach Decl. ¶ 23.

23 24. On September 23, 2001, Auerbach e-
24 mailed a letter to Lynn, asking to have made
25 available certain financial records, certain
26 records pertaining to employee policies, certain
27 record pertaining to ICANN's law firm and
28 others. Auerbach also included in that e-mail
another copy of his December 3, 2000 letter e-
mailed to Roberts.

Auerbach Decl. ¶ 26 and Ex. 24.

29 25. Auerbach specifically stated in the
30 September 23, 2001 e-mailed letter that it was
31 his "intention to exercise my right to make
32 copies and to take them to my offices for
33 examination."

Auerbach Decl. ¶ 26 and Ex. 24.

1 26. Auerbach lives in Santa Cruz, Auerbach Decl. ¶ 28.
2 California and works near his home. ICANN is
3 located in Marina Del Rey, California, more
4 than 300 miles away.

5 27. On October 5, 2001, in response to Auerbach Decl. ¶ 27 and Ex. 25.
6 Auerbach's letter, Lynn e-mailed a letter to
7 Auerbach.

8 28. Lynn's October 5, 2001 letter sought to Auerbach Decl. ¶ 27 and Ex. 25.
9 impose additional restrictions on Auerbach's
10 inspection and copying of ICANN's records,
11 beyond those set forth in the Inspection
12 Procedures.

13 29. Lynn's October 5, 2001 letter required Auerbach Decl. ¶ 27 and Ex. 25.
14 Auerbach to countersign that letter as a prior
15 condition to Auerbach's inspection.

16 30. Lynn's October 5, 2001 letter reserved Auerbach Decl. ¶ 27 and Ex. 25.
17 to himself the right to make determinations
18 about the confidentiality of any particular
19 record, or of all of them, requiring Auerbach to
20 maintain the utmost confidentiality until Lynn
21 responded to a written inquiry by Auerbach
22 about the confidential status of records.

23 31. Lynn reserved to himself the right to Auerbach Decl. ¶ 27 and Ex. 25.
24 approve the attorney or other advisor who
25 might accompany Auerbach to the inspection.

26 32. Lynn determined that Auerbach only Auerbach Decl. ¶ 27 and Ex. 25.
27 would be allowed to inspect paper copies of
28

1 the records, he would not be given electronic
2 copies of at least some of them.

3 33. Notwithstanding the clear statement in Auerbach Decl. ¶ 27 and Ex. 25.
4 Auerbach's September 23, 2001 letter that
5 Auerbach wanted copies of all the records to
6 be inspected, Lynn said in his October 5, 2001
7 letter that, upon the conclusion of the
8 inspection, Auerbach would designate those
9 records of which he wanted copies and his
10 request for copies would be considered by
11 Lynn, Touton and the Audit Committee of the
12 Board. At that time, Auerbach might or might
13 not be provided with copies of all of the
14 records, or any of them.

15 34. Lynn's October 5, 2001 letter merely Auerbach Decl. ¶ 29 and Ex. 25.
16 made conclusory statements that certain of the
17 requested records necessarily involved issues of
18 confidentiality, privilege or privacy. Lynn gave
19 no explanation of why that was the case, in his
20 view.

21 35. Lynn himself did not follow the Auerbach Decl. ¶ 30.
22 Inspection Procedures when, in November
23 2001, he e-mailed to Auerbach one of the
24 requested records.

25 36. Auerbach responded to Lynn by e- Auerbach Decl. ¶ 31 and Exs. 26 - 28.
26 mailed letter dated October 15, 2001. Lynn
27 responded by e-mailed letter dated October 21,
28

1 2001. Auerbach responded by e-mailed letter
2 dated October 27, 2001. Lynn responded by e-
3 mailed letter dated October 31, 2001.

4 37. In those letters, Auerbach showed a Auerbach Decl. ¶ 32 and Ex. 28.
5 willingness to compromise on some of his
6 positions in order to move the matter forward;
7 Lynn showed none.

8 38. To address Lynn's concerns that Auerbach Decl. ¶ 32 and Ex. 28.
9 Auerbach would disclose records that should
10 not be disclosed, Auerbach offered in his
11 October 27 letter to:

12 " ...give ICANN seven calendar days advance
13 written or e-mail notice of any disclosure of
14 data that I learn solely from the corporate
15 materials I have inspected to parties beyond my
16 inner circle of advisors.... This will give you
ample opportunity to suggest alternatives, to
offer constructive advice, or, to take other
actions if you feel that I am violating my rights
and duties as a Director."

17 39. Lynn dismissed Auerbach's compromise Auerbach Decl. ¶ 32 and Ex. 29.
18 in his October 31, 2001 letter.

19 40. When Lynn and Auerbach could not Auerbach Decl. ¶ 33 and Exs. 27, 30.
20 reach agreement, Lynn referred the matter to
21 the Board's Audit Committee for review.

22 41. Lynn provided the Audit Committee Auerbach Decl. ¶ 33 and Ex. 30.
23 only with materials through October 22, 2001,
24 thus excluding the compromise offered in
25 Auerbach's October 27, 2001 letter.

26 42. Auerbach was not given notice of when Auerbach Decl. ¶ 34.
27 the Audit Committee would meet, and was not
28

1 given an opportunity to present his case to the
2 Audit Committee.

3 43. Phil Davidson, then-chair of the Audit Auerbach Decl. ¶ 33 and Ex. 30.
4 Committee, e-mailed Auerbach on November
5 17, 2001 that the Audit Committee considered
6 the safeguards in Lynn's October 5, 2001 letter
7 to be reasonable, and that the Audit Committee
8 urged Auerbach to agree to that letter.

9

10 MAY 20, 2002

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