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9

10 SUPERIOR COURT FOR THE STATE OF CALIFORNIA  
11 IN AND FOR THE COUNTY OF LOS ANGELES  
12

13	KARL AUERBACH, an individual,	)	Case No.: BS 074771
14		)	
14	Petitioner,	)	PETITIONER KARL AUERBACH'S REPLY
15		)	BRIEF IN SUPPORT OF HIS MOTION FOR
15	v.	)	SUMMARY JUDGMENT & IN
16	INTERNET CORPORATION FOR	)	OPPOSITION TO RESPONDENT ICANN'S
16		)	MOTION FOR SUMMARY JUDGMENT
17	ASSIGNED NAMES AND NUMBERS, a	)	[THE HONORABLE DZINTRA JANAVS]
17		)	
18	California Nonprofit Public Benefit	)	DATE: July 29, 2002
18		)	TIME: 9:30 a.m.
19	Corporation,	)	DEPARTMENT: 85
19		)	
20	Respondent	)	
20		)	
21	<hr/>		

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1  
2 **Introduction**

3 Plaintiff Karl Auerbach was publicly elected to the ICANN Board of Directors more than  
4 18 months ago; his term expires in roughly three months.<sup>1</sup> For the entire length of his term,  
5 Auerbach has sought to exercise his right under California Corporations Code § 6334 to inspect  
6 and copy the books and records of the corporation. To date ICANN has allowed him access to only  
7 one page of its internal records -- concerning staff international travel.

8 ICANN first claimed that it needed to promulgate a policy concerning director access to  
9 corporate books and records. It took nine months to do so. Auerbach First Declaration, ¶19. Then,  
10 ICANN management required Auerbach to contractually bind himself to the policy -- to give up his  
11 statutory right before allowing him access. On top of that it also outlined a separate process for  
12 allowing him to copy any records. Auerbach First Decl. ¶ 27, Exh. 25. Auerbach at first tried to  
13 convince ICANN to agree to a compromise (Auerbach First Decl. ¶32, Exh. 28), but ICANN  
14 management refused and apparently sent his request to a Board committee for affirmance without  
15 mentioning his proposed compromise. Auerbach First Decl. ¶35, Exh. 30. When it became  
16 obvious that ICANN was trying to wait out Auerbach's term as a director, he brought this action.

17 We should be extremely clear about what ICANN's conditions do. In plain terms, they  
18 require Auerbach to forfeit his statutory right to inspect and copy, and instead to grant ICANN's  
19 management broad, nonspecific discretion to withhold access and prevent copying of any of  
20 ICANN's books and records if the CEO asserts, accurately or not, that compliance with the request  
21 involves "issues of confidentiality, privilege or privacy." Auerbach First Decl., Exhibit 20.  
22 Management's decision to deny inspection is subject to appeal first to ICANN's Audit Committee  
23 and then to a "final and binding" decision of the full Board. And the conditions in the policy are not  
24 the end of ICANN's conditions. In a separate letter ICANN's CEO added, among other provisions,  
25 a separate process for Auerbach to "request" copies of records. Auerbach First Decl., Exh. 25.

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<sup>1</sup> ICANN recently ensured that neither Mr. Auerbach nor any other publicly elected individual will be allowed to sit on the ICANN Board after his term expires by eliminating the public electoral process at its June, 2002 meeting in Bucharest. Auerbach Second Declaration ¶3.

1 It is therefore more than a little ironic that ICANN portrays Auerbach as claiming the sole  
2 discretion to decide what records are and are not confidential. For 18 months ICANN has  
3 exercised *its* sole discretion to prevent Auerbach from exercising his statutory right to inspect and  
4 copy ICANN's records, based solely on its apparent belief that Auerbach will thereafter violate his  
5 fiduciary duties as an ICANN director. Compounding the irony — or perhaps adding insult to  
6 injury — ICANN's attempt to portray Auerbach as a "rogue" director and danger to ICANN rests  
7 almost entirely on his vocal, public and candid calls for thoroughgoing reform of ICANN.  
8 Auerbach's public statements, ICANN insists, demonstrate that he cannot be trusted.

9 ICANN's arguments are, in a word, disingenuous. ICANN has presented no evidence that  
10 Auerbach's beliefs about the need to reform ICANN in any way implicate a corporate director's  
11 duty of loyalty. This fiduciary duty has traditionally prohibited director activities such as  
12 usurpation of corporate opportunity and self-dealing. Nothing in this record shows or can show  
13 that Auerbach has acted to further his personal interest, financial or otherwise.

