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2 SUPERIOR COURT OF THE STATE OF CALIFORNIA

3 THE COUNTY OF LOS ANGELES

4 DEPARTMENT NO. 85 -- HON. DZINTRA JANAVS, JUDGE

5

6 NO. BS 074771

7 KARL AUERBACH, AN INDIVIDUAL,

8 PETITIONER,

9 VS.

10 ICANN, A CORPORATION,

11 RESPONDENT.

12

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14 REPORTER'S TRANSCRIPT OF PROCEEDINGS

15 MONDAY, JULY 29, 2002

16 APPEARANCES:

17 FOR PETITIONER: ELECTRIC FRONTIER FOUNDATION

18 BY: CINDY COHN, ESQUIRE

19 JAMES S. TYRE, ESQUIRE

20

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22 FOR RESPONDENT: JONES, DAY, REAVIS & POGUE

23 BY: JEFFREY A. LE VEE, ESQUIRE

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28 DARYL CASE, C.S.R. #8739 OFFICIAL REPORTER

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2 LOS ANGELES, CALIFORNIA; MONDAY, JULY 29, 2002

3 9:46 P.M.

4 DEPARTMENT NO. 85 HON. DZINTRA JANAVS, JUDGE

5 APPEARANCES: (SEE TITLE PAGE.)

6

7 **THE COURT:** NO. 1, AUERBACH VERSUS INTERNET

8 CORPORATION, ET CETERA.

9 **MR. LE VEE:** GOOD MORNING, YOUR HONOR.

10 MY NAME IS JEFFREY LE VEE, FROM JONES, DAY. I

11 REPRESENT INTERNET CORPORATION FOR ASSIGNED NAMES NUMBERS.

12 LET ME INTRODUCE TO YOU THE OTHERS THAT ARE

13 ACCOMPANYING ME TODAY: MY PARTNER ELWOOD LUI; AND MY

14 COLLEAGUE COURTNEY SCHABERG; AND MY CLIENT, MR. TOUTON, WHO

15 IS VICE PRESIDENT AND GENERAL COUNSEL OF ICANN, AND FOR TWO

16 DECADES A MEMBER OF THE CALIFORNIA BAR.

17 **MS. COHN:** GOOD MORNING, YOUR HONOR.

18 CINDY COHN, OF ELECTRONIC FRONTIER CORPORATION.

19 I REPRESENT AUERBACH TODAY. WITH ME IS MY CO-COUNSEL JAMES

20 TYRE, AND MR. AUERBACH IS PRESENT IN THE COURTROOM TODAY.

21 **THE COURT:** I TAKE IT YOU ALL HAVE HAD A CHANCE TO

22 READ THE COURT'S TENTATIVE?

23 **MS. COHN:** WE HAVE, YOUR HONOR.

24 **THE COURT:** BEFORE WE PROCEED WITH THE ARGUMENTS I DO

25 NEED TO TAKE CARE OF THE FORMALITIES WITH RESPECT TO THE

26 EVIDENCE, SO IF YOU ALL WANT TO SIT DOWN YOU ARE WELCOME TO

27 DO SO.

28 WE HAVE CROSS-MOTIONS FOR SUMMARY JUDGMENT FILED

3

1 BY THE PETITIONER AND RESPONDENT. THE PETITIONER'S REQUEST

2 FOR JUDICIAL NOTICE IS GRANTED. THE RESPONDENT'S

3 DECLARATIONS OF MAY 20TH OF LYNN, CERF, TOUTON AND EXHIBITS
4 THERETO, AND THE JULY 15TH - AND THOSE ARE FILING DATES THAT
5 I'M REFERRING TO - SUPPLEMENTAL DECLARATIONS OF LYNN AND
6 TOUTON KNOW AND EXHIBITS THERETO ARE ADMITTED IN EVIDENCE BY
7 REFERENCE SUBJECT TO EVIDENTIARY RULINGS, WHICH I WILL BE
8 MAKING IN A MOMENT.

9 THE AUERBACH DECLARATION FILED MAY 21ST AND THE
10 SECOND DECLARATION FILED JULY 15TH AND EXHIBITS THERETO 1
11 THROUGH 32 ARE ADMITTED IN EVIDENCE BY REFERENCE. THE
12 RULINGS ON THE OBJECTIONS TO THE LYNN DECLARATION, TOUTON
13 DECLARATION AND CERF DECLARATION ARE AS FOLLOWS: ON THE LYNN
14 DECLARATION, OBJECTIONS 1, 2 AND 3 ARE OVERRULED; OBJECTION
15 4 TO PARAGRAPHS 29 THROUGH 32; AND 5, WHICH ALSO IS TO 29;
16 AND 6, WHICH IS TO PARAGRAPH 32, ARE SUSTAINED.

17 I DON'T REALLY THINK THAT MR. DAVIDSON'S
18 COMPLIANCE WITH ANY REQUIREMENTS IS PARTICULARLY RELEVANT
19 HERE. AND OBJECTION 7 TO PARAGRAPHS 33 THROUGH 36, THE
20 VOTING RECORD OF MR. AUERBACH, THE OBJECTION IS GOING TO BE
21 SUSTAINED. I DON'T THINK IT'S PARTICULARLY RELEVANT. IF I
22 WERE TO CONSIDER IT, I WOULDN'T GIVE THAT ASPECT MUCH
23 WEIGHT.

24 I THINK THE FACT THAT SOMEONE DOESN'T VOTE
25 CONSISTENTLY WITH THE MAJORITY DOESN'T IN ANY WAY REALLY
26 MEAN THAT PARTICULAR RULES AND REGULATIONS AND POLICIES
27 DEALING WITH AVAILABILITY OF RECORDS ARE VALID OR INVALID.
28 IN FACT, IT LOOKS TO ME LIKE MR. AUERBACH WAS ELECTED AT

4
1 LARGE BECAUSE HE DID HAVE SOME CRITICISMS AND HAD SOME
2 OBJECTIONS TO THE WAY THE RESPONDENT WAS OPERATING. IF HE
3 HADN'T HAD THAT, HE MIGHT NOT HAVE EVEN BEEN ELECTED, AND HE
4 WAS SUPPOSED TO BE REPRESENTING THOSE INTERESTS, AND IT'S

5 ONLY REASONABLE, AND ONE WOULD SUPPOSE HE WOULD OBJECT
6 AGAINST THE MAJORITY ON SOME OF THESE.
7 AND BESIDES, IF THE MAJORITY COULD CENSOR THE
8 LONE DISSENTER, THAT GOES AGAINST ANY INTERPRETATION OR
9 POLICY IN THE CALIFORNIA CODE WHICH ALLOWS DIRECTORS ACCESS
10 TO THESE CORPORATE RECORDS.
11 NOW, GOING ON TO THE TOUTON DECLARATION,
12 OBJECTION 9, SUSTAINED; OBJECTION 10 AND 11 ARE AGAIN THE
13 VOTING RECORDS, SUSTAINED. OBJECTION 12, 13 ARE SUSTAINED;
14 14, 15, OVERRULED. ON THE CERF DECLARATION, OBJECTION 16 IS
15 SUSTAINED.
16 I THINK THAT TAKES CARE OF THOSE RULINGS.
17 NOW, HAVING RULED ON THESE DECLARATIONS AND
18 OBJECTIONS, UNLESS ANYONE ELSE HAS ANY EVIDENTIARY MATTERS
19 THAT THE COURT MAY HAVE OVERLOOKED, WE'LL PROCEED TO THE
20 MERITS.

21 **MR. LE VEE:** THANK YOU, YOUR HONOR.
22 WE HAVE CROSS-MOTIONS, BUT IN VIEW OF YOUR
23 TENTATIVE IT SEEMS TO ME WE BEAR THE BURDEN OF GOING FIRST.

24 **THE COURT:** YES.

25 **MR. LE VEE:** YOUR HONOR, I THINK YOUR TENTATIVE
26 OPINION DOES ZERO IN VERY MUCH ON ABSOLUTELY THE CORRECT
27 DOCUMENTS AND ABSOLUTELY THE CORRECT LEGAL ISSUES. AND WHAT
28 I WOULD LIKE TO DO THIS MORNING, WITH YOUR INDULGENCE, IS TO

5
1 ADDRESS OUR VIEW OF WHAT THOSE DOCUMENTS AND LEGAL ISSUES
2 ARE, AND GIVE YOU OUR VIEW AS TO WHY YOUR TENTATIVE, WITH
3 SOME MODIFICATIONS, SUPPORTS CLEARLY A PROTECTIVE ORDER IN
4 THIS CASE; AND WHY ALSO, IN OUR VIEW, FRANKLY, ICANN'S
5 MOTION SHOULD BE GRANTED WITH VERY MINOR ADJUSTMENTS IN THE
6 COURT'S ANALYSIS. AND I'D LIKE TO GO THROUGH THAT IF I

7 COULD.

8 THE ISSUE, IT SEEMS TO ME, IS NOT ABOUT WHETHER
9 MR. AUERBACH IS OR SHOULD HAVE BEEN INSPECTING ICANN'S
10 DOCUMENTS. AND JUST TO BE CLEAR I'M GOING TO GO THROUGH ONE
11 OR TWO PIECES OF EVIDENCE THAT MAKES THAT VERY CLEAR. THE
12 PARTIES HAVE NOT HAD A DISPUTE ABOUT A RIGHT TO INSPECTION.
13 ICANN INVITED MR. AUERBACH TO ITS OFFICES FOR THE PURPOSES
14 OF AN INSPECTION. THE DISPUTE IS THE EXTENT TO WHICH AN
15 INDIVIDUAL DIRECTOR HAS THE ABILITY TO TAKE COPIES OF
16 CONFIDENTIAL DOCUMENTS AND, ON HIS OWN, USING HIS OWN
17 JUDGMENT AND DISREGARDING THE VIEWS OF THE CORPORATION, POST
18 THOSE DOCUMENTS ON THE INTERNET OR DO WHATEVER THE INSPECTOR
19 MIGHT WISH TO DO.

20 AND WHAT I WILL DO TODAY IS SHOW YOU TWO
21 SPECIFIC PIECES OF EVIDENCE THAT WE BELIEVE MAKE IT CLEAR
22 THAT THE DISPUTE THAT THE PARTIES HAVE JUSTIFIES AT LEAST AT
23 A MINIMUM A PROTECTIVE ORDER IN THIS CASE, WHICH YOUR HONOR
24 IS CLEARLY AUTHORIZED TO DO, BOTH BY THE STATUTE --

25 **THE COURT:** NO QUESTION ABOUT IT. IF I'M CONVINCED IN
26 MY MIND THAT I SHOULD HAVE A PROTECTIVE ORDER, I CERTAINLY
27 CAN DO THAT UNDER THE STATUTE. AND THE MAIN QUESTION HERE,
28 OF COURSE, WAS SHOULD ANY KIND OF ORDER GRANTING THEIR

6
1 MOTION BE MADE.
2 AND OF COURSE I THINK WE HAVE TEN MONTHS HERE
3 WHERE REALLY HE WASN'T ALLOWED TO SEE ANYTHING BECAUSE OF
4 THIS EXCUSE THAT WE DON'T HAVE ANY -- YOU KNOW, THIS
5 ORGANIZATION HAS BEEN GOING ON SINCE '98, AND STILL NOTHING
6 IN TERMS OF ACCESS.
7 I MEANT TO ASK YOU A QUESTION, AND I DON'T WANT
8 TO INTERRUPT YOU, BUT IT CAME TO ME.

9 THIS AUDIT COMMITTEE, WHAT DOES IT CONSIST OF AS

10 FAR AS THE MEMBERSHIP?

11 **MR. LE VEE:** THE AUDIT COMMITTEE ONLY CONSISTS OF
12 DIRECTORS. THERE ARE FOUR DIRECTORS, I BELIEVE; MAYBE
13 THREE.

14 **THE COURT:** AND NONE OF THESE PEOPLE HAS EVER LOOKED
15 AT A SINGLE RECORD BEFORE THIS CAME UP?

16 **MR. LE VEE:** NO DIRECTOR HAD REVIEWED PURSUANT TO AN
17 INSPECTION REQUEST --

18 **THE COURT:** WELL, I THINK THAT'S A RATHER SAD
19 COMMENTARY, SEEMS TO ME, TO HAVE COMPLETELY IGNORED
20 EVERYTHING FOR FOUR YEARS.

21 **MR. LE VEE:** ACTUALLY, YOUR HONOR, JUST TO BE CLEAR -
22 I THINK MR. AUERBACH WOULD AGREE WITH THIS - ICANN HOLDS
23 QUARTERLY MEETINGS. THERE'S A TREMENDOUS AMOUNT OF
24 INFORMATION PUSHED TO EACH OF THE DIRECTORS, AND A NUMBER OF
25 DECISIONS MADE. AND SO WHILE YOU ARE CORRECT, THERE HAD
26 BEEN NO -- OTHER THAN MR. DAVIDSON, WHO DID MAKE AN
27 INSPECTION REQUEST AND DID IN FACT COME AND INSPECT - NO
28 OTHER DIRECTOR HAD MADE A REQUEST AS SUCH. HOWEVER, THERE'S

7
1 AN ENORMOUS AMOUNT OF INFORMATION THAT IS COMMUNICATED TO
2 THESE DIRECTORS, AND THEN QUARTERLY THE DIRECTORS ASSEMBLE
3 IN PLACES ALL OVER THE WORLD.
4 THE LAST SEVERAL MEETINGS HAVE BEEN MOSTLY
5 OUTSIDE OF THE UNITED STATES, BUT THERE ARE ALSO MEETINGS,
6 TYPICALLY IN LOS ANGELES, WHERE ICANN IS BASED. SO I THINK
7 IT'S FAIR TO SAY THAT THE DIRECTORS VIEW THEMSELVES AS
8 RECEIVING AN ENORMOUS AMOUNT OF INFORMATION AS OPPOSED TO
9 JUST SITTING BACK AND DOING NOTHING. WE HAVEN'T BRIEFED
10 THESE ISSUES AND HAVEN'T PRESENTED YOUR HONOR WITH A RECORD

11 ON THAT. IF IT WERE IMPORTANT TO YOUR HONOR, I COULD
12 PRESENT YOUR HONOR WITH FILE DRAWERS, LITERALLY, OF
13 INFORMATION THAT HAS BEEN COMMUNICATED TO THE DIRECTORS. AND
14 THEN THE DIRECTORS HAVE AN E-MAIL LIST WHO THEY COMMUNICATE
15 AMONG ONE ANOTHER ALL THE TIME.

16 SO I DO THINK THE DIRECTORS TAKE THEIR
17 RESPONSIBILITIES EXTREMELY SERIOUSLY AND SPEND PROBABLY MUCH
18 MORE TIME THAN THEY HAD EXPECTED TO SPEND FOR VOLUNTARY
19 SERVICE. NONE OF THE DIRECTORS IS PAID OTHER THAN THE CHIEF
20 EXECUTIVE OFFICER, WHO IS AN EX OFFICIO DIRECTOR.

21 **MS. SCHABERG:** IF I CAN ADD ONE POINT, YOUR HONOR,
22 IT'S ALSO THE CASE THAT THE AUDIT COMMITTEE MEMBERS ARE
23 ENTITLED TO RELY UPON THE WORK OF THE OUTSIDE CONSULTANT,
24 AND THERE IS AN OUTSIDE CONSULTANT AVAILABLE.

25 **THE COURT:** YES, BUT, YOU KNOW HOW THAT IS. AND SEEMS
26 TO ME THAT TAKING ONE'S DUTIES AND RESPONSIBILITIES
27 SERIOUSLY MEANS OCCASIONALLY CHECKING ON A COUPLE OF THINGS
28 YOURSELF INSTEAD OF RELYING ON JUST THE OUTSIDE. THAT'S WHY

8
1 SOMEONE COMES IN FROM THE OUTSIDE, SO THAT THEY WOULD LOOK,
2 BECAUSE SOME PEOPLE THINK THAT MAYBE SOMEONE SHOULD LOOK AT
3 MORE THAN WHAT HAS BEEN GOING ON AND JUST RELYING ON THE
4 OUTSIDE.

5 ALL RIGHT. I'M SURE THEY HAVE PLENTY OF
6 INFORMATION TO LOOK AT. I DON'T HAVE ANY QUALMS ABOUT
7 THAT. I DON'T THINK THERE'S ANY DOUBT ABOUT THAT. THE
8 QUESTION IS, SHOULD ONE, IF THEY ARE INTERESTED IN CHECKING
9 OUT THINGS THEMSELVES, SHOULD THEY BE ABLE TO DO THAT. DO
10 THEY HAVE TO WAIT TEN MONTHS TO EVEN GET CLOSE TO --

11 **MR. LE VEE:** AGAIN, JUST TO REASSURE YOUR HONOR OF
12 WHAT THE OTHER DIRECTORS DO, THESE BOARD MEETINGS I

13 MENTIONED ARE HELD IN GHANA AND IN EGYPT AND ALL OVER THE
14 WORLD.

15 **THE COURT: BULGARIA AND SO ON.**

16 **MR. LE VEE:** THESE MEETINGS LAST TYPICALLY A WEEK.

17 THE ACTUAL BOARD MEETING ITSELF OCCURS OVER THE COURSE OF A
18 DAY, BUT THE BOARD MEMBERS TYPICALLY ARE PRESENT AT
19 COMMITTEE MEETINGS AND ALL SORTS OF OTHER INTERNATIONALLY
20 BASED MEETINGS THAT LEAD UP TO THE ICANN MEETING. SO
21 CANDIDLY THE COMMITMENT OF A ICANN DIRECTOR FAR SURPASSES
22 THE COMMITMENT OF MOST TYPICAL CORPORATE DIRECTORS BECAUSE
23 THEY LITERALLY ARE SPENDING MORE WEEKS A YEAR IN ADDITION TO
24 THE TIME THAT IS SPENT BETWEEN THE MEETINGS RECEIVING THE
25 INFORMATION, PARTICIPATING IN CONFERENCE CALLS AND SO FORTH.
26 SO I REALLY DO WANT TO ASSURE YOUR HONOR THAT
27 THE MEMBERS OF THIS BOARD TAKE THEIR RESPONSIBILITIES QUITE
28 SERIOUSLY. AND HAVING ATTENDED SOME OF THOSE MEETINGS, I

9

1 CAN TELL YOU THAT THE INTERACTION IS VERY INFORMED FROM MY
2 BASIS, FROM MY STANDPOINT.

3 IF I CAN TURN BACK TO THE SPECIFIC ISSUES, FIRST

4 JUST A NOTE ABOUT WHAT ICANN IS. WE TOUCH UPON IT ON THE

5 EARLY PAPERS, AND IT GETS LOST LATER. ICANN IS FORMED IN

6 1998, AS YOUR HONOR HAS MENTIONED, BY TRULY A COALITION OF

7 DIFFERENT TYPES OF ENTITIES THAT USE THE INTERNETS -

8 BUSINESS, TECHNICAL, ACADEMIC AND USER COMMUNITIES, AS WE

9 CALL THEM. THE REASON THAT ICANN WAS FORMED IS THAT FROM

10 ITS ORIGINS, WHEN IT WAS CALLED SOMETHING OTHER THAN THE

11 INTERNET AND WORLDWIDE WEB, THE UNITED STATES GOVERNMENT,

12 ORIGINALLY THE DEPARTMENT OF DEFENSE, NOW THE DEPARTMENT OF

13 COMMERCE, IS THE ENTITY THAT HAS -- THAT ADMINISTERS ALL

14 ASPECTS OF THE INTERNET. AND IN 1997 AND 1998

15 PRESIDENT CLINTON ISSUED EXECUTIVE ORDERS IN ESSENCE THAT
16 MANDATED THE ATTEMPT TO PRIVATIZE WHAT IS NOW DONE THROUGH
17 THE UNITED STATES GOVERNMENT.

18 AND ICANN'S FORMATION WAS IN RESPONSE TO THAT,
19 AND IT THEN ENTERED INTO A SERIES OF AGREEMENTS WITH THE
20 DEPARTMENT OF COMMERCE, WHICH STILL TO THIS DAY SUPERVISES
21 EVERYTHING ICANN DOES, AND MANY THINGS THAT PEOPLE ASSUME
22 ICANN -- THAT ICANN ACTUALLY DOES, WHAT ICANN DOES IS MAKE
23 RECOMMENDATIONS TO THE DEPARTMENT OF COMMERCE PURSUANT TO
24 THESE AGREEMENTS, AND IT'S THE DEPARTMENT OF COMMERCE THAT
25 ULTIMATELY MAKES THESE DECISIONS.

26 ICANN HAS TODAY 18 BOARD MEMBERS. ONE OF THE
27 MEMBERS RECENTLY RESIGNED. USED TO BE 19. AND EXACTLY
28 TWO-THIRDS OF THOSE BOARD MEMBERS RESIDE OUTSIDE OF THE

10

1 UNITED STATES. SO WE DO HAVE A VERY UNIQUE CORPORATION IN
2 THAT REGARD. AND, AS WE POINTED OUT IN OUR PAPERS, THE
3 DIRECTORS ARE ELECTED THROUGH A MYRIAD OF MEANS - SOME
4 THROUGH THE VOTING THAT CAUSED MR. AUERBACH TO BE ELECTED,
5 SOME THROUGH SUPPORTING ORGANIZATIONS AND TECHNICAL
6 COMMUNITIES THAT NOMINATE AND THEN SELECT DIRECTORS. IT'S A
7 VERY BROAD PROCESS, AND, AS WE'VE SAID, ICANN IS A
8 NOT-FOR-PROFIT CORPORATION BASED IN CALIFORNIA, IT WAS
9 REGISTERED IN CALIFORNIA, AND ITS ONLY OFFICE IS IN MARINA
10 DEL REY.

11 SO THE REASON WE'RE HERE, OF COURSE, IS THAT ONE
12 OF ICANN'S DIRECTORS MADE AN INSPECTION REQUEST, AND WHAT
13 I'D LIKE TO DO FIRST IS SKIP TO THE LETTER THAT YOUR HONOR
14 ACTUALLY REFERENCES IN YOUR TENTATIVE. AND I HAVE
15 HIGHLIGHTED THAT LETTER, IF I MAY HAND COPIES TO COUNSEL AND
16 TO YOUR HONOR.

17 THIS IS EXHIBIT 10 TO MR. LYNN'S DECLARATION.
18 IT'S THE OCTOBER 5, 2001, LETTER FROM MR. LYNN TO
19 MR. AUERBACH, WHICH ITSELF IS THE CULMINATION OF SEVERAL
20 EXCHANGES. AND WHAT I WOULD LIKE TO DO VERY BRIEFLY IS RUN
21 THROUGH THIS LETTER BECAUSE THIS I THINK IS THE MOST
22 IMPORTANT LETTER SAVE MAYBE ONE OTHER IN THE RECORD.
23 IF YOU WILL NOTE IN THE FIRST PARAGRAPHS,
24 MR. LYNN, WHO IS RESPONDING TO MR. AUERBACH'S REQUEST, SAYS
25 THAT THE PROCEDURES THAT HE FOLLOWS ARE THE ICANN
26 PROCEDURES. AND I'M GOING TO GIVE THAT TO YOUR HONOR NEXT.
27 WE'LL LOOK AT THOSE. THEN IN THE PARAGRAPH NUMBERED 1,
28 MR. LYNN SAYS, THE MATERIALS WILL BE MADE AVAILABLE FOR YOUR

11

1 INSPECTION AT ICANN'S OFFICES IN MARINA DEL REY. HERE ARE
2 THE DATES, HERE ARE THE TIMES; AND, FRANKLY, IF THESE DATES
3 AND TIMES AREN'T CONVENIENT FOR YOU, LET US KNOW WHAT IS.
4 SO RIGHT HERE, YOU ARE RIGHT, THERE WAS SOME
5 DELAY IN GETTING THE PROCEDURES ENACTED, BUT THE INSPECTION
6 THAT MR. AUERBACH WANTED TO HAVE COULD HAVE BEEN HAD NINE
7 MONTHS AGO.
8 NOW I'LL COME TO WHETHER YOUR HONOR THINKS THAT
9 THE PROCEDURES WERE APPROPRIATE OR NOT.
10 **THE COURT:** WELL, I THINK THIS IS REALLY NOT AN OFFER
11 AS LONG AS IT'S CONDITIONED ON SIGNING ON THE BOTTOM OF THIS
12 LETTER. THERE'S ABSOLUTELY NO JUSTIFICATION, NO EXCUSE, NO
13 RIGHT FOR THAT KIND OF THING, SEEMS TO ME. SO THIS REALLY
14 IN MY MIND IS NOT PARTICULARLY -- DOESN'T REALLY EQUATE WITH
15 SAYING, OKAY, HERE IT IS UNDER THE PROCEDURES, THIS IS WHAT
16 WE'RE GOING TO MAKE AVAILABLE FOR YOU.
17 GO AHEAD.
18 **MR. LE VEE:** WELL, WE'D BE IN A DIFFERENT SITUATION TO

19 BE SURE -- THE SITUATION WE WOULD BE IN HAD MR. AUERBACH
20 SIGNED THE LETTER, HE WOULD HAVE MADE HIS INSPECTION, HE
21 WOULD HAVE SEEN THAT ICANN WOULD HAVE DESIGNATED SOME
22 DOCUMENTS AS CONFIDENTIAL.
23 AND I WANT TO BE VERY CLEAR. MR. AUERBACH HAS
24 ASKED FOR, FOR EXAMPLE, CORRESPONDENCE WITH ICANN'S LAWYERS,
25 HE HAS ASKED FOR THEIR GENERAL LEDGER, HE'S ASKED FOR A
26 SERIES OF DOCUMENTS THAT UNDOUBTEDLY MAY BE SUBJECT TO THE
27 ATTORNEY-CLIENT PRIVILEGE AND OTHER CONFIDENTIALITY CONCERNS
28 OR PRIVACY CONCERNS.

12

1 I DON'T THINK MR. AUERBACH DISPUTES THAT. THE
2 ISSUE IS WHO BEARS THE BURDEN OF TRYING TO DO SOMETHING
3 ABOUT IT. SO HE WOULD HAVE SEEN ICANN'S DESIGNATIONS, AND
4 UNDER THESE PROCEDURES HE WOULD HAVE SAID, I OBJECT TO YOUR
5 DESIGNATION, AT WHICH POINT THE BOARD CONSIDERS HIS
6 OBJECTION AND MAKES A DECISION. AND IF HE'S NOT HAPPY WITH
7 IT HE HAS AVAILABLE FOR HIM JUDICIAL REVIEW.

8 **THE COURT:** AFTER A WHOLE BUNCH OF OTHER STEPS IN
9 BETWEEN, WHICH, IN MY VIEW, INSTEAD OF BEING HELPFUL, SIMPLY
10 DELAY THE PROCESS AND, OF COURSE IN THIS CASE, COULD DELAY
11 IT UNTIL SUCH TIME WE WIND UP WITH THE SITUATION YOU SEE IN
12 SOME OF THESE CASES.

13 **MR. LE VEE:** I UNDERSTAND, ALTHOUGH TO BE CLEAR -- I'M
14 JUMPING AROUND, BUT TRYING TO BE RESPONSIVE TO YOUR HONOR.
15 THE CASE LAW YOUR HONOR CITES ARE CASES WHERE THE
16 CORPORATION REFUSED IN ITS ENTIRETY TO PERMIT AN INSPECTION;
17 SIMPLY SAID, "I'M SORRY. THANK YOU FOR YOUR REQUEST. WE
18 WILL NOT PERMIT YOU TO REQUEST."
19 THAT'S NOT THIS CASE. THIS CASE IS, "COME IN
20 AND INSPECT, AND THEN WHEN YOU HAVE ISSUES AS TO HOW WE

21 HAVE, FOR EXAMPLE, DESIGNATED OR YOU HAVE ISSUES YOU WANT
22 ELECTRONIC COPIES OF A PARTICULAR DOCUMENT, WE'D LIKE TO
23 SORT THAT OUT WITH YOU THEN." AND THE NOTION THAT A COURT
24 HAS A STATUTORY ABILITY TO ENACT A PREROGATIVE ORDER WE
25 ISSUE --

26 **THE COURT:** WHAT'S YOUR AUTHORITY? THERE'S A BIG
27 DIFFERENCE WITH THE COURT PUTTING ON CONDITIONS AND THE
28 MAJORITY OF A BOARD DEPRIVING THE MINORITY OF THE KIND OF

13

1 ACCESS THAT THE LEGISLATURE HAS SAID IT'S ENTITLED TO. BIG
2 DIFFERENCE IN MY MIND.

3 IS THERE A SINGLE CASE THAT YOU CITED THAT EVEN
4 INTIMATES THAT THE BOARD CAN PUT ON THOSE CONDITIONS THAT
5 THE JUDGE MIGHT ON APPROPRIATE JUDICIAL REVIEW.

6 **MR. LE VEE:** WE DO NOT CITE A CASE, YOUR HONOR, AND
7 I'LL TELL YOU WHY. I BELIEVE THAT IT WOULD BE ROUTINE FOR A
8 CORPORATION LIKE ICANN OR, FRANKLY, ANY LARGE CORPORATION
9 WITH DIRECTORS ALL OVER THE COUNTRY, TO HAVE A PROCESS THAT
10 IS DOCUMENTED. AND WHERE I HEAR THE COURT DISAGREEING WITH
11 WHAT ICANN'S VIEW IS, IS WHETHER THESE RESTRICTIONS ARE
12 SOMEHOW ACTUALLY RESTRICTING RIGHTS OR WHETHER THEY ARE A
13 PROCESS.

14 ICANN VIEWS ITS INSPECTION PROCEDURES, WHICH IS
15 THE THIRD DOCUMENT I WAS GOING TO HAND TO YOU, AS A
16 PROCESS. IT DOES NOT VIEW THEM AS RESTRICTED RIGHTS, WHICH
17 IS WHY WHEN MR. AUERBACH LAID OUT WHAT HE WANTED TO SEE, THE
18 OCTOBER 5 LETTER FROM MR. LYNN, WHICH I HANDED TO
19 YOUR HONOR, SAYS, "OKAY, COME IN AND INSPECT." THE CASE
20 LAW -- WE SHOULD HAVE SAID, "NO. NO INSPECTION UNTIL YOU
21 FILE SUIT AND WE HAVE A JUDGE DETERMINE VIA A PROTECTIVE
22 ORDER HOW YOUR INSPECTION IS GOING TO GO."

23 AND THAT IS WHAT THE CHANTILES CASE AND HAVLICEK
24 CASE STAND FOR. YOU'RE RIGHT. IT'S NOT A SITUATION WHERE
25 THE CORPORATION TRIED TO BE FLEXIBLE. IN THOSE CASES THE
26 CORPORATION SAID, "ABSOLUTELY NOT. WE'LL SEE YOU IN
27 COURT."
28 INSTEAD, WHAT ICANN TRIED TO DO, THUS FAR MAYBE

14

1 NOT DOING SO WELL, ICANN TRIED TO SAY, "WE WANT TO BE
2 REASONABLE. WE WANT TO GIVE YOU THE RIGHT OF INSPECTION."
3 THE RIGHT OF INSPECTION IS IN ICANN'S BYLAWS. IT'S
4 SOMETHING ICANN AFFIRMATIVELY ASSERTS AS A RIGHT FOR ITS
5 DIRECTORS.
6 THE ISSUE THEN IS WHAT IS THE SEQUENCE. IS THE
7 SEQUENCE GOING TO BE MR. AUERBACH CAN COME IN AND LOOK AT
8 ICANN'S DOCUMENTS AND THAT THERE ARE NO RESTRICTIONS AS TO
9 WHAT IS PLACED ON HOW HE CAN USE THE DOCUMENTS?
10 THAT'S WHY I JUST HANDED YOUR HONOR THE OCTOBER
11 15TH LETTER, WHICH IS EXHIBIT 11. THIS IS MR. AUERBACH'S
12 LETTER, WHICH I HAVE HIGHLIGHTED. LET ME, IF I MAY, POINT
13 YOUR HONOR TO THE TWO HIGHLIGHTED PORTIONS TWO-THIRDS OF THE
14 WAY DOWN THE FIRST PAGE.
15 HE SAYS: I HAVE NO OBJECTION TO THE
16 DOCUMENT, WHICH IS THE INSPECTION PROCEDURES,
17 TO THE EXTENT IT ESTABLISHES AN UNDERSTANDING
18 REGARDING WHAT ARE REASONABLE TIMES AND PLACES
19 FOR DIRECTOR INSPECTION. INDEED, I'M GLAD
20 THAT THE CORPORATE MANAGEMENT HAS SET FORTH
21 WHAT THEY BELIEVE CONSTITUTES REASONABLE TIMES
22 AND PLACES.
23 THEN WE SKIP TO THE BOTTOM. HIS CONCERN IS THAT
24 ICANN IS GOING TO DESIGNATE DOCUMENTS AS CONFIDENTIAL, SO HE

25 WRITES.

26 YOUR LETTER IMPOSES VAGUE OBLIGATIONS
27 OF CONFIDENTIALITY ON MY USE OF WHATEVER IT
28 IS I MIGHT SEE, BUT THE DECISION AS TO WHAT

15

1 MATERIAL IS CONFIDENTIAL, AND CONFIDENTIAL
2 FROM WHOM, AND HOW I MAY USE SUCH MATERIALS
3 IS NOT IN YOUR DISCRETION. IT IS SUBJECT TO
4 MY OWN DISCRETION, CAREFULLY EXERCISED AS
5 DIRECTOR AND AS DEFINED AND LIMITED SOLELY BY
6 THE LAWS OF CALIFORNIA AND THE UNITED STATES.
7 SO MR. AUERBACH'S POSITION IS, I - NOT THE
8 CORPORATION, NOT THE BOARD, NOT ANY OTHER ENTITY - I GET TO
9 DECIDE WHETHER I GET TO TAKE A LETTER FROM A LAW FIRM TO
10 ICANN, CLEARLY SUBJECT TO THE PRIVILEGE, AND POST THAT
11 LETTER ON THE INTERNET.
12 NOW, I KNOW MR. AUERBACH APPARENTLY HAS
13 CLAIMED - I'D LOVE TO HAVE HIS COUNSEL RECLAIM IT
14 TODAY - THAT HE HAS NO SUCH INTENTIONS, BUT THE FACT THAT HE
15 WRITES THE LETTER THAT SAYS THAT I HAVE THIS RIGHT, AND IN
16 MY JUDGMENT, ON BEHALF OF ICANN, I DON'T THINK THAT'S THE
17 LAW --

18 **THE COURT:** I DON'T THINK THAT YOU CAN JUST SIMPLY
19 TAKE THAT STATEMENT BY ITSELF AND SAY THAT IT MEANS WHAT YOU
20 ARE SAYING THAT IT MEANS. I THINK WHAT WE'RE SAYING AND
21 WHAT THIS LETTER MEANS IN THE ENTIRE CONTEXT IS THAT - EVEN
22 THIS VERY SENTENCE - IS THAT HE HAS OBLIGATIONS AS A
23 DIRECTOR OF CONFIDENTIALITY, FIDUCIARY DUTIES AND SO ON,
24 THAT HE INTENDS TO LIVE UP TO THOSE; HE DOES NOT INTEND TO
25 VIOLATE THEM; BUT THE COMPANY HAS NO RIGHT TO ADD ANYTHING
26 ON ITS OWN OR MAKING HIM SIGN PIECES OF PAPER TO RECONFIRM

27 THAT. AND, YOU KNOW, THAT IS WHAT I THINK HE'S SAYING.

28 NOW, MAYBE I'M MISINTERPRETING HIS LETTERS AND

16

1 HIS STATEMENTS, BUT SEEMS TO ME HE'S NOT SAYING THAT HE CAN
2 JUST GO AHEAD AND PUT ANYTHING THAT HE THINKS -- NOT THAT HE
3 THINKS, THAT HE WOULD LIKE TO PUT ON THE INTERNET, THAT HE
4 CAN DO THAT. HE IS AT LEAST ACKNOWLEDGING THAT HE HAS SOME
5 DUTIES.

6 NOW, WHETHER HE MIGHT OR MIGHT NOT VIOLATE THOSE
7 DUTIES, WE NEVER KNOW. THERE ARE PEOPLE OUT THERE WHO
8 VIOLATE THEIR DUTIES, AND WE SEE THAT HAPPENING TOO. BUT
9 AT ANY RATE I DIDN'T QUITE INTERPRET THE STATEMENT EXACTLY
10 THE WAY YOU JUST SAID, AND NOW OF COURSE I'VE READ IT AS
11 WELL.

12 GO AHEAD.

13 **MR. LE VEE:** I WILL SAY, YOUR HONOR, I DO INTERPRET
14 THIS STATEMENT AT THE BOTTOM OF EXHIBIT 11 FROM MR. LYNN'S
15 DECLARATION, I INTERPRET THIS STATEMENT AS FUNDAMENTALLY AT
16 ODDS WITH THE LAW. AND I APPRECIATE THAT WE ARE IN A
17 DISAGREEMENT, BUT IF THE CORPORATION HAS DESIGNATED A
18 DOCUMENT AS CONFIDENTIAL, MY VIEW IS THAT AN INDIVIDUAL
19 DIRECTOR DOES NOT HAVE THE RIGHT TO SIT DOWN AT HIS DESK AND
20 SAY, "OKAY, I KNOW I HAVE TO BE A GOOD FIDUCIARY. LET ME
21 LOOK AT THIS DOCUMENT. THE CORPORATION HAS DESIGNATED IT AS
22 CONFIDENTIAL." I READ IT, I READ IT. I KNOW WHAT
23 CALIFORNIA LAW PROVIDES. AND MR. AUERBACH IS A LICENSED
24 LAWYER, AND HE SAYS TO HIMSELF, "I'M SORRY. I DISAGREE WITH
25 THE CORPORATION'S DETERMINATION OF CONFIDENTIALITY. I NOW
26 AM FREE --"

27 **THE COURT:** I DON'T THINK THAT'S QUITE WHAT HE SAYS IN
28 THERE. I DON'T QUITE READ IT THAT WAY, BUT AT ANY RATE GO

17

1 AHEAD AND --

2 MR. LE VEE: ALL RIGHT. LET ME KEEP GOING. IF I MAY
3 HAND UP THE LAST OF THE THREE DOCUMENTS I WANTED IN FRONT OF
4 YOU, YOUR HONOR HAS SEEN THIS BEFORE, AND YOU QUOTE FROM IT
5 IN YOUR TENTATIVE. THESE ARE THE PROCEDURES INVOKED. AT
6 THE END OF THE DAY I DO THINK THIS IS WHERE YOUR HONOR AND I
7 CAN AT LEAST TENTATIVELY HAVE DISAGREED AS TO WHETHER THESE
8 TWO PAGES ACTUALLY WERE STRICT RIGHTS.

9 IF I MAY, VERY BRIEFLY, IN PARAGRAPH 1 THE
10 PROCEDURES EXPLAIN THAT THEY ARE DESIGNED TO BALANCE THE
11 DIRECTOR'S INTEREST IN INSPECTION AND THE CORPORATION'S
12 INTERESTS, AND THEY DO NOT INTEND -- THEY DO NOT DIMINISH,
13 IN THE LAST LINE, A DIRECTOR'S RIGHT TO INSPECT, AS
14 REFLECTED IN CALIFORNIA LAW, WHICH IS WHY WE'RE HERE, AND
15 THE BYLAWS.

16 AND THEN IT SETS FORTH WHAT THE BYLAWS SAY ON
17 INSPECTION, WHICH IS CONSISTENT WITH CALIFORNIA LAW. THEN
18 IN PARAGRAPH 2 IT SAYS, IF YOU WOULD LIKE TO INSPECT OUR
19 RECORDS, PLEASE PUT IT IN WRITING.

20 AND PARAGRAPH 3, IT SAYS, WITHIN TEN DAYS OF OUR
21 GETTING YOUR LETTER WE WILL LET YOU KNOW WHEN YOU CAN
22 INSPECT, WHICH IS WHAT MR. LYNN DID. IF YOU TURN TO THE
23 SECOND PAGE, PARAGRAPH 4, THIS RELATES TO INSPECTION OF
24 PROPERTY, AND NOT BEFORE YOUR HONOR. PARAGRAPH 5 AND
25 PARAGRAPH 6, I BELIEVE, ARE THE MOST IMPORTANT PARAGRAPHS.
26 PARAGRAPH 5 SAYS THAT IF THE CHIEF EXECUTIVE
27 OFFICER IN CONSULTATION WITH THE GENERAL COUNSEL DETERMINES
28 THAT THE RECORDS - PARAPHRASING NOW - DETERMINING THAT THE

18

1 RECORDS THAT HAVE BEEN REQUESTED INVOLVE ISSUES OF

2 CONFIDENTIALITY, PRIVILEGE AND PRIVACY, AS HAS HAPPENED
3 HERE, THE CHIEF EXECUTIVE OFFICER IS SUPPOSED TO TELL THE
4 DIRECTOR, WHICH IS WHAT MR. LYNN DID. AND HE SAYS -- AND
5 THEN IF THE DIRECTOR ACCEPTS THE RESTRICTIONS, AND THE
6 RESTRICTIONS BEING THAT I'M GOING TO TELL YOU IF THERE ARE
7 ANY PROPOSED RESTRICTIONS ON YOUR USE AND ACCESS - WHICH
8 MEANS, I WANT YOU TO ASK ME FIRST, ME, THE CORPORATION
9 BEFORE YOU POST IT ON THE INTERNET - IF THE DIRECTOR ACCEPTS
10 BY COUNTER-SIGNING, WE'RE DONE. THE INSPECTION OCCURS.
11 MR. AUERBACH DID NOT DO THAT. THAT'S WHY WE'RE HERE.
12 THEN IN PARAGRAPH 6, IF THE DIRECTOR IS
13 DISSATISFIED WITH THE CEO'S DETERMINATION, THE CEO IS
14 SUPPOSED TO SUBMIT A REQUEST TO THE AUDIT COMMITTEE OF THE
15 BOARD -- OF THE CORPORATION FOR RESOLUTION. THAT DID HAPPEN
16 HERE. THE AUDIT COMMITTEE DETERMINED THAT MR. LYNN'S LETTER
17 OF OCTOBER 5 WAS REASONABLE. AND THEN IF THE DIRECTOR
18 DISAGREES WITH THE AUDIT COMMITTEE'S RESOLUTION, THE
19 DIRECTOR IS SUPPOSED TO APPEAL THAT DECISION TO THE
20 CHAIRMAN, AND SO THE WHOLE BOARD CAN DETERMINE.
21 THAT DID NOT HAPPEN HERE. MR. AUERBACH RECEIVED
22 THE AUDIT COMMITTEE'S RESPONSE, AND FOUR MONTHS LATER, WITH
23 NO OTHER COMMUNICATION BETWEEN MR. AUERBACH AND THE BOARD,
24 MR. AUERBACH FILED HIS LAWSUIT.
25 THAT'S IT. THESE PROCEDURES THAT I'VE JUST READ
26 BEFORE YOU, THERE ARE NO OTHER RESTRICTIONS. THERE'S
27 NOTHING IN THESE TWO PAGES THAT SAY WE WILL NOT GIVE YOU
28 DOCUMENTS, OR WE WILL NOT GIVE YOU CONFIDENTIAL DOCUMENTS,

19

1 OR WE'RE GOING TO RESTRICT ANY OF YOUR USE OF THOSE
2 DOCUMENTS. SO I THINK THE PROCEDURES THEMSELVES SIMPLY
3 PROVIDE FOR A PROCESS.

4 THAT TAKES US BACK, THEN, TO THE OCTOBER 5
5 LETTER PURPORTING TO IMPLEMENT THE PROCEDURES AND WHETHER
6 THAT LETTER IS UNDULY RESTRICTIVE OF MR. AUERBACH'S RIGHTS
7 AS A DIRECTOR. AND I AGREE WITH YOUR HONOR THE LETTER DID
8 ASK MR. AUERBACH TO COUNTER-SIGN TO ACKNOWLEDGE THE TERMS OF
9 THE LETTER, THE FURTHERANCE OF HIS DUTIES AS A DIRECTOR. AND
10 THE LETTER DID PUT HIM IN A POSITION TO HAVE TO SAY, I AM
11 NOT SATISFIED -- I HAVE NOW CONDUCTED MY INSPECTION, THE
12 WHOLE PURPOSE OF THIS, AND I AM NOT SATISFIED WITH YOUR
13 DETERMINATIONS OF CONFIDENTIALITY, OR, I AM NOT SATISFIED
14 THAT I'VE REQUESTED A PARTICULAR FILE IN ELECTRONIC FORM AND
15 THAT YOU ONLY WANT TO GIVE IT TO ME IN PAPER FORM, OR THAT
16 YOU DON'T WANT TO GIVE ME A CERTAIN DOCUMENT AT ALL.
17 WITHOUT GETTING SPECIFIC, BECAUSE THAT'S NOT
18 BEFORE YOUR HONOR, SOME OF THESE DOCUMENTS ARE INCREDIBLY
19 CONFIDENTIAL, AND THEY ARE EXTREMELY PRIVILEGED. THEY
20 INCLUDE THE SORTS OF LEGAL OPINIONS -- AND THERE'S PERSONNEL
21 FILES. I MEAN, THERE'S A LOT OF STUFF. AND AS I SAID
22 BEFORE, WE'RE NOT REALLY DEBATING WHETHER THEY ARE
23 CONFIDENTIAL BECAUSE MR. AUERBACH HAS NOT SUGGESTED THAT
24 THEY ARE NOT. HE KNOWS THEY ARE. THAT'S WHY HE WANTS
25 THEM.
26 AND SO THE ISSUE IS REALLY THE ONUS. DO WE GIVE
27 MR. AUERBACH THE RECORDS, CLOSE OUR EYES AND HOPE FOR THE
28 BEST? IS THAT WHAT CALIFORNIA LAW PROVIDES, OR CAN A

20

1 CORPORATION, ALWAYS HAVING THE BURDEN ON IT - WE RECOGNIZE
2 THAT THAT'S WHAT THE STATUTE SAYS, THAT'S WHAT THE HAVLICEK
3 CASE SAYS. WE KNOW WE BEAR THE BURDEN - CAN A CORPORATION
4 SAY YOU'VE GOT ACCESS TO ALL THE DOCUMENTS BUT BEFORE YOU DO
5 CERTAIN THINGS WITH CERTAIN OF THE

6 DOCUMENTS --

7 **THE COURT:** WHERE DOES IT SPECIFICALLY IDENTIFY IN
8 THIS LETTER SPECIFIC DOCUMENTS THAT HE'S GOING TO HAVE TO BE
9 CONCERNED ABOUT? IT DOESN'T GIVE ANY IDEA WHETHER OR NOT
10 THE CORPORATION IS CLAIMING THAT ALL OF THEM ARE, WHICH ONES
11 ARE, OR ANYTHING AT ALL. THAT'S SOMETHING THAT'S STILL TO
12 BE DETERMINED DOWN THE LINE.

13 **MR. LE VEE:** IT IS. AND FRANKLY, FOR THAT REASON
14 YOUR HONOR, I PERSUADED MR. TOUTON TO START OUR REPLY BRIEF
15 WITH THE ISSUE OF RIPENESS BECAUSE I BELIEVE VERY STRONGLY
16 THAT YOUR HONOR DOESN'T KNOW WHETHER THE PARTIES ARE GOING
17 TO HAVE DISAGREEMENT ON CONFIDENTIALITY.

18 **THE COURT:** THIS IS WHERE THE PROBLEM IS BECAUSE A
19 CORPORATION COULD TAKE FOREVER EXCLUDING A DIRECTOR FROM
20 GETTING HIS RIGHTFUL INSPECTION BY SETTING UP PROCEDURES
21 SUCH AS ARE HERE, AND THAT'S WHY I THINK THE CALIFORNIA LAW
22 HASN'T SAID THAT THE CORPORATION, THE BOARD OF DIRECTORS,
23 CAN PRECLUDE OR PLACE CONDITIONS ON OTHER MEMBERS SEEING
24 DOCUMENTS, BECAUSE INDEED IT CAN BE STRETCHED OUT.
25 TOOK TEN MONTHS TO DO THE RULES HERE. WE'LL
26 ALREADY SPEND THE NEXT SEVERAL MONTHS BEFORE WE'RE HERE. AND
27 I GUESS COME NOVEMBER MR. AUERBACH PROBABLY HAS BEEN
28 LEGISLATED OUT OF A POSITION HERE.

21

1 ANYWAY, BE THAT AS IT MAY, I THINK THIS CASE
2 REALLY POINTS UP THE PROBLEM, AND WHAT YOU JUST SAID POINTS
3 IT UP MORE ACUTELY THAN EVER BECAUSE WHAT IT MEANS IS THE
4 MAJORITY CAN ALWAYS PRECLUDE THE MINORITY FROM SEEING
5 ANYTHING BASED UPON THE CONFIDENTIALITY OF CONTENTION. AND,
6 AS I SAY, IN THIS LETTER IT DOESN'T GIVE YOU ANY REAL
7 UNDERSTANDING, AT LEAST DOESN'T GIVE ME UNDERSTANDING AS TO

8 EXACTLY WHICH THINGS ARE SO CONFIDENTIAL.

9 MR. LE VEE: YOU ARE RIGHT. WELL, LET ME MAKE IT
10 CLEAR FOR THE RECORD.

11 THE COURT: YEAH. I MEAN, AS FAR AS I CAN
12 TELL FROM THIS, EVERYTHING COULD BE VIEWED CONFIDENTIAL BY
13 THE COMPANY.

14 MR. LE VEE: ICANN DID NOT PROPOSE MR. AUERBACH WOULD
15 NOT BE ABLE TO SEE A SINGLE DOCUMENT. JUST TO BE CLEAR,
16 BECAUSE, YOUR HONOR'S LAST STATEMENT SUGGESTED --

17 THE COURT: DOESN'T APPEAR FROM THAT LETTER.

18 MR. LE VEE: OH, YES. IN PARAGRAPH 1, YOUR HONOR, AND
19 IN PARAGRAPH 2 ICANN SAYS, MR. LYNN SAYS, THE MATERIALS WILL
20 BE MADE AVAILABLE FOR YOU ON THESE DAYS.

21 THE COURT: WHAT MATERIALS?

22 MR. LE VEE: THE MATERIALS MR. AUERBACH HAS REQUESTED,
23 ALL OF THEM.

24 THE COURT: BUT THEN IT GOES ON, AND WE DON'T KNOW
25 WHICH ONES ARE GOING TO BE CONFIDENTIAL. IT MAY BE ALL.

26 MR. LE VEE: NO. WHAT IT SAYS IS IN PARAGRAPH 2, MUCH
27 OF THE MATERIAL YOU HAVE REQUESTED FOR REVIEW CONTAINS
28 NON-PUBLIC AND CONFIDENTIAL INFORMATION. IN MAKING THIS

22

1 INFORMATION AVAILABLE TO INSPECTION ICANN PROPOSED TO GIVE
2 HIM EVERY SINGLE DOCUMENT.

3 THE COURT: EXCEPT MUCH OF BLAH, BLAH, BLAH.

4 MR. LE VEE: NO. I APOLOGIZE, YOUR HONOR. I DON'T
5 THINK MR. AUERBACH AND HIS COUNSEL HAVE EVER READ THE LETTER
6 THAT WAY.

7 AT NO TIME DID ICANN EVER PROPOSE THAT IT WOULD
8 NOT PERMIT MR. AUERBACH TO SEE A SINGLE PIECE OF PAPER OR
9 DOZENS OF PIECES OF PAPER.

10 **THE COURT:** I'M NOT SAYING NOT A SINGLE PIECE OF
11 PAPER, BUT YOU HAVE THIS TERMINOLOGY, MUCH OF THIS IS. SO
12 IT'S NOT IDENTIFIED.

13 **MR. LE VEE:** MUCH OF IT IS CONFIDENTIAL BECAUSE OF THE
14 NATURE OF WHAT HE WAS REQUESTING, SO WHAT WE SAID THEN WAS,
15 AFTER YOU HAVE REVIEWED THE CONFIDENTIAL INFORMATION --

16 **THE COURT:** EXACTLY.

17 **MR. LE VEE:** SO JUST TO BE CLEAR, HE'S REVIEWED ALL OF
18 IT.

19 **THE COURT:** TELL ME FROM THIS LETTER WHAT IS IT THAT
20 HE WOULD HAVE DONE -- GIVEN THE LIST THAT WE HAVE THAT HE
21 MADE, WHAT WOULD HE BE GIVEN WITHOUT --

22 **MR. LE VEE:** ALL OF IT, EVERY SINGLE PIECE OF PAPER,
23 YOUR HONOR. THERE WAS NOT A SINGLE PIECE OF PAPER UNDER
24 THIS --

25 **THE COURT:** THAT'S WHAT IT SAYS HERE. NOT WITHOUT
26 SIGNING THE LETTER AND DOING ALL KINDS OF OTHER THINGS. NOT
27 WITHOUT THE CONDITIONS. HE'S NOT GOING TO GET ONE THING
28 WITHOUT THE CONDITIONS.

23

1 **MR. LE VEE:** YES, THAT IS CORRECT. IF HE DOESN'T SIGN
2 THE LETTER WE WIND UP IN COURT.

3 **THE COURT:** AND HE HAS TO SIGN THE LETTER BEFORE HE'S
4 EVEN TOLD THE COMPANY WHETHER OR NOT IT'S CLAIMING
5 CONFIDENTIAL AS TO EVERY PIECE OF PAPER, OR WHATEVER "MUCH
6 OF IT" MEANS.

7 **MR. LE VEE:** WHAT HE WAS TOLD IS, YES, IF YOU WANT TO
8 REVIEW THESE DOCUMENTS, AND BECAUSE MANY OF THE DOCUMENTS
9 YOU HAVE REQUESTED ARE CONFIDENTIAL, THEN WE'RE GOING TO
10 GIVE YOU THE DOCUMENTS, BUT IF YOU THEN HAVE -- WE'RE
11 BASICALLY TALKING ABOUT USE RESTRICTIONS. WE'RE NOT TALKING

12 ABOUT ACCESS. AND THAT'S WHY, YOUR HONOR, WHEN WE TALK
13 ABOUT THE CASE LAW, YOU ASKED ME A QUESTION TEN MINUTES
14 AGO, WHAT COURT ALLOWS THE CORPORATION TO DO THIS.
15 IF YOU LOOK AT HAVLICEK AND CHANTILES, THE
16 CORPORATIONS IN THOSE CASES APPARENTLY VIEWED THEMSELVES AS
17 HAVING THE ALTERNATIVE OF NO INSPECTION OR FULL INSPECTION.
18 AND SO THEY OPTED FOR NO INSPECTION, AND THE COURT THEN
19 IMPOSED JUST AND PROPER CONDITIONS.
20 WE COULD HAVE SAID TO MR. AUERBACH, THE
21 DOCUMENTS YOU ARE REQUESTING ARE CONFIDENTIAL IN MANY
22 RESPECTS. HE ASKS FOR, FOR EXAMPLE, THE FILE THAT CONTAINS
23 INFORMATION FROM MY LAW FIRM. I DON'T WANT TO PERSONALIZE
24 IT, OBVIOUSLY, BECAUSE I DON'T THINK IT'S PERSONAL, BUT IF I
25 SEND A LETTER TO MR. [TU/] TO KNOW, THAT'S PRETTY LIKELY TO
26 BE SUBJECT TO THE ATTORNEY-CLIENT PRIVILEGE. AND SO THE
27 CORPORATION THEN -- WE'RE IN A CONUNDRUM, IF THAT'S WHAT THE
28 LAW IS. THE CONUNDRUM IS MAYBE I SHOULD HAVE SAID, "I'M

24

1 SORRY, MR. AUERBACH, YOU CANNOT GET ACCESS TO ANY OF THE
2 DOCUMENTS. SUE US."
3 WE COME IN, WE CAN ASK YOUR HONOR FOR A
4 PROTECTIVE ORDER THAT ACCOMPLISHES THE JUXTAPOSITION OF THE
5 RELATIVE RIGHTS HERE, GIVES FULL INSPECTION, PERHAPS WITH A
6 SPECIAL MASTER TO DETERMINE WHAT DOCUMENTS ARE CONFIDENTIAL
7 AND SHOULDN'T BE POSTED ON THE INTERNET, WHAT DOCUMENTS
8 ARE. THAT CLEARLY WAS ONE ALTERNATIVE, AND AT LEAST AS I
9 READ YOUR HONOR'S TENTATIVE AGAIN, I WAS SORRY THAT'S NOT
10 THE ALTERNATIVE WE WANT.
11 BUT WE VIEW ICANN AS HAVING DONE SOMETHING MUCH
12 MORE REASONABLE. ICANN DID NOT SAY, YOU CAN'T COME IN.
13 ICANN SAID, YOU CAN COME IN, YOU CAN LOOK AT EVERYTHING, AND

14 THEN LET'S DECIDE IF WE HAVE A DISPUTE. AND THEN IF WE HAVE
15 A DUTY, WE'VE NARROWED WHAT THE DISPUTE IS ABOUT. AND WE
16 CAN THEN PRESENT TO YOUR HONOR THE SPECIFIC ISSUE: OKAY,
17 I'VE NOW GOT A MEMO FROM A LAWYER TO THE CORPORATION OR TO
18 THE BOARD. CAN MR. AUERBACH - AND WE'VE DESIGNATED THIS IS
19 PRIVILEGED AND CONFIDENTIAL - MUST MR. AUERBACH RESPECT THAT
20 DESIGNATION. AND THE SPECIAL MASTER OR MAYBE YOUR HONOR, IF
21 YOUR HONOR HAS THAT KIND OF PATIENCE, WOULD GO THROUGH EACH
22 DOCUMENT.

23 **THE COURT:** WELL, I'VE DONE IT, AND I THINK IN MANY
24 SITUATIONS IT'S MORE QUICK TO DO IT YOURSELF. BUT LET ME
25 ASK YOU THIS, WHY COULDN'T ICANN SIMPLY HAVE SAID, OKAY, WE
26 WILL GIVE YOU THIS, THIS, AND THIS, BUT THIS WE DESIGNATE
27 CONFIDENTIAL BEFOREHAND, BEFORE LETTING THEM GO THROUGH ALL
28 OF IT. THEN WE CAN COME HERE AND STILL DEAL WITH THOSE

25

1 THINGS, BUT WE HAVEN'T WASTED ALL OF THIS TIME AND EFFORT,
2 WHICH IN ESSENCE PUTS IN MY VIEW THE DISSIDENT OR MINORITY'S
3 RIGHTS, WHICH I THINK CALIFORNIA LAW IS INTENDED TO PROTECT.

4 **MR. LE VEE:** WE THOUGHT THAT WE HAD DONE BETTER FOR
5 THE DIRECTOR, RATHER THAN SAYING, AS YOUR HONOR IS
6 SUGGESTING, HERE IS THE PILE THAT YOU ASKED FOR THAT'S NOT
7 CONFIDENTIAL. WE'RE NOT GOING TO GIVE YOU THIS PILE. SUE
8 US FOR THAT PILE.

9 WE SAID, TAKE BOTH PILES AND LOOK AT THEM.

10 **THE COURT:** AND THEN A MONTH LATER WE'RE GOING TO TELL
11 YOU THAT HALF OF THAT STUFF YOU CAN'T HAVE, AND THEN YOU CAN
12 GO TO COURT AFTER YOU'VE GONE THROUGH THE TWO OTHER STEPS,
13 TO SEE THE COMMITTEE AND THE C.E.O. AND EVERYBODY ELSE
14 APPROVES.

15 **MR. LE VEE:** IT'S NOT A QUESTION OF CAN'T HAVE.

16 **THE COURT:** THIS IS A DIFFERENT OF SITUATION WHERE
17 THESE KINDS OF ADMINISTRATIVE REMEDIES THAT ARE DRAGGED OUT
18 IN FACT PUTS A TREMENDOUS BURDEN ON THE REQUESTING PARTY,
19 WHO SHOULDN'T HAVE THIS BURDEN.

20 **MR. LE VEE:** THE INSPECTION PROCEDURES WHICH WE DID
21 FOLLOW HAVE A PRETTY TIGHT TIMETABLE. I AGREE, YOUR HONOR,
22 IT'S BEEN A LONG TIME SINCE THE BEGINNING OF MR. AUERBACH
23 BECOMING A DIRECTOR UNTIL TODAY, BUT HAD MR. AUERBACH
24 CONDUCTED THE INSPECTION, GRANTED AFTER COUNTER-SIGNING THE
25 LETTER, HE THEN IS GRANTED THE INSPECTION, AND THE AUDIT --
26 HE PREPARES AN APPEAL. THE AUDIT COMMITTEE HAS 20 DAYS. HE
27 CAN APPEAL TO THE BOARD. IN MY OWN JUDGMENT, YOUR HONOR, WE
28 WOULD HAVE RESOLVED OR NOT RESOLVED THE DISPUTES A LONG TIME

26

1 AGO.

2 **THE COURT:** THE BOARD HAS ALREADY IN ESSENCE STATED
3 ITS POSITION, PRESUMABLY. BY THE WAY, WHAT ABOUT THE
4 VALIDITY OF THESE RULES? WHAT IS THERE IN THE -- IN
5 ANYTHING, BYLAWS OR WHATEVER, THAT GIVES THE AUDIT COMMITTEE
6 AND WHOEVER ELSE PARTICIPATED IN THIS THE RIGHT TO
7 PROMULGATE THESE RULES?

8 **MR. LE VEE:** WELL, UNDER OUR UNDERSTANDING OF THE
9 CORPORATIONS CODE, BECAUSE THE CHIEF EXECUTIVE OFFICER IS
10 DELEGATED SPECIFIC RESPONSIBILITIES TO RUN THE DAY-TO-DAY
11 MANAGEMENT OF THE CORPORATION, OUR VIEW WAS THAT THE CHIEF
12 EXECUTIVE OFFICER ACTUALLY COULD HAVE SET FORTH WHAT AGAIN
13 WHAT WE VIEW AS PROCEDURES.

14 **THE COURT:** SEEMS TO ME IT'S SORT OF A LEGISLATIVE
15 TYPE ACT THAT'S NOT DAY-TO-DAY. IT'S REALLY SORT OF A
16 LEGISLATIVE TYPE OF THING THAT DETERMINES HOW A CERTAIN KIND
17 OF SITUATION IS GOING TO BE HANDLED FOREVER.

18 MR. DIRKSEN: WELL --

19 THE COURT: SEEMS A POLICY DECISION TO ME.

20 MR. LE VEE: IT DID GO, THEN, TO ICANN'S AUDIT

21 COMMITTEE. AND, YOU ARE RIGHT, THE AUDIT COMMITTEE DID NOT

22 THEN ASK FOR THE BOARD'S DETERMINATION. I WILL SAY,

23 OBVIOUSLY BECAUSE I'M HERE, THAT THE BOARD DOES BELIEVE THAT

24 THE PROCEDURES THAT WERE PROMULGATED WERE REASONABLE. THEY

25 HAVE AUTHORIZED ME TO DEFEND THE SUIT.

26 AND THEIR CONCERN AND MY CONCERN, JUST TO GIVE

27 YOU AN EXAMPLE, WHICH WE ALLUDED TO IN THE PAPERS AND I

28 ALLUDED TO RIGHT WHEN I STARTED HERE, IF WE'RE IN A POSITION

27

1 BECAUSE WE HAVE 12 DIRECTORS WHO RESIDE OUTSIDE OF THE

2 UNITED STATES THAT WE HAVE NO PROCEDURES, DIRECTOR CALLS ON

3 TUESDAY AND SAYS I'M IN TOWN, I'D LIKE TO SEE THE DOCUMENTS

4 TODAY. THE DIRECTOR COMES IN, TAKES THE DOCUMENTS, MAKES A

5 BUNCH OF COPIES, GETS ON THE NEXT PLANE TO BRAZIL, GHANA,

6 KOREA, JAPAN - THAT'S WHERE THESE DIRECTORS ARE FROM - ICANN

7 THEN, UNDER THE ORIGINAL PROPOSAL THAT MR. AUERBACH HAD

8 PRESENTED TO US, WHICH WAS, I'LL GIVE YOU SEVEN DAY'S NOTICE

9 THAT I'M GOING TO HAVE A VIEW OF CONFIDENTIALITY DIFFERENT

10 THAN YOURS. I WANT TO MAKE A DOCUMENT PUBLIC. YOU

11 DESIGNATE IS AS CONFIDENTIAL. I'M HOLDING A COPY OF IT.

12 YOU'VE GOT SEVEN DAYS. THE CLOCKS ARE RUNNING.

13 I'LL TELL YOU WHAT I THEN HAVE TO DO IN SEVEN

14 DAYS. CALIFORNIA LAW APPLIES. ICANN IS WITHIN THIS

15 COUNTY. I HAVE TO RUN IN AND GET YOUR HONOR'S T.R.O. I

16 THEN HAVE TO GO TO GHANA, BRAZIL, KOREA OR WHATEVER AND HOPE

17 THAT I CAN THEN ENFORCE THAT T.R.O.

18 THE COURT: I THINK YOU ARE DOING HERE HORRORS THAT

19 DON'T NEED TO BE THERE. I THINK THAT THE REASONABLE TIME

20 AND PLACE RESTRICTIONS ARE NOT AT ISSUE HERE AT ALL. I
21 THINK THERE CAN BE REASONABLE TIME AND PLACE RESTRICTIONS,
22 AND I DON'T KNOW THAT SIMPLY HAVING TO MAKE RECORDS
23 AVAILABLE FOR INSPECTION AUTOMATICALLY MEANS THAT EVERYTHING
24 CAN BE COPIED. WE HAVEN'T GOTTEN TO THAT, AND THAT'S WHERE
25 WE GET TO THE PROTECTIVE ORDER, YOU KNOW, AS I INDICATED IN
26 MY TENTATIVE, THAT OBVIOUSLY THERE MIGHT VERY WELL NEED TO
27 BE SOME KIND OF PROTECTIVE ORDER.
28 BUT AT ANY RATE, I THINK THAT THAT IS NOT HARDLY

28

1 AN EXCUSE FOR NOT MAKING GENERAL, ROUTINE, LEGITIMATE LIKE
2 LEDGER AND THINGS LIKE THAT AVAILABLE TO THE DIRECTOR.
3 SEEMS TO ME THERE SHOULDN'T BE ANYTHING TO HIDE IN THESE
4 LEDGERS. THERE SHOULDN'T BE ANYTHING TO HIDE IN THESE
5 LEDGERS. WHY IS THAT SO SECRET?
6 **MR. LE VEE:** THE ISSUE, AGAIN -- AND I JUST WANT TO BE
7 SO CLEAR. THE ISSUE IS NOT WHETHER THERE'S ANYTHING TO HIDE
8 FROM MR. AUERBACH. ICANN OFFERED TO GIVE MR. AUERBACH
9 ACCESS TO EVERY SINGLE DOCUMENT HE REQUESTED. THE ISSUE IS
10 USE. AND SO IF I COULD -- I'VE TAKEN A LOT OF YOUR TIME, SO
11 LET ME CLOSE ON THE SUBJECT OF THE PROTECTIVE ORDER.
12 ICANN LOOKED AT THE LAW, LOOKED AT THE CASES
13 YOUR HONOR CITED, AS I SAID BEFORE, AND SAID, TRUE, THOSE
14 STATUTES AND THE CASES TALK ABOUT THE COURT ISSUING A
15 PROTECTIVE ORDER. THE HAVLICEK CASE IS QUITE CLEAR ON THAT,
16 TO HAVE JUST AND REASONABLE RESTRICTIONS ON DIRECTOR USE.
17 ICANN TRIED TO FORM, THROUGH IT'S PROCEDURES, RESTRICTIONS
18 THAT IT THOUGHT WERE LESS INTRUSIVE THAN THOSE THAT HAD BEEN
19 ADOPTED BY THE COURTS.
20 AND WE SAID TO ICANN, YOUR CHOICE, AS I SAID
21 BEFORE, IS, DENY ACCESS ENTIRELY, IN WHICH CASE WE GET AN

22 EARLY COURT DATE BEFORE YOUR HONOR; OR HAVE A PROCEDURE
23 WHERE INDIVIDUAL DIRECTORS CAN COME IN, CAN LOOK, CAN MAKE
24 REQUESTS. AND WHEN THERE ARE DISAGREEMENTS, THEN WE CAN
25 LITIGATE OVER A NARROWER BODY SO THAT WE DON'T HAVE TO HAVE
26 A COMPLETE DENIAL WHICH THEN IS FOLLOWED BY OUR REQUEST TO
27 YOU FOR SPECIAL MASTER - WHICH INCIDENTALLY ICANN WILL PAY
28 FOR IF YOUR HONOR ORDERS - THAT BECAUSE WE THOUGHT THAT WAS

29

1 A MORE COMPLICATED PROCEDURE THAN WHAT WE HAD PROPOSED.
2 IF YOUR HONOR BELIEVES THAT OUR INSPECTION
3 PROCEDURES ARE FLAWED, THEN I WOULD ASK -- I WOULD SAY TWO
4 THINGS: FIRST, WE DID FEEL THAT WHAT WE WERE DOING WAS
5 SPECIFICALLY AUTHORIZED, THAT IF PROCEDURES COULD BE
6 JUDICIALLY IMPOSED, THAT IT WAS REASONABLE FOR A CORPORATION
7 TO TRY TO DO SOMETHING ALONG THOSE LINES IN LIEU OF A
8 COMPLETE DENIAL. IF THAT'S NOT THE CASE, IT'S JUST SIMPLY
9 NOT THE CASE.
10 SECOND, WE ARE PREPARED TO, IF YOUR HONOR IS
11 WILLING, TO -- WE'VE ALWAYS BEEN PREPARED TO TURN OVER ALL
12 OF THE RECORDS THAT HAVE BEEN REQUESTED. WE WOULD ASK
13 YOUR HONOR TO ASK THE PARTIES TO CONSULT REGARDING THE
14 APPOINTMENT OF A SPECIAL MASTER SO THAT IF MR. AUERBACH
15 SAYS, "I SEE THAT YOU HAVE DESIGNATED A DOCUMENT AS
16 CONFIDENTIAL. I DISAGREE," ICANN THROUGH A VERY QUICK
17 PROCESS CAN EXPLAIN TO THE SPECIAL MASTER ITS REASONS FOR
18 DESIGNATING THAT DOCUMENT AS CONFIDENTIAL. MR. AUERBACH CAN
19 EXPLAIN HIS REASONS TO DISAGREE. AND WE CAN APPROACH THIS
20 ON A DOCUMENT-BY-DOCUMENT BASIS.
21 WHAT WE HAD ORIGINALLY PROPOSED PUTS THAT WITHIN
22 THE CORPORATION. AND WHAT I HEAR YOUR HONOR SAYING IS THAT
23 IS NOT SATISFACTORY.

24 **THE COURT:** NO. I JUST DON'T UNDERSTAND WHY -- IT
25 SEEMS TO ME THAT AN AWFUL LOT OF THESE SHOULD NOT BE
26 DESIGNATED CONFIDENTIAL THAT ANYONE SHOULD HAVE TO LOOK AT
27 BEFORE THE DIRECTOR LOOKS AT. FOR EXAMPLE, THE GENERAL
28 LEDGER, CHART OF ACCOUNTS, DAILY TRANSACTIONS JOURNAL - WHY

30

1 SHOULD ANYBODY EVEN BE LOOKING AT THAT STUFF? WHEN YOU
2 FINALLY GET TO SOMETHING THAT YOU DO BELIEVE IS
3 CONFIDENTIAL, THAT SHOULD BE DESIGNATED CONFIDENTIAL. IF
4 THERE IS SUCH AN AMOUNT OF PAPERWORK THAT I CANNOT DO IT, I
5 WILL DESIGNATE A SPECIAL MASTER. IF THERE ISN'T, AND I CAN
6 MANAGE TO DO IT, I'LL DO IT MYSELF. I DO AN AWFUL LOT OF
7 THESE MYSELF FOR VARIOUS REASONS. MANY TIMES IT'S MORE
8 EFFICIENT.
9 BUT BE THAT AS IT MAY, IT MAY BE IN THIS CASE
10 THAT SO MUCH STUFF IS DESIGNATED CONFIDENTIAL THAT IT MIGHT
11 BE REASONABLE TO APPOINT A SPECIAL MASTER, BUT I'M NOT GOING
12 TO DO THAT UNTIL WE HAVE AT LEAST SOME KIND OF CLAIM AS TO
13 WHAT IS IN THAT CATEGORY. BECAUSE IT SEEMS TO ME THAT A
14 DIRECTOR, AS A GENERAL RULE, UNDER THE LAW SHOULD BE
15 ENTITLED TO LOOK AT MOST OF THE CORPORATE RECORDS WITHOUT
16 HAVING TO GO FOR A SPECIAL MASTER TO DECIDE ON IT OR TO A
17 COURT TO DECIDE ON IT. THEY HAVE A RIGHT TO IT UNDER THE
18 STATUTE.
19 AND IF YOU ARE GOING TO HAVE SOME RECORDS, A
20 CERTAIN NUMBER THAT ARE NOT AVAILABLE IN YOUR VIEW WITHOUT
21 REVIEW BY SOMEBODY ELSE, THEN YOU WILL HAVE TO OR SHOULD, AT
22 LEAST, SEEMS TO ME, DESIGNATE WHICH ONES ARE THOSE. AND IF
23 THOSE ARE SO EXTENSIVE THAT THEY CANNOT BE HANDLED BY THE
24 COURT, I WILL APPOINT A SPECIAL MASTER, OF COURSE, AND I
25 SUPPOSE BOTH SIDES SHOULD HAVE AN INPUT AS TO WHO THAT

26 PERSON SHOULD BE AND HOW HE'S GOING TO GET PAID FOR, OR SHE.

27 MR. LE VEE: WE WERE PREPARED ON OCTOBER 5TH IN THE

28 LETTER -- ACTUALLY, THE DATES WE PROPOSED WERE OCTOBER 19,

31

1 18, 22, 23. WE WERE PREPARED TO PUT INTO A CONFERENCE ROOM
2 EVERY SINGLE PIECE OF PAPER THAT MR. AUERBACH HAD REQUESTED.

3 AND I APOLOGIZE THAT I CANNOT TELL YOU TODAY EXACTLY WHICH
4 OF THOSE RECORDS WERE CONFIDENTIAL. THAT WAS NOT REALLY AN

5 UNDERLYING PART OF THE ARGUMENT. MR. AUERBACH HAS NEVER

6 DEBATED THE FACT THAT HE UNDERSTOOD THAT AT LEAST SOME OF

7 THOSE RECORDS WERE CONFIDENTIAL AND SUBJECT TO THE

8 PRIVILEGE.

9 I'M NOT TELLING YOUR HONOR THAT THE GENERAL

10 LEDGER IS NECESSARILY CONFIDENTIAL. I WILL SAY TO

11 YOUR HONOR THAT WE DON'T -- ICANN POSTS ON ITS WEBSITE, I'M

12 GOING TO GUESS NOW, IN EXCESS OF 90 PERCENT OF THE LETTERS

13 IT RECEIVES. IT POSTS ON THE WEBSITE, FRANKLY, EVERYTHING

14 ABOUT THIS LITIGATION. BETWEEN OUR WEBSITE AND

15 MR. AUERBACH'S WEBSITE, YOU CAN GET IT ALL. IT POSTS ON THE

16 WEBSITE ALL OF ITS CORPORATE MINUTES. ICANN IS REQUIRED BY

17 THE U.S. GOVERNMENT IN ESSENCE TO BE A VERY OPEN

18 CORPORATION. WHAT WE'RE TALKING ABOUT ARE THOSE MATERIALS

19 THAT HAVEN'T BEEN POSTED, BECAUSE IF THEY HAVE BEEN POSTED

20 MR. AUERBACH HAS THEM --

21 **THE COURT:** HE WOULDN'T BE ASKING FOR THOSE,

22 **OBVIOUSLY.**

23 **MR. LE VEE:** WHAT HE'S ASKING FOR ARE THE MATERIALS

24 THAT ICANN HAS DETERMINED IT WOULD HINDER ICANN TO HAVE OUT

25 IN THE PUBLIC. AND IF WE ARE OVERINCLUSIVE, THEN THAT WOULD

26 BE WRONG ON OUR PART TO BE SO OVERINCLUSIVE, BUT I'M JUST SO

27 UNCOMFORTABLE WITH THE COURT HAVING DETERMINED THAT WE WOULD

32

1 GOT TO THE POINT WHERE WE SAT DOWN AND PUT THE DOCUMENTS ON
2 THE TABLE.

3 **THE COURT:** LET ME ASK YOU THIS, THE INITIAL INQUIRIES
4 THAT HE MADE, SEEM TO ME THE INITIAL INQUIRIES WHICH WERE
5 SORT OF GIVEN SOMEWHAT SHORT SHRIFT AND SO ON, IN MARCH OF
6 2001 AND SO ON THAT HE MADE CONCERNING FUNDS OF THE DMSO AND
7 SO ON, SEEMS TO ME THEY WERE PROPER, LEGITIMATE INQUIRIES.
8 AND IT SEEMS TO ME THAT INFORMATION AT LEAST AS TO THOSE
9 INQUIRIES SHOULD BE PUBLIC INFORMATION.

10 I MEAN, WHAT'S CONFIDENTIAL ABOUT THAT? I MEAN,
11 IF YOU ARE NOT IN A POSITION TO TELL ME WHICH OF THESE ITEMS
12 ARE CONFIDENTIAL OR WHICH, AT LEAST -- OBVIOUSLY, I GUESS
13 THE ATTORNEY-CLIENT PRIVILEGE EVERYBODY CAN ASSUME THAT
14 THERE IS SOMETHING THERE THAT WOULD BE CONFIDENTIAL, BUT
15 OTHER THAN THAT I FAIL TO SEE -- THIS IS A NONPROFIT PUBLIC
16 CORPORATION.

17 **MR. LE VEE:** YES, IT IS, YOUR HONOR.

18 **THE COURT:** PEOPLE SHOULD BE ABLE TO FIND OUT PRETTY
19 MUCH EVERYTHING THAT IT'S DOING, AND NOT JUST WHAT IT WANTS
20 TO PUT ON THE INTERNET EITHER. SO THAT'S WHAT THE
21 DIRECTOR'S OBLIGATIONS ARE. SEEMS TO ME THEY ARE NOT JUST
22 TO THE CORPORATION PER SE, BUT ALSO TO THE PUBLIC AND THE
23 COMMERCE DEPARTMENT, OBVIOUSLY, AS WELL. AS YOU POINTED
24 OUT, YOU KNOW, THEY ARE SORT OF, I GUESS, A PARTY IN A SENSE
25 AS WELL.

26 SO ANYWAY, I GET A VERY DISTINCT SENSE FROM
27 READING EVERYTHING HERE THAT THERE HAS BEEN AN EFFORT HERE
28 TO TRY TO PUT THIS OFF AS MUCH AS POSSIBLE AND TO MAKE IT AS

33

1 DIFFICULT AS POSSIBLE. AND I DON'T REALLY SEE HOW ANYTHING
2 IS BEING EXPEDITED THROUGH THESE PARTICULAR PROCEEDINGS.
3 MAYBE THROUGH SOME PARTICULAR CONTEXT AND SOME OTHER SETUP
4 IT MIGHT WORK, BUT I DON'T SEE THE CASE LAW THAT, FIRST OF
5 ALL, ALLOWS DIRECTORS TO IMPOSE RESTRICTIONS ON OTHER
6 DIRECTORS' ACCESS.

7 AND SECONDLY, THE SPECIFICS HERE SEEM TO ME, AS
8 FAR AS WHAT IS REQUIRED HERE TO GET TO THE RECORDS, IT
9 MILITATES AGAINST WHAT THE LAW PROVIDES IN THAT REGARD.
10 ALL RIGHT. GETTING BACK --

11 **MR. LE VEE:** MAY I QUICKLY RESPOND TO THAT?

12 **THE COURT:** YES, GO AHEAD.

13 **MR. LE VEE:** JUST THE REQUEST THAT I'VE BEEN WORKING
14 OFF OF, WHICH IS ON PAGE 9 OF MR. AUERBACH'S MEMORANDUM IN
15 SUPPORT OF HIS MOTION --

16 **THE COURT:** AND ALSO THE PROPOSED ORDER. I ACTUALLY
17 USED THAT.

18 **MR. LE VEE:** OKAY.

19 **THE COURT:** IT'S THE SAME THING.

20 **MR. LE VEE:** YOUR HONOR, WHEN WE'RE -- THE FIRST ITEM
21 IS GENERAL LEDGER, WHICH IS ESSENTIALLY CHART OF ACCOUNTS,
22 TRANSACTION JOURNAL ACCOUNT BALANCES. THESE ARE NOT THINGS
23 THAT CORPORATIONS POST ON THE INTERNET. THEY ARE THINGS
24 THAT DIRECTORS SHOULD LOOK AT. I DON'T HAVE ANY QUALMS
25 ABOUT THAT.

26 **THE COURT:** AND THEY SHOULD HAVE NO RESTRICTIONS TO
27 LOOK AT THOSE.

28 **MR. LE VEE:** AND THEY NEVER DID.

34

1 **THE COURT:** SHOULDN'T HAVE TO WAIT TEN MONTHS TO LOOK
2 AT THEM.

3 MR. LE VEE: WELL, IF YOUR HONOR IS CONCERNED ABOUT
4 THE DELAY, THAT'S ONE ISSUE. I'M CERTAINLY PREPARED TO
5 ADDRESS THAT.

6 THE COURT: IT GOES INTO THE CONTEXT WITH EVERYTHING
7 ELSE HERE, IN MY VIEW.

8 MR. LE VEE: WHAT MR. LYNN SAYS IN HIS LETTER OF
9 OCTOBER 5, "COME LOOK AT THE DOCUMENTS ON THESE FOLLOWING
10 DATES," THAT WAS INCLUDING THE GENERAL LEDGER. SO
11 MR. AUERBACH WAