Memorandum of Points and Authorities in Support of Summary Judgment Motion
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INTRODUCTION AND SUMMARY OF ARGUMENT

This is an action by Petitioner KARL AUERBACH ("Auerbach") against Respondent INTERNET CORPORATION FOR ASSIGNED NAMES AND NUMBERS ("ICANN"). ICANN is a California Nonprofit Public Benefit Corporation (California Corporations Code §§ 5110 et seq.) which, among other things, is responsible for the domain naming system of the Internet. Auerbach is, and since the conclusion of ICANN's annual meeting in November 2000 has been, a member of ICANN's Board of Directors.

It is undisputed that, as a Director of ICANN, Auerbach has a right to inspect and copy ICANN corporate records. Corporations Code § 6334, which applies to ICANN, states that:

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.

At least in theory, ICANN does not dispute that Auerbach has the right to inspect and copy ICANN's records. Indeed, Article V, Section 21 of ICANN's Bylaws is similar, though not identical, to § 6334. Article V, Section 21 provides:

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. (Emphasis added.)

Virtually from the moment Auerbach became a Director of ICANN in November 2000, he has been seeking to inspect and copy ICANN’s General Ledger, as well as other documents he later requested. In December 2000, he was told by Michael Roberts ("Roberts"), then the President and CEO of ICANN, that ICANN never had received such a Director request, and that it needed to develop a procedure for handling it. Auerbach waited, patiently, but nothing happened. In response to an e-mail which Roberts sent in early March 2001, Auerbach requested to see additional records.¹

¹As set forth in more detail in Auerbach's accompanying Declaration, ICANN's Directors are spread around the planet. It is customary and normal ICANN business practice for Board members to communicate by e-mail, and ICANN has a Bylaw provision, Article V, Section 20, which allows for e-mail communications in the conduct of the Board's business.
Dr. Vinton Cerf ("Cerf"), the Chairman of the Board of ICANN, said in e-mail that Auerbach had a right to see the records, and that he would so advise either Roberts or M. Stuart Lynn ("Lynn"), who was scheduled to succeed Roberts as ICANN's President and CEO within a matter of weeks.

Again, Auerbach waited, patiently. Lynn being new to the job, it was appropriate for Auerbach to give him a settling-in period, so Auerbach waited until June 2001 to reiterate his records request, even though more than six months had elapsed since his initial request.

Finally, in September 2001, nine months after Auerbach's initial request, more than five months after Lynn succeeded Roberts, and virtually three years after ICANN adopted its Bylaws, including Article V, Section 21, Lynn circulated to the Board a two page document called "Procedures Concerning Director Inspection of Records and Properties" (hereinafter simply the "Inspection Procedures"). Shortly thereafter, Auerbach renewed his December 2000 document request and requested to inspect and copy additional documents. However, Lynn would not allow Auerbach even to inspect the requested documents, let alone copy them, without first agreeing both to the Inspection Procedures and to additional restrictions Lynn sought to impose in a letter he wrote to Auerbach on October 5, 2001.

In Auerbach's accompanying Declaration and the thirty exhibits attached to it, we will introduce a substantial quantity of evidence concerning what has occurred, and it will be clear that ICANN has engaged in a pattern of conduct designed to prevent or delay Auerbach from inspecting and copying the corporate records. But the issues raised by this case are not primarily factual, they are legal issues. Auerbach contends that both the Inspection Procedures themselves and Lynn's subsequent letter unlawfully interfere with his rights as a Director to inspect and copy ICANN corporate records, under both Corporations Code § 6334 and Article V, Section 21 of ICANN's own Bylaws. ICANN contends to the contrary. Thus, the Court will be asked to decide four questions of law:

First, what are the nature and extent of Auerbach's rights, as a Director of a California Nonprofit Public Benefit Corporation, to inspect and copy the records of that corporation?
Second, if the corporation has the right to impose restrictions on Auerbach's right (other than reasonable time restrictions, about which the parties do not disagree), would ICANN's Inspection Procedures (Exhibit 20) be in accordance with the law, assuming that they had been adopted or approved by the Board?

Third, given that the Inspection Procedures have not been adopted or approved by the Board, are they valid nonetheless?

Fourth and finally, are the additional restrictions set forth in Lynn's October 5, 2001 letter (Exhibit 25) lawful and binding on Auerbach?²

I.

THE FACTS

A. Facts Prior to Auerbach Becoming an ICANN Director.

ICANN is a California Nonprofit Public Benefit Corporation. See ICANN Articles of Incorporation (Auerbach Decl. ¶ 4 and Ex. 1). There is no single governing body for all of the Internet, but ICANN bears responsibility for certain key functions of the Internet. (Auerbach Decl. ¶ 4.) Currently, ICANN has 18 members on its Board of Directors, who reside around the world, not just across the United States. (Auerbach Decl. ¶ 9.) Having won an election for the At Large Director seat for the North America region, Auerbach became a Director of ICANN on the conclusion of ICANN's November 2000 annual meeting. (Auerbach Decl. ¶ 2.) His term as an ICANN Director continues through ICANN's 2002 annual meeting, presently scheduled to be held in Shanghai on October 31, 2002. (Id.)

²The interpretation of written instruments, including the Inspection Procedures and Lynn's letter, of course is a question of law for the Court. Parsons v. Bristol Development Co., (1965) 62 Cal.2d 861, 865 ("The interpretation of a written instrument, even though it involves what might properly be called questions of fact [...] is essentially a judicial function to be exercised according to the generally accepted canons of interpretation so that the purposes of the instrument may be given effect. [...] It is therefore solely a judicial function to interpret a written instrument unless the interpretation turns upon the credibility of extrinsic evidence.")
In November 1998, ICANN adopted its first set of Bylaws. (Auerbach Decl. ¶ 5.) Though the Bylaws have been amended or revised from time to time, there are three provisions of Article V that are relevant here and that have remained unchanged from the beginning. First, given the purpose of ICANN’s existence and that its Board members are located around the world, it is no surprise that the Bylaws specifically provide for the conduct of ICANN business through the use of e-mail. Article V, Section 20 states:

If permitted under applicable law, communication by electronic mail shall be considered equivalent to any communication otherwise required to be in writing. The Corporation shall take such steps as it deems appropriate under the circumstances to assure itself that communications by electronic mail are authentic.

(Auerbach Decl. ¶ 9 and Ex. 2 [ICANN Bylaws, Article V].)

Second, the ICANN Bylaws recognize that a Director must act consistent with the Director's reasonable belief as to what is in the best interest of ICANN. Article V, Section 8 of the Bylaws provides that:

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

Third, to help a Director make a determination of what he or she sees as being in the best interest of ICANN, Article V, Section 21 of ICANN's Bylaws, as quoted in the Introduction, allows a Director the right to inspect and copy "...all books, records and documents of every kind...."


Shortly after Auerbach became an ICANN Director in November 2000, he made an oral request of Michael Roberts ("Roberts"), the President and CEO of ICANN at the time, to inspect and copy ICANN's General Leger. On December 3, 2000, Auerbach followed up the oral request by e-mailing a letter to Roberts, making the same request. (Auerbach Decl. ¶s 7, 8 and Ex. 3.) Roberts responded by e-mail of December 6, 2000. He stated:

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

(Auerbach Decl. ¶ 10 and Ex. 4.)

Despite what Roberts wrote, Auerbach did not hear anything further from Roberts, Touton,
Wilson or any other ICANN representative. Nothing happened with respect to Auerbach's request
until three months later, in early March, 2001. On or about March 3, 2001, Roberts sent an e-mail
to the Board e-mail list <icann-board@icann.org> concerning ICANN’s financial statements.
Responding to a particular item mentioned by Roberts, Auerbach replied by e-mail on March 3,
stating in part that "I, for one, would like to see the detailed statements of account for all financial
matters related to the DNSO. Consider this a request for that material." (The DNSO is one of
ICANN's core functions.) (Auerbach Decl. ¶ 14 and Ex. 6.)

A series of e-mails related to Auerbach's document request ensued, between Roberts, ICANN
Vice President, Secretary and General Counsel Louis Touton ("Touton"), Board Chair Cerf and
Auerbach. (Auerbach Decl. ¶ 15 and Exs. 7 - 15.) In Exhibit 7, Roberts suggested that Auerbach
take up the matter of access to corporate records with Phil Davidson ("Davidson"), who had
succeeded Linda Wilson as Chair of the Board's Audit Committee, thus implying that at least
Davidson, and possibly the whole Audit Committee, had access to the information Auerbach sought.
In Exhibit 8, Auerbach again requested the DNSO financial records, and reminded Roberts that he
had not dropped his earlier request for the ICANN General Ledger. In Exhibit 10, responding to an
e-mail from Cerf about the DNSO funds, Auerbach wrote that he had a right to see the records, that
he had been patient, but that Roberts' response the previous day had made him impatient. In Exhibit
11, Cerf wrote to Auerbach that "i agree that you have a right to see financial records - and I will
advise Mike (or perhaps more appropriately, Stuart) that this is the case." (Mike Roberts was
departing ICANN, and was scheduled to be replaced as President and CEO later in March by M.
Stuart Lynn ("Lynn").)
In Exhibit 12, Roberts wrote, in part:

For the record, at no time have I ever told you that you could not have access to the records of the corporation. I said to you that if you felt this was necessary, I would discuss the matter with General Counsel, with the Chair of the Board, and with the 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.

Again, Roberts implies that the Board members who were also members of the Audit Committee had access to the records Auerbach was seeking, even though a written procedure had not yet been established. In Auerbach’s response to Roberts, Exhibit 13, he reminded Roberts that his initial records request already had been pending for three months, but that neither Roberts nor Touton nor the Audit Committee had done anything to advance the request. Roberts had insisted that there be written procedures and a related agreement, but Auerbach was aware of no progress towards producing either of those documents. In Exhibit 14, Touton responded to some of Auerbach’s statements about what he believed to be the rights and duties of a Director of a corporation such as ICANN. Touton did not state any disagreement with Auerbach’s right to inspect the corporate records. Knowing that Touton, unlike Roberts, would be continuing with ICANN, Auerbach made certain in his response, Exhibit 15, that Touton understood that Auerbach was still seeking access to the General Ledger.

Shortly after the early March e-mail exchanges, Roberts did in fact depart ICANN, and was replaced as President, CEO and Board member by Lynn. As Lynn was new to ICANN, it was appropriate for Auerbach to give him a settling-in period before pursuing the records request with him, particularly since Auerbach’s impression was that the March exchange of e-mails had gotten things moving on the creation of the procedures which Roberts required. On June 22, 2001, roughly three months after Lynn’s tenure with ICANN began, Auerbach e-mailed Lynn a short note saying that he was still interested in looking at the General Ledger and inquiring how best to arrange it. Lynn responded by e-mail dated June 26, 2001. Lynn indicated that the Audit Committee had some changes it wanted made to the "governing document", but that he expected to have it approved within the next few weeks, depending on schedules. Auerbach was uncertain what exactly that "governing
document” might be, but at least he was encouraged that, apparently, progress was being made. On August 6, 2001, Lynn e-mailed Auerbach an update. (Auerbach Decl. ¶ 18 and Exs 16 - 18.)


Finally, on September 2, 2001, almost nine months to the day after Auerbach’s initial written request, more than five months after Lynn took office, more than two months after Lynn wrote (Exhibit 17) that he expected the document to be ready within two to three weeks, depending on schedules, and almost three years after ICANN adopted a Bylaw provision (Article V, Section 21) that calls for ICANN to "establish reasonable procedures to protect against the inappropriate disclosure of confidential information," Lynn sent e-mails to the Board and to Auerbach saying that the procedures for directors to inspect corporate records had been released, and attaching the two-page Inspection Procedures. (Auerbach Decl. ¶ 19 and Exs 19, 20.)

We will discuss the Inspection Procedures in detail in the Argument section. Here, we simply set forth the most critical provisions, paragraphs 3, 5 and 6:

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.

[....]

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.

By e-mail on September 2, 2001 to Lynn and the Board list, Auerbach thanked Lynn for
having the Inspection Procedures prepared. Without regard to whether he agreed with them, at least
he finally had something tangible with which to work. In that e-mail, Auerbach stated that the
Inspection Procedures appeared to be at variance with California law. (Auerbach Decl. ¶ 24 and Ex.
21. Though not engaged in the active practice of law, Auerbach has been a member in good standing
of the California bar since 1978. (Auerbach Decl. ¶ 25.)

On September 3, 2001, Touton and Auerbach exchanged e-mails through the Board e-mail
list. Touton presented his interpretation of the Inspection Procedures, and why he thought they were
reasonable. Auerbach responded that he was happy that the long awaited procedures had finally
come into existence. However, that statement did not imply that those procedures lacked flaws. In
fact, in the same e-mail Auerbach pointed out some of those flaws. He recognized, as he always has
done, the fiduciary duties imposed on him as a Director of ICANN, including the duty of confidence,
but he was concerned, among other things, that the Inspection Procedures could result in a conflict
between those procedures and the law, to the detriment of both ICANN and Auerbach, or any other
Director. (Auerbach Decl. ¶ 25 and Exs 22, 23.)

Subsequently, Lynn and Auerbach exchanged a series of e-mailed letters, each sent only or
primarily one to the other, rather than through the Board e-mail list to the entire Board. On
September 23, 2001, Auerbach e-mailed to Lynn a letter, which included another copy of Auerbach's
December 3, 2000 letter to Roberts ([Exhibit 3](#)), and stated the following, among other things:
Please make available the following materials for my inspection and copying:

1. ICANN's General Ledger reports (chart of accounts, transaction journal, and account balances) from corporate inception to the present (or as close to present as is reasonably feasible.)
   a. These reports should include, at a minimum, the following standard accounting reports.
      i. Chart of Accounts
      ii. The daily transaction journal showing for each account in the chart of accounts all amounts and transactions that have been debited or credited to that account.
   b. In order to save time and cost and to facilitate my analysis, I'd prefer to get these reports in two distinct forms:
      i. An electronic image capture of each of the above described reports. This electronic image capture would, for example, use something like Adobe Acrobat.
      ii. Some format that can be loaded into Microsoft Excel.

2. Any supplemental accounting ledgers showing all funds or financial obligations held by ICANN but not listed in the General Ledger. This would include, but is not limited to, accounting ledgers pertaining to entities such as IANA, the Domain Name Supporting Organization (DNSO), and the Government Advisory Committee (GAC).

3. With regard to employee hiring and employee policies:
   a. The corporate employee handbook, if any.
   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.)

Toward the end of the letter, Auerbach specifically stated that "It is my intention to exercise my right to make copies and to take them to my offices for examination." (Auerbach Decl. ¶ 26 and Ex. 4.)

Lynn responded by e-mailed letter dated October 5, 2001. Lynn proposed dates when Auerbach could inspect the requested materials at ICANN's office, but he also imposed additional restrictions that are beyond both the law and the Inspection Procedures (Exhibit 20).
Lynn required that, to the extent there were any concerns about the confidentiality of a document, Auerbach make a written inquiry to Lynn about same, and that Auerbach maintain the utmost confidentiality until Lynn responded. In other words, Lynn was reserving to himself the right to determine if any particular document, or even all the requested documents, were confidential;

Lynn allowed Auerbach to be accompanied by Auerbach's attorney or other advisor, but reserved to himself the right to veto the person(s) selected;

Lynn determined that, though Auerbach would be allowed to inspect paper copies of the records requested, Auerbach would not be given electronic copies as requested of at least some of them;

Lynn required Auerbach to sign and return a copy of his letter as a prior condition of Auerbach's inspection;

Finally, only after Auerbach had inspected the records could he designate those for which he wanted copies made. His "request" for copies then would be considered by Lynn, with the advice of Touton and in consultation with the Audit Committee, at which point copies of the records might or might not be provided; this despite the clear statement in Auerbach's September 23 letter that he wanted copies of everything.³

Lynn concluded the letter by stating that Auerbach's refusal to countersign the letter would be "inconsistent with the Procedures endorsed by the Board's Audit Committee" and that if Auerbach believed that anything in Lynn's letter was unreasonable, Auerbach should refer the matter to the Audit Committee. (Auerbach Decl. ¶ 27 and Ex. 25.) As set forth towards the end of the

³Auerbach lives in Santa Cruz and works near his home. ICANN is located in Marina Del Rey, more than 300 miles away. The records he requested were fairly extensive. It is not unreasonable for Auerbach to want to actually study the records, rather than to just skim through them at ICANN's office.
Introduction, this October 5 letter from Lynn, along with the Inspection Procedures, are the writings which the Court must construe.

By letter e-mailed to Lynn on October 15, 2001, Auerbach responded to Lynn's October 5 letter. He declined to sign Lynn's letter for the reasons stated there and in his Declaration accompanying this motion. On October 21, 2001, Lynn responded by e-mailing Auerbach a four-page letter, including multiple case citations, setting forth "the corporation's legal position on these points." Auerbach responded by letter e-mailed on October 27, 2001. Lynn responded by letter e-mailed on October 31, 2001. (Auerbach Decl. ¶ 31 and Exs 26 - 29.)

It is clear from reading those letters that there were (and are) fundamental disagreements between Lynn and Auerbach. Yet, in an attempt to go forward, Auerbach was willing to compromise on some (but not all) of his positions. Lynn stresses, for example, the duties which a Director owes to a corporation. Auerbach has always acknowledged those duties. Lynn says that ICANN never refused to permit Auerbach's inspection. But the simple fact is that for more than nine months Auerbach was blocked from inspection because ICANN claimed it had no procedures for him to make an inspection and that he had to wait for ICANN to create such procedures. After nine months of waiting, and once those procedures were revealed, Auerbach discovered that his ability to inspect was made dependent on his signing an agreement with ICANN in which Lynn imposed substantive limitations and restrictions as set forth in his October 5 letter (Exhibit 25). As far as compromises, Auerbach did not believe that ICANN could force him to disclose the names of his advisors and obtain ICANN's approval of those advisors (one of the additional terms imposed by Lynn's October 5 letter), but Auerbach did so anyway in his October 27 letter (Exhibit 28). Most importantly, though Auerbach had stated repeatedly to Lynn and others that it was not his intent to publicly disclose the corporate records, Lynn remained fearful, without foundation, that Auerbach would do so. Consequently, in his October 27 letter, Auerbach suggested the following compromise that he did not believe was required by law:

I will undertake the following as a matter of courtesy: I am willing to give ICANN seven calendar days advance written or e-mail notice of any disclosure of data that I learn solely from the corporate materials I have inspected to parties beyond my inner
circle of advisors. (My inner circle consists of my attorney, Curtis Karnow of Sonnenschein Nath & Rosenthal, Sheila Joyce Kellerman, CPA, and the members and employees of their respective firms.) 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.

Lynn dismissed Auerbach’s offer in his October 31 letter, even though, in that same letter, he wrote that "[y]ou have stated that your actions are governed by your duty of loyalty to the corporation, and of course we accept your representation of this at face value." (Auerbach Decl. ¶ 32.)

In his October 21 letter (Exhibit 27), Lynn said that the matter would be referred to the Board’s Audit Committee if Auerbach did not wish to proceed in accordance with Lynn's October 5 letter. As Auerbach declined to do so, the matter apparently was referred to the Audit Committee, though Auerbach was given no notice of when the committee would meet and was given no opportunity to present his position to the committee.

On November 17, 2001, Phil Davidson, at the time the Chair of the Audit Committee, sent an e-mail to Auerbach stating that the committee had met on November 15, 2001. (Auerbach Decl. ¶ 33 and Ex. 30.) In that e-mail, Davidson wrote that "[t]he material considered was the e-mail and letter attachments sent by the CEO [Lynn] to Director Karl Auerbach on 22 October 2001. This means, among other things, that the Audit Committee did not have Auerbach's October 27, 2001 e-mailed letter (Exhibit 28), in which Auerbach proposed the compromise of giving seven days notice of any disclosures that might be contemplated. Without the benefit of knowledge of Auerbach's proposal, Davidson wrote that the committee believed that Lynn's October 5, 2001 letter provided reasonable safeguards for the confidentiality of ICANN information, and that the committee urged Auerbach to reconsider his refusal to accept the terms of Lynn's October 5 letter.
II.

ARGUMENT

A. The Right of a Director to Inspect and Copy Under Corporations Code § 6334 is Close to Absolute.

As a California Nonprofit Public Benefit Corporation, ICANN is governed by Corporations Code § 6334, which provides that:

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.

The reason why Directors have such expansive rights is set forth in Corporations Code § 5210:

"...the activities and affairs of a corporation shall be conducted and all corporate powers shall be exercised by or under the direction of the board. The board may delegate the management of the activities of the corporation to any person or persons, management company, or committee however composed, provided that the activities and affairs of the corporation shall be managed and all corporate powers shall be exercised under the ultimate direction of the board. (Emphasis added.)"

We assume that the Legislature knew what it was doing when it included the word "absolute" in § 6334 and when it did not include other limiting language. Compare, for example, Corporations Code § 9513, applicable to Nonprofit Religious Corporations, which states:

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 of which such person is a director for a purpose reasonably related to such person's interests as a director.

A Director of a Nonprofit Public Benefit Corporation has an "absolute right" to inspect and copy, while a Director of a Nonprofit Religious Corporation only has a "right" to inspect and copy.

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4We are aware that, in its First Amended Answer to the Petition, ICANN has made wild and speculative allegations about a number of matters, including the timing of this action as it related to a recent ICANN Board meeting. ICANN can not rely on its pleadings to oppose a summary judgment motion, and it is not Auerbach's burden to negate in his moving papers any alleged defenses raised by the Amended Answer. Code of Civil Procedure § 437c(o). If ICANN raises those matters in a manner which requires response, we will do so accordingly.
Further, a Director of a Nonprofit Religious Corporation must show that the request to inspect and copy is "for a purpose reasonably related to such person's interests as a director," but a Director of a Nonprofit Public Benefit Corporation is not required to make such a showing.¹

§ 6334 also should be contrasted to § 6333, which governs the inspection rights that the members of a Nonprofit Public Benefit Corporation have with respect to the corporation's accounting records. It provides:

The accounting books and records and minutes of proceedings of the members and the board and committees of the board shall be open to inspection upon the written demand on the corporation of any member at any reasonable time, for a purpose reasonably related to such person's interests as a member.

Here again, the "reasonably related to such person's interests" language appears, as in § 9513, but not in § 6334. The Legislature is telling us something, and part of the focus of this case is to ascertain what is the message.

Despite the differences in these code sections, we recognize that a Director's rights under § 6334 are not literally absolute. First, the statute itself contains the "reasonable time" limitation, about which the parties do not seem to disagree. Second, however, as with any statute, it must yield to Constitutional rights, and may yield to other statutes in conflict with it.

For example, in Chantiles v. Lake Forest II Master Homeowners Ass'n, (1995) 37 Cal.App.4th 914, a Director of a homeowners association requested to inspect the ballots of the most recent election of Board members.⁶ Citing the privacy rights of the individual association members, the Association refused, and Chantiles filed a writ of mandate petition. The trial court found that the ballots were the type of record that a Director of the association had a right to inspect, but that the inspection right had to be balanced against the reasonable expectations of privacy of the association

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¹Both sections were enacted in the same legislation in 1978, effective January 1, 1980, though § 9513 subsequently was amended.

⁶There are no cases construing Corporations Code § 6334. Thus, to a point, we look to cases construing similar statutes applicable to corporations other than Nonprofit Public Benefit Corporations. Chantiles construed Corporations Code § 8334, which is worded identically to § 6334.
members, 120 of whom submitted Declarations in opposition to Chantiles' petition. The trial court declined to allow Chantiles to inspect the ballots, but allowed his attorney to do so under certain conditions. Chantiles appealed, and the Court of Appeal affirmed.

The Court found that the individual owners had a right of privacy to their ballots under Article I, Section 1 of the California Constitution. The Court further found that a Director's statutory inspection rights needed to be balanced against the Constitutional privacy right. Finally, the Court held that the trial court struck the proper balance by denying Chantiles the right to inspect the ballots personally, but allowing his attorney to inspect them, without revealing the names of who voted for whom. 37 Cal.App.4th at 926. The decision is no surprise given the sanctity that free countries place on the privacy of the ballot box.

In *dicta*, the Court gave other examples of where a Director's inspection rights might collide with the Constitutional right of privacy. At 37 Cal.App.4th 925, the Court stated:

> We reject Chantiles's assertion because section 8334 gives him an "absolute right" to inspect, this right need not yield to any other right, not even a constitutional right. As Sproul & Rosenberry note, "[Section 8334's] broad and unqualified statement of a director's inspection rights can present difficult ethical and legal issues.... [For] example, what if a director who ran for office on a platform critical of the present general manager's conduct and salary demands the right to inspect the general manager's personnel file and to disclose its contents to the members ...? [¶][T]he manager's constitutional right of privacy under [California Constitution, article I, section 1] may preempt a director's general rights of inspection [...]."

Havlicek v. Coast-to-Coast Analytical Services, Inc. (1995) 39 Cal.App.4th 1844 is another instructive case. After disposing of a choice of law issue, the Court analyzed Corporations Code § 1602, the analog to § 6334 in the General Corporation Law. At 39 Cal.App.4th 1852, it stated:

> The directors of a corporation owe a fiduciary duty to the corporation and its shareholders. Section 1602 represents a legislative judgment that directors are better able to discharge those duties if they have free access to information concerning the

7"All people are by nature free and independent and have inalienable rights. Among these are enjoying and defending life and liberty, acquiring, possessing, and protecting property, and pursuing and obtaining safety, happiness, and privacy."
corporation. Thus, California has a public policy favoring broad inspection rights for the directors. The Legislature has also declared that it is the public policy of California to apply the same standards to foreign corporations whose principal executive offices are located in California. We may not ignore that declaration of public policy. (Citations omitted.)

The issue in Havlicek was whether corporate directors who might use the corporate records to open a competing business could be denied access to the records. The trial court said they could be denied, but the Court of Appeal reversed. In the only case in addition to Chantiles that speaks meaningfully to a director's absolute right to inspect and copy, the Court stated (39 Cal.App.4th at 185-56):

The trial court must apply California law but is not obligated to grant appellants unfettered access to every document ever created by CCAS. Instead, the trial court may impose "just and proper conditions" upon appellant's otherwise "absolute" inspection rights. We admit that the Legislature's choice of the word, "absolute," in section 1602 does give us pause. But one hypothetical illustrates that "absolute" cannot mean "absolute." A disgruntled director unambiguously announces his or her intention to violate his or her fiduciary duties to the corporation and the shareholders by using inspection rights to learn trade secrets, gain access to confidential customer lists, and compete with the corporation. In this situation, does the Legislature want the judiciary to come to the aid of the disgruntled director, enforce the "absolute right" to inspect and help the director commit a tort against the corporation? No.

Auerbach, of course, has made no such announcement. At 39 Cal.App.4th 1856, the Court continued, in language most important to what the parties need to do in this case:

The "absolute right" to inspect documents is the general rule in California. However, section 1602 must be read in pari materia with section 1603. The language of section 1603, subdivision (a) is expansive. It is not expressly limited to an inspection request by a shareholder. Being a remedial statute, it must be liberally construed. Where the corporation determines that an unfettered inspection will result in a tort against the corporation, it may decline the request for inspection. In this situation, "...directors can enforce their inspection rights by court action.... [§ 1603]."

Upon a director's request for inspection pursuant to section 1603 in the superior court, the corporation must demonstrate, by evidentiary showing, that a protective order is necessary to prevent a tort against the corporation. Whether there are other situations where a director's inspection rights may be curtailed is not before us and we

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8We note, however, that directors of a nonprofit public benefit corporation owe fiduciary duties to more than just the corporation and its members. See Advising California Nonprofit Corporations, 2d Ed. (Cont.Ed.Bar 2001) § 8.100, pp. 385-86 ("Thus, the fiduciary duties of a public benefit corporation's directors are not only to the members but also to the general public.") See also paragraph 4 of ICANN's Articles of Incorporation (Auerbach Decl., Ex 1): "The Corporation shall operate for the benefit of the Internet community as a whole ...."
We await ICANN's evidence as we recall Lynn's words in his October 31, 2001 letter to Auerbach (Auerbach Decl. Ex. 29): "You have stated that your actions are governed by your duty of loyalty to the corporation, and of course we accept your representation of this at face value."

Part of the reason for that broad policy is set forth in Corporations Code § 5231(a):

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

9We await ICANN's evidence as we recall Lynn's words in his October 31, 2001 letter to Auerbach (Auerbach Decl. Ex. 29): "You have stated that your actions are governed by your duty of loyalty to the corporation, and of course we accept your representation of this at face value."

10 Part of the reason for that broad policy is set forth in Corporations Code § 5231(a):

11 Based on Lynn's October 21, 2001 letter to Auerbach (Auerbach Decl. Ex. 27), we anticipate that ICANN may cite National Football League Properties v. Superior Court (1998) 65 Cal.App.4th 100 for the proposition that the absolute right also does not allow for inspection of attorney-client privileged documents. However, in that case, the parties already were in litigation when the request for records concerning the litigation was made. More important, the case simply did not involve a request by a corporate director. "Most importantly, the discovery dispute between NFLP and the Raiders cannot be resolved by looking to a director's right to inspect corporate records. No NFLP director is a party to this dispute." Id. at 109.

B. Article V, Section 21 of ICANN's Bylaws Does not Conflict With the Meaning of Section § 6334.

Article V, Section 21 provides:

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. (Emphasis added.)

Though Section 21 does not contain the word "absolute," it accomplishes much the same by making it explicit, as does § 6334, that the right to inspect and copy applies to books and records of every kind, not just to certain kinds or to those which the ICANN President or Audit Committee agrees. That being the case, the second sentence regarding procedures cannot reasonably be construed to limit or place any prior conditions on a director's right to inspect corporate records, and cannot reasonably be construed to limit or place any prior condition on a director's right to copy corporate records, save only for the exceptional circumstances set forth in cases such as Chantiles and Havlicek.12 By speaking in terms of reasonable procedures to prevent disclosure, it presumes that the Director already has the pertinent corporate records. The "reasonable procedures" simply are not intended, according to the plain reading of the Section, to limit or put conditions on a Director's right to inspect or copy.

12 Of course, if Article V, Section 21 did conflict with § 6334, necessarily the statute would take precedence over the Bylaw. Nothing in the nonprofit public benefit corporation law says that a corporation may by Bylaw or otherwise abrogate the rights conferred by § 6334.
C. The Inspection Procedures Conflict with § 6334 and with Article V, Section 21 of ICANN's Bylaws.

Simply by setting forth the facts in Part IC, supra, we have made much of the argument. Except under rare circumstances, which must be proven, not just baldly asserted, a nonprofit public benefit corporation cannot deny or put prior conditions on a director's right to inspect and copy the corporate records. However, that is exactly what the Inspection Procedures (Exhibit 20) do.

Paragraph 3 of the Inspection Procedures specifically states that it includes "... restrictions on access to requested records," even though both Corporations Code § 6334 and Article V, Section 21 of ICANN's Bylaws (quoted in paragraph 1 of the Inspection Procedures) are explicit that a Director has a right of access to "all books, records and documents of every kind ..." subject only to reasonable time limitations. Both the title and text of paragraph 5 of the Inspection Procedures make the conflict between the statute and the Inspection Procedures even more clear. Paragraph 5, entitled "Restrictions on Access or Use," provides in part that "[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."

Paragraph 6 of the Inspection Procedures provides for a referral of the matter to the Board's Audit Committee if there is a disagreement between the CEO and the requesting Director, but gives the requesting Director no right to appear before the Audit Committee to present his or her case, nor even notice of when the Audit Committee will consider the matter. Finally, paragraph 6 permits (but does not require) an appeal to the full Board if the requesting Director disagrees with the Audit Committee's decision, and the Board "... shall make a final and binding decision concerning the production of records involved ...." (Emphasis added.) That phrase would preclude the requesting Director from seeking judicial relief should the decision of the Board be adverse to the requesting
Director. There is no severability clause in the Inspection Procedures, and the idea that a corporation can deprive an aggrieved director of judicial access is utterly at odds with California law.

In short, the Inspection Procedures place both substantive and procedural restrictions on the Director's right to inspect and copy records; despite the fact that neither the statute nor the Bylaws allow for anything other than reasonable procedures to insure non-disclosure of specific items after the Director has obtained them, save only for exceptional and proven circumstances involving matters such as constitutional rights or a tort against the corporation.

ICANN's Board never has adopted or approved the Inspection Procedures (Auerbach Decl. ¶ 23), but we submit that their failure to do so is irrelevant. Even if the Inspection Procedures had been approved by the Board, they run afoul of both § 6334 and ICANN's own Bylaws.

D. Lynn's October 5, 2001 Letter Runs Further Afoul of § 6334 and of Article V, Section 21 of ICANN's Bylaws.

We have earlier set forth the problems with Lynn's October 5, 2001 letter (Auerbach Decl. Ex. 25). We reiterate here only the two most significant ones: (1) Lynn required that, to the extent there were any concerns about the confidentiality of a document, Auerbach make a written inquiry to Lynn about same, and that Auerbach maintain the utmost confidentiality until Lynn responded. In other words, Lynn was reserving to himself the right to determine if any particular document, or even all the requested documents, were confidential; and (2) only after Auerbach had inspected the records could he designate those for which he wanted copies made. His "request" for copies then would be considered by Lynn, with the advice of Touton and in consultation with the Audit Committee, at which point copies of the records might or might not be provided; this despite the clear statement in Auerbach's September 23 letter that he wanted copies of everything.

Clearly, these restrictions violate the law and the meaning of the relevant Bylaw provision, as we have argued already. A corporation's ability to impose a priori restrictions is itself highly restricted, and surely is not as broad as are these restrictions.

Further, Lynn's letter did not even follow the Inspection Procedures. Those procedures provide, among other things, that Lynn "shall advise the requesting Director of the issues which
require the restrictions and the nature of any proposed restrictions on access or use." There is an obvious and good reason for such a provision. Lynn already has access to the records in question, he is better equipped to articulate why there may be a problem with a particular requested record. By explaining the issues, Lynn would have fostered a possible meeting of the minds, a possible agreement with Auerbach that certain records should be handled in a particularly sensitive manner.\footnote{Auerbach demonstrated his willingness to compromise, if only to attempt to move forward. See Auerbach Decl. ¶ 32 and Ex. 28.}

Additionally, the law speaks of denying director access only to specific records, based on good reason.

But Lynn ignored all of that, he simply invoked the mantra, without explanation, that "... these materials are confidential, and their release or disclosure to anyone other than an officer or Director of ICANN has not been approved by the Board of Directors of ICANN."\footnote{The quote is from paragraph 4 of Lynn's October 5 letter, the same paragraph in which Lynn acknowledges that part of Auerbach's request was for the Chart of Accounts. Though some financial records may be confidential, we cannot possibly see how the Chart of Accounts would be, see Auerbach Decl. ¶ 29. If one assumes that ICANN really does want to accommodate Auerbach but just does not understand the law, then Lynn's coarse-grained approach helps no one.}

CONCLUSION

We return to the four questions of law we posed in the Introduction.

"First, what are the nature and extent of Auerbach's rights, as a Director of a California Nonprofit Public Benefit Corporation, to inspect and copy the records of that corporation?"

Auerbach's rights to inspect and copy ICANN's corporate records are absolute, unless ICANN can invoke, with admissible evidence, the exceptional circumstances concerning constitutional privacy rights or a tort against ICANN as set forth in Havlicek and Chantiles.

"Second, if the corporation has the right to impose restrictions on Auerbach's right (other than reasonable time restrictions, about which the parties do not disagree), would ICANN's Inspection
Procedures (Exhibit 20) be in accordance with the law, assuming that they had been adopted or approved by the Board?"

   No. ICANN has no such generalized right, and its Inspection Procedures run afoul both of Corporations Code § 6334 and of ICANN's own Bylaws.

   "Third, given that the Inspection Procedures have not been adopted or approved by the Board, are they valid nonetheless?"

   No, for the reasons stated. They would be invalid even if they had been adopted or approved.

   "Fourth and finally, are the additional restrictions set forth in Lynn's October 5, 2001 letter (Exhibit 25) lawful and binding on Auerbach?"

   Clearly not, they go beyond the scope of even the Inspection Procedures, let alone § 6334 and ICANN's own Bylaws.

   One might conclude that ICANN has been drawing this out as long as possible, perhaps in the hope that, literally, Auerbach will go away – his two-year term as a Director ends in October of this year. But whatever motives ICANN may have, Auerbach has the right to inspect and copy the corporate records, and to do so now.

   The questions we raise are ones of law, not fact. This Court should grant the motion, and in accordance with Code of Civil Procedure § 1085, should issue its peremptory writ ordering and directing ICANN to immediately make available to Auerbach for inspection and copying all of the records which he has requested, and which he may request.

Dated: May 21, 2002

Respectfully submitted,

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