14 ICANN argues that because Auerbach has a different, even radical, view of how ICANN  
15 should work and operate, he does not have ICANN's best interests at heart. ICANN is confusing  
16 two very different things: the interests of management and other Board members as ICANN is  
17 presently constituted, and the interests that ICANN was originally created to serve. Put another  
18 way, ICANN seems to believe that Auerbach has a duty to protect today's ICANN even if he  
19 believes that today's ICANN is not carrying out its public-interest mission.

20 But Auerbach is not alone in calling for massive reform. ICANN's own President and CEO,  
21 Stuart Lynn, has issued a plan to radically change almost every aspect of ICANN, appropriately  
22 entitled: "ICANN: The Case For Reform." In it he states: "[T]o put it bluntly: On its present  
23 course, ICANN cannot accomplish its assigned mission. A new path – a new and reformed  
24 structure – is required."<sup>2</sup> Testimony recently submitted to the U.S. Senate Committee on  
25 Commerce, Science and Transportation amounts to a virtual Greek chorus calling for major

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<sup>2</sup> <<http://www.icann.org/general/lynn-reform-proposal-24feb02.htm>>

1 institutional reform.<sup>3</sup>

2 Moreover, Auerbach’s specific reform theme — the need for, and the present lack of,  
3 openness and accountability to Internet stakeholders— is no mere idiosyncrasy.<sup>4</sup> On June 12,  
4 2002, the General Accounting Office issued a report entitled: *Internet Management: Limited*  
5 *Progress on Privatization Project Makes Outcome Uncertain*, GAO-02-805T (June 12, 2002)  
6 (Request for Judicial Notice, Exh. A), noting that ICANN has failed to "represent the globally and  
7 functionally diverse group of Internet stakeholders within its decision-making processes." *Id.*, at 2.  
8 Similarly, one of ICANN’s major corporate supporters, Verisign, testified that in its regulation of  
9 gTLD services (top-level domains such as .com, .edu, .org): “ICANN has failed to provide due  
10 process. . . . Perhaps the worst consequence of the absence of due process. . . is the frequency with  
11 which arbitrary or inconsistent regulatory decisions are made.” Verisign went on to say “ICANN  
12 has placed an enormous accountability burden on itself and generated great pressure for the public  
13 election of its Board.” Request for Judicial Notice, Exh. B. Finally, after the Senate hearing,  
14 several key members of the House of Representatives sent a letter to Secretary of Commerce  
15 Donald Evans echoing these concerns:

16 One of ICANN’s greatest obstacles has been its complete lack of clearly articulated decision-  
17 making processes. Any reform of ICANN must address this lack of accountability. As a non-  
18 governmental body responsible for managing a global Internet resource, ICANN's operating  
19 procedures must be transparent to any and all interested parties.

20 Tauzin, Dingell, Upton and Markey letter, Request for Judicial Notice, Exh. C.

21 This Court need not be drawn into the complex debate about how ICANN should be  
22 reformed, which is not at issue here. The point is simply that the undisputed existence of this  
23 debate, including widespread calls for accountability and openness, provides the proper context in  
24 which to view Auerbach’s request to inspect and copy ICANN’s corporate records. It was no

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25 <sup>3</sup> < <http://commerce.senate.gov/hearings/hearings0202.htm>> (links to all statements before the Sub-Committee).

<sup>4</sup> See Auerbach Congressional Testimony, Auerbach 2nd Declaration, para. 4; Exh. 31.

1 secret that he intended to seek access to ICANN’s records in pursuit of his reform agenda. He  
2 campaigned for and was elected to his position as an ICANN director on the basis of his sincere  
3 belief that ICANN must change. He has no hidden agenda to “harm” ICANN; he has a *public*  
4 agenda to reform ICANN so that it better serves the public interest. Auerbach 2nd Decl., ¶6.

5 Thus, the key legal question here is straightforward: can a corporate director’s highly public  
6 agenda to reform a nonprofit public benefit corporation be grounds for the corporation’s requiring  
7 that he bind himself contractually to broad, vague conditions that eviscerate his statutory right to  
8 inspect and copy corporate records?

9 **Argument**

10 **I. ICANN may not impose conditions on Auerbach’s statutory rights to inspect and copy**  
11 **corporate records.**

12 As explained in our opening memorandum, Auerbach has an “absolute” statutory right to  
13 inspect and copy ICANN’s corporate records. Corp. Code § 6334. This right arises from his  
14 fiduciary duty to the corporation. As the court in *Havlicek v. Coast to Coast Analytical Services*  
15 ((1995) 39 Cal.App.4th 1844) observed, the right of a director to inspect and copy books and  
16 records of a corporation "represents a legislative judgment that directors are better able to discharge  
17 those duties if they have free access to information concerning the corporation." *Id.* at 1851.  
18 ICANN, however, has sought to limit that statutory right in two ways: first, by establishing  
19 restrictive inspection procedures as a condition of inspection or copying; second, by imposing extra  
20 conditions on Auerbach’s rights. ICANN’s actions are both unlawful and unreasonable. They are  
21 unlawful because only a court may impose “just and proper” conditions on Auerbach’s access, and  
22 they are unreasonable because they are burdensome, unnecessary, unfounded in caselaw, and  
23 frustrate the statutory purpose of enabling directors to provide meaningful corporate oversight.

24 **A. Only a court may condition a director’s access rights.**

25 While the term “absolute” cannot be read literally, *Chantiles v. Lake Forest II Master*  
*Homeowners Ass’n* ((1995) 37 Cal.App.4th 914, 925), it also cannot be read out of the statute.  
Properly understood, Auerbach’s statutory right to inspect and copy can only be limited by a court.



1 Corp. Code § 6336(a) provides that *a court* may impose “just and proper” conditions on a  
2 director’s right to inspect and copy. Moreover, courts have imposed such conditions only in two  
3 narrow situations: first, when the director’s “absolute” right results in harm to the constitutional  
4 right to privacy (*Chantiles*, 37 Cal.App.4th at 925-926); second, when “the corporation []  
5 demonstrate[s], by evidentiary showing, that a protective order is necessary to prevent a tort against  
6 the corporation.” *Havlicek*, 39 Cal.App.4th at 1856.

7 For its part, ICANN has offered no authority for the proposition that it may condition  
8 Auerbach’s statutory right of access. ICANN cites *Chantiles* and *Havlicek* in support, but in both  
9 of these cases the conditions were created and imposed by a court, not the corporation itself.<sup>5</sup>  
10 Taken together, *Chantiles*, *Havlicek* and the statutory text of §6336(a) make clear one crucial point:  
11 only a court has the power to impose conditions on Auerbach’s absolute right to inspect and copy.  
12 ICANN does not.

13 The reasons should be obvious. First, § 6334 represents a legislative judgment that a  
14 director can better discharge his or her fiduciary duties to the corporation and the public interest  
15 with unfettered access to information about the corporation. See *Havlicek*, 39 Cal.App.4th at 1852  
16 (“California has a public policy favoring broad inspection rights for the directors.”); *Hoiles v.*  
17 *Superior Court* (1984) 157 Cal.App.3d 1192, 1201, *citations omitted* (“A director is a fiduciary and  
18 in order to meet his obligation he must have access to books and records; indeed, he often has a  
19 duty to consult them”).

20 Second, nonprofit public benefit corporations like ICANN do not have shareholders, who in  
21 the for-profit corporate context provide another check on corporate behavior. For this reason,  
22 members of boards of directors of nonprofit corporations are generally subject to a higher standard  
23 of ethical care in their oversight responsibilities than are directors of for-profit corporations. See

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24 <sup>5</sup>ICANN also cites *NFL Properties, Inc. v. Superior Court of Santa Clara County* (1998) 65  
25 Cal.App.4th 100, but this case is irrelevant because no party seeking access sued in his or her  
capacity as a corporate director. *Id.* at 109-110 (“Mr. LoCasale has not sued the NFLP in his  
capacity as a director”).

1 generally Michael R. Ostrowski, *Nonprofit Board of Directors*, in THE NONPROFIT ORGANIZATION:  
2 ESSENTIAL READINGS II 182-183 (David L. Gies et al. eds., 1990).

3 Third, ICANN is no ordinary nonprofit public benefit corporation. Its core function of  
4 managing the Internet's domain name system, once largely in the hands of the U.S. government, is  
5 at the very least quasi-governmental.<sup>6</sup> There can be no doubt that ICANN has a responsibility to  
6 the public<sup>7</sup> and that ICANN's corporate directors are bound to consider the interests of the public.  
7 *People v. Orange County Charitable Services* (1999) 73 Cal.App.4th 1054, 1074 (assets of  
8 nonprofit charitable corporations "are impressed with a charitable trust") (citation omitted); *Queen*  
9 *of Angels v. Younger* (1977) 66 Cal.App.3d 359, 365.

10 Fourth, ICANN's history and today's headlines make abundantly clear that the public  
11 interest is not well served by shielding corporate management and financial records from Board  
12 member scrutiny. Recent revelations of accounting irregularities at major corporations like Enron  
13 and Worldcom strongly suggest the need for serious scrutiny of managerial decision-making by  
14 corporate directors. This need is significant for nonprofit corporations as well. *See, e.g.,* Harvey  
15 Goldschmid, *The Fiduciary Duties of Nonprofit Directors and Officers: Paradoxes, Problems, and*  
16 *Proposed Reforms* (1998) 23 J. CORP. L. 631, 633-635 (discussing failures of nonprofit corporate  
17 governance relating to United Way of America and Adelphi University).

18 **B. There is no empirical basis for conditioning Auerbach's rights to access  
19 ICANN's corporate records.**

20 First, ICANN has presented no facts sufficient for this Court to find that ICANN's interest  
21 in confidentiality outweighs Auerbach's absolute right to inspect and copy the records. ICANN

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24 <sup>6</sup> See Michael Fromkin, *Wrong Turn in Cyberspace: Using ICANN to Route Around the APA and*  
25 *the Constitution* (2000) 50 DUKE L.J. 17, 113-125 (arguing that ICANN is "state actor").

<sup>7</sup>ICANN "shall operate for the benefit of the Internet community as a whole." ICANN Articles of  
Incorporation, ¶ 4 (Auerbach First Decl., Ex. 1).

1 has simply asserted that CEO Stuart Lynn determined that all of the withheld records “necessarily  
2 involved issues of privacy, confidentiality, and privilege.” ICANN Opening Brief, at 17.<sup>8</sup>

3 ICANN’s position sharply contrasts with that in the most relevant case, *Chantiles*, where  
4 the defendant homeowners’ association showed in detail that the director’s intended inspection of  
5 member homeowners’ secret ballots implicated individual privacy. The courts in *Chantiles*  
6 carefully analyzed the strength of the privacy rights at stake and the balance between the director’s  
7 inspection right and those privacy rights. *Id.* at 923-926. For instance, the appeals court  
8 specifically noted that the homeowners’ association had submitted declarations from 120 members  
9 stating they believed their ballots were private and they did not want them divulged, and it credited  
10 the trial court’s consideration of the power of homeowners’ associations in their members’  
11 everyday lives. *Id.* at 924. The care with which the *Chantiles* court assessed the competing  
12 interests shows that courts must exercise great care in limiting a director’s access rights. ICANN  
13 has not presented the kinds of evidence that would permit this Court to make a careful, factually  
14 specific judgment.

15 Moreover, ICANN’s nonspecific confidentiality claims are a far cry from the privacy  
16 claims at issue in *Chantiles*, where inspection would directly compromise ballot secrecy. Here,  
17 Auerbach has requested documentation concerning ICANN’s General Ledger, funds, financial  
18 obligations, and relationship with its lawyers. Even if any of these records were in fact confidential  
19 or privileged, ICANN has not shown or argued that divulging them to a Board member would itself  
20 violate privilege or confidentiality. ICANN merely speculates that Auerbach may, after inspection  
21 or copying, disclose or use these records in violation of Auerbach’s own duty of confidentiality to  
22 ICANN. But ICANN has obvious remedies, including the ability to seek a temporary restraining  
23 order or preliminary injunction, should Auerbach violate his duties. *See Hoiles*, 157 Cal.App.3d at  
24

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25 <sup>8</sup> Actually, ICANN's letter to Mr. Auerbach responding specifically to his request does not mention "privacy" as an issue. Auerbach Exhibit 25.

1 1201, *citations omitted* ("If [he] does violate his fiduciary duty in this regard, then the Corporation  
2 has its remedy in the courts").

3 ICANN, in effect, asks this Court to endorse procedural conditions that give ICANN the  
4 sole discretion to determine confidentiality and withhold documents on that basis in the first  
5 instance, without any meaningful judicial review. ICANN's position has no support in the  
6 caselaw.

7 The only other possible justification for conditioning Auerbach's rights to access the  
8 records he seeks is if ICANN must prevent Auerbach from committing a tort against ICANN.  
9 Here again, the record is inadequate for such a finding. Like *Chantiles*, *Havlicek* does not support  
10 imposing any conditions on Auerbach's right to inspect and copy absent meaningful judicial  
11 scrutiny of evidence. Rather, if the corporation denies the director's right, it must demonstrate "by  
12 evidentiary showing" that a protective order is "necessary to prevent a tort against the corporation."  
13 *Havlicek*, 39 Cal.App.4th at

14  
15 1856; *id.* at 1855 ("A disgruntled director unambiguously announces his or her intention to  
16 violate his or her fiduciary duties . . . by using inspection rights to learn trade secrets, gain access to  
17 confidential customer lists, and compete with the corporation").

18 If we ignore the rhetoric in ICANN's papers, we find no evidence either that Auerbach will  
19 commit a tort against ICANN or that conditions are "necessary" to prevent such a tort.<sup>9</sup> Auerbach  
20 undoubtedly wishes to reform ICANN, and his vision of reform entails dramatic change in the  
21 organization. *See e.g.* Auerbach 2nd Decl ¶4; Exh. 31 (Auerbach Senate Testimony). But seeking  
22 to reform ICANN, even along clearly different lines from that of ICANN management and other  
23 ICANN directors, does not remotely resemble the kind of conduct noted in *Havlicek*.

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24 <sup>9</sup> ICANN's claim that the timing of the filing of this lawsuit provides evidence of the nefarious  
25 "real motive" of Mr. Auerbach is plainly irrelevant. Objections to Evidence ¶7. Yet in truth, the  
timing of this Complaint had nothing to do with the votes at the Accra meeting. Auerbach  
Declaration, ¶ 8.

1 ICANN claims that Auerbach's goal in seeking these records is "not to help the  
2 corporation, but to hurt it." ICANN Brief, at 20-21. ICANN quotes Auerbach's statement that if  
3 he reviews ICANN's records, he may "find things that could well trigger things like the IRS  
4 intermediate sanctions for 501(c)'s. That's a big hammer against a corporation and its board  
5 members." *Id.* at 21 (citing Touton Decl., Ex. 3). Here again, there is no tort against ICANN.  
6 Indeed, ICANN in effect criticizes Auerbach for wanting to find out if ICANN has acted  
7 unlawfully. But if ICANN has violated the tax laws or any other laws, Auerbach may well have a  
8 duty to act. It is telling that ICANN's conception of "help" appears to amount to a director's  
9 ignoring or even concealing possible illegalities.

10 ICANN makes much of Auerbach's statement that he intends to exercise his own discretion  
11 as to the confidentiality of ICANN records. ICANN Brief, at 16 ("subject to my own discretion")  
12 (citing Lynn Decl., Ex. 11 (Oct. 15, 2001 letter from Auerbach to Lynn). ICANN also quotes  
13 Auerbach as having said in his campaign to be elected ICANN director that all of ICANN's  
14 decisions, except for those concerning personnel and litigation, "must be made public." ICANN  
15 Brief, at 24 (citing Touton Decl., Ex. 1 (Platform)).

16 ICANN thus argues that Auerbach cannot be trusted to keep ICANN records confidential.  
17 But Auerbach also stated that his "own discretion" would be "carefully exercised as a Director, and  
18 as defined and limited solely by the laws of California and the United States" and that he would be  
19 "very happy to review and [] seriously consider a statement from corporate management that  
20 describes, with particularity, your concerns for confidentiality in a particular body of information."  
21 Lynn Decl., Ex. 11 (Oct. 15, 2001 letter from Auerbach to Lynn). Auerbach's position is entirely  
22 consistent with California law, which expressly states that a director shall perform his or her duties  
23 "in good faith, in a manner *such director believes* to be in the best interests of the corporation."  
24 Corp. Code § 5231(a) (emphasis added).

25 By contrast, ICANN's arguments that Auerbach will act against ICANN's best interests  
assume that ICANN management has a monopoly on what ICANN's best interests are. The legal  
basis for this position is doubtful. For instance, ICANN cites *Bushnell v. Vis. Corp.* (N.D.Cal.

1 1996) 1996 WL 506914 and *Chantiles* for the proposition that “it is the corporation, and *not* an  
2 individual director, that has the authority to determine what is confidential.” ICANN Brief at 24.  
3 But *Bushnell* simply found that Bushnell could not invoke the director’s right to inspect and copy  
4 because he was not a current director, and that only the corporation could validly waive attorney-  
5 client and work-product privilege. *Bushnell*, 1996 WL 506914, at \*8. *Chantiles* nowhere supports  
6 ICANN's argument; to the contrary, both the trial and appellate courts in *Chantiles* considered  
7 whether the homeowners' association members had a reasonable expectation of privacy in the  
8 specific documents sought, relying on the affidavits submitted and the law (*Chantiles* at 924--25) --  
9 they did not simply accept the corporation's assertions of generalized "issues of privacy,  
10 confidentiality or privilege."

11 Ultimately, ICANN argues only that Auerbach’s request is motivated by an improper  
12 purpose: that he will violate his fiduciary duties by making the information available to others. But  
13 California law contains no proper-purpose requirement. *Havlicek*, 39 Cal.App.4th at 1852. In  
14 *Hoiles, supra*, at 1201, the Court held that a director’s purpose is not improper “because of the  
15 possibility that he may abuse his position as a director and make information available to persons  
16 hostile to [the corporation] or otherwise not entitled to it,” *Id.* at 1201 (*citation omitted*), and noted  
17 that the corporation could seek judicial remedies if the director in fact did so abuse his position. *Id.*  
18 The same is true here. Nor has Auerbach ever stated any intent to abuse his position or violate his  
19 fiduciary duties. Under his proposed compromise, he offered to give ICANN seven days in which  
20 to provide him advice about any proposed disclosure or to seek injunctive relief. Auerbach 1st  
21 Decl., Exhibit 28.

22 **II. The conditions imposed on Auerbach’s rights to inspect and copy ICANN’s corporate**  
23 **records are not reasonable.**

24 Moreover, ICANN’s restrictions on Auerbach’s rights to access to corporate records are not  
25 reasonable and conflict with both Corp. Code § 6334 and ICANN’s own bylaws. § 6334 plainly  
contemplates no restrictions on the director’s right of access other than that of a “reasonable time,”  
which is not in dispute here. ICANN’s procedures go far beyond that.

1 ICANN's procedures are problematic in several ways. First, they expressly empower  
2 ICANN management to restrict a director's inspection of corporate records merely by asserting  
3 "issues of confidentiality, privilege, or privacy." Auerbach Exh. 20. They do not require any  
4 individualized analysis of particular documents or the issues they raise. Second, while the  
5 procedures purport to implement a director's statutory right to inspect records, they are silent on a  
6 director's right to copy. Lynn's Oct. 5, 2001 letter sets forth additional restrictions on Auerbach's  
7 right to copy, requiring him to "request those copies at the conclusion of the inspection," after  
8 which his request would "be given prompt consideration." Auerbach Exh. 25. ICANN's actions  
9 show that it considers itself free to impose conditions on the right to inspect and copy beyond those  
10 set forth in its stated procedures.

11 In sum, nothing in the statutory scheme of Corp. Code § 6334 suggests that a corporation  
12 may effectively require a director to give up his statutory rights in order to gain access to corporate  
13 records. And the specific conditions that ICANN has promulgated here, both in its procedures and  
14 in its letters, are both unlawful and unreasonable.<sup>10</sup>

15 **III. Auerbach's independence from ICANN management or other corporate directors is**  
16 **not a basis for denying or limiting him access.**

17 ICANN claims that its attempt to deny or limit Auerbach's access to corporate records  
18 stems from concerns that Auerbach will act against ICANN's interests. But ICANN's interests do  
19 not speak for themselves. As several members of Congress have told the Department of  
20 Commerce, "Board members with different perspectives, alternative ideas, and novel solutions will  
21 provide the checks and balances necessary to make ICANN a credible and legitimate  
22 organization." Tauzin letter, *supra*, Request for Judicial Notice, Exh. C.

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23 <sup>10</sup> In its papers, ICANN makes much of the fact that a former corporate director, Phil Davidson,  
24 accepted the same inspection conditions in his inspection of the same records. ICANN Brief, at 10,  
25 17. In addition to the plain fact that Mr. Davidson did *not* seek the same records as Mr. Auerbach  
seeks (Objections to Evidence ¶5), Davidson did not submit a declaration, so we have no  
admissible facts about his acquiescence (Objections to Evidence ¶6); in any case, his acquiescence  
cannot save these procedures.

1 ICANN argues that Auerbach may rely on ICANN management’s representations. But the  
2 duty of “reasonable inquiry” requires that “directors may not close their eyes to what is going on  
3 about them in the conduct of corporate business and must in appropriate circumstances make such  
4 reasonable inquiry as an ordinarily prudent person under similar circumstances.” *Gaillard v.*  
5 *Natomas Co.* (1989) 208 Cal.App.3d 1250, 1264-1265; *id.* at 1271 (reversing summary judgment  
6 for outside directors because “under suspicious circumstances,” they “should have examined the  
7 golden parachutes more attentively”); *Raven’s Cove Townhomes, Inc. v. Knuppe Development Co.*  
8 (1981) 114 Cal.App.3d 783, 800 (directors’ failure “to exercise supervision which permits  
9 mismanagement or non-management” is breach of fiduciary duty).

10 This duty includes the duty to monitor corporate activities. *Francis v. United Jersey Bank*  
11 (N.J. 1981) 432 A.2d 814, 822 (directors “should maintain familiarity with the financial status of  
12 the corporation by a regular review of financial statements”); *id.* at 826 (“this obligation included  
13 reading and understanding financial statements, and making reasonable attempts at detection and  
14 prevention of the illegal conduct of other officers and directors”); *cf. Hanson Trust PLC v. ML*  
15 *SCM Acquisition, Inc.* (2d Cir. 1986) 781 F.2d 264, 274-75 (directors must be “reasonably diligent”  
16 in obtaining information); *Hoiles, supra* at 1201 (in order to meet his fiduciary duty, a director  
17 “often has a duty” to consult corporate books and records).

18 Thus, ICANN cannot seriously dispute that Auerbach has a duty to oversee ICANN's  
19 operations and that this duty extends to reviewing the corporate records if he believes that this will  
20 assist him in that fulfilling his duties. That he has a different vision of the proper sort of reform  
21 needed is not sufficient to relieve him of his fiduciary duties, and it is not sufficient to deny him the  
22 access required to fulfill those duties.

#### 23 **IV. Auerbach’s claim is neither unripe nor moot**

24 Finally, ICANN argues that Auerbach’s claim is either unripe or moot. Both arguments are  
25 specious. The statutory scheme plainly gives Auerbach the right to seek judicial enforcement and  
contemplates that courts resolve disputes over a director’s right of access. Corp. Code § 6336(a)



1 ("[u]pon refusal of a lawful demand for inspection," superior court "may enforce the demand or  
2 right of inspection with just and proper conditions.").

3 First, the ripeness requirement prevents courts from issuing advisory opinions, or  
4 considering a hypothetical state of facts in order to give general guidance rather than to resolve a  
5 specific legal dispute. *Hunt v. Superior Court* (1999) 21 Cal.4th 984, 998. Here, there is a clear  
6 dispute: ICANN will not let Auerbach inspect and copy ICANN's records unless he agrees to  
7 procedures that restrict his "absolute" statutory right and agrees to additional conditions set by  
8 Lynn in his Oct. 5, 2001 letter. The facts are as concrete as those in *Chantiles* or *Havlicek*.

9 This case is also ripe under the federal ripeness test, which considers the fitness of the  
10 issues for judicial decision and the hardship to the parties of withholding judicial consideration.  
11 *Abbott Laboratories v. Gardner* (1967) 387 U.S. 136, 149. At issue in *Abbott* was a pre-  
12 enforcement challenge to regulations requiring drug companies to print generic names on labels  
13 every time the trade name of a drug was printed on the bottle, which the companies argued would  
14 cost too much. *Id.* at 139. The challenge satisfied the fitness prong because the issue was one of  
15 statutory interpretation and the hardship prong because, although the regulation had not been  
16 enforced, companies either had to comply with the allegedly unlawful regulation or refuse to  
17 comply and thus risk its enforcement. *Abbott Laboratories*, 387 U.S. at 152.<sup>11</sup> Auerbach is in a  
18 similar situation. The issue is one of statutory interpretation, and he is faced with either foregoing  
19 his statutory right of inspection or complying with ICANN's unlawful policy.

20 ICANN argues that Auerbach's claim will not be ripe until he has actually availed himself  
21 of ICANN's inspection procedures and is dissatisfied; until then, ICANN says, he suffers no more  
22 than "self-inflicted harm." But Auerbach has no duty to avail himself of flawed procedures. A  
23 similar situation was faced in *Unnamed Physician v. Bd. of Trustees of St. Agnes Medical Center*

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24 <sup>11</sup> See, e.g., *NRDC v. U.S. EPA* (D.C. Cir. 1988) 859 F.2d 156, 173 (where EPA transferred its  
25 permit-granting authority to states, and environmental group argued that the terms of the transfers  
were unlawful in failing to allow sufficient public participation, challenges were ripe; "if the  
challengers' legal position be correct, the regulations are invalid").

1 (2001) 93 Cal.App.4th 607, where a doctor challenged a hospital’s peer review bylaws on  
2 procedural grounds. The court observed: “[a] party is not required to exhaust the available  
3 administrative remedies when those administrative procedures are the very source of the alleged  
4 injury.” *Id.* at 621 (citations omitted).

5 The same is true here; indeed, Auerbach’s dilemma is worse. If he rejects the unlawful  
6 conditions, he will not be permitted to inspect the records. But if he countersigns the Lynn letter,  
7 thereby agreeing to the unlawful conditions, he will be allowed to inspect some records, but  
8 possibly not all of them. And he does not know when, if ever, he will be able to copy them. More  
9 importantly, once he signs the Lynn letter, he is contractually bound to the procedures, including  
10 the provision that gives ICANN management the discretion to delay or even deny his request to  
11 copy ICANN records and the provision requiring him to appeal any dispute about inspection or  
12 copying to the ICANN Board and to accept its decision as “final and binding.” In so doing, he  
13 would contractually waive his statutory rights under Corp. Code §§ 6334 and 6336(a), and be  
14 unable to invoke judicial review. Given the glacial pace at which ICANN management has thus far  
15 responded to his 18-month-old request, it is reasonable for him to fear that his term as corporate  
16 director will have ended before the processes are complete, and he would have lost his right to  
17 inspect and copy.

18 ICANN argues that Auerbach’s claim is a “merely general challenge on statutory . . .  
19 grounds,” *Pacific Legal Foundation v. California Coastal Comm’n* (1982) 33 Cal.3d 158, 169, but  
20 that contention is meritless. In *Pacific Legal Foundation*, the plaintiffs consistently argued “that no  
21 specific application” of the challenged guidelines was involved; indeed, plaintiffs “expressly  
22 declined the trial court’s offer to introduce evidence concerning the application of the guidelines.”  
23 *Ibid.* Here, the challenged procedures (including Lynn’s additional conditions) are being applied  
24 by ICANN to Auerbach’s access claim.

25 Finally, ICANN argues that Auerbach’s claim is moot because ICANN is (and has been)  
willing to permit him to inspect ICANN’s records. This argument makes no sense. Auerbach  
claims that the conditions that ICANN would impose upon his inspection and copying of ICANN’s

1 records are as a matter of law invalid. ICANN itself appears to recognize that its mootness claim is  
2 contingent on this court's accepting that "ICANN's procedures for inspection comply with  
3 California law." But if this Court were to hold that ICANN's procedures are lawful, it would be  
4 deciding a substantive legal issue on the merits – which it cannot do in a moot case . ICANN's  
5 argument is circular.

6 In any case, Auerbach's ripeness argument also answers the mootness question. ICANN's  
7 sole point here is that it "always has been willing to perform its obligations under Corp. Code §  
8 6334 without the coercion of a writ." ICANN Brief, at 29:8-10. But ICANN is evading  
9 Auerbach's point that the inspection procedures (and Lynn's additional conditions) that ICANN  
10 seeks to force upon Auerbach conflict with Corp. Code § 6334.

### 11 Conclusion

12 Today's headlines are filled with the distressing consequences of corporate directors who  
13 have failed to challenge management.<sup>12</sup> As Mr. Thomas H. Wyman, former member of the Board  
14 of Directors of General Motors and Delphi Automotive Systems recently observed in the *New York*  
15 *Times*:

16 The director's real role is to smell trouble. And to find out if its real. And to ask questions,  
17 again and again. And if you don't get answers to call the press. Its considered seditious, but  
18 think of the hundreds of thousands of dollars, and the lives that would have been better, if  
19 somebody had blown the bugle at Enron two years ago.

20 Mary Williams Walsh & David Leonhardt, "To Rein in Abuses, Executives Get Watchdog  
21 Directors," *New York Times*, C1, C5 (July 5, 2002). Auerbach's request to inspect and copy  
22 ICANN's corporate records is his attempt to ask ICANN the questions that both the law and the  
23 public expect him to ask. He must be allowed to do so.

24 Respectfully submitted,

25 <sup>12</sup> See e.g. Richard A. Oppel, Jr., "Senate Panel Says Enron's Board Could Have Stopped High-Risk Practices," *New York Times*, A15 (July 7, 2002).

1 ELECTRONIC FRONTIER FOUNDATION

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4 Attorneys for Petitioner Karl Auerbach  
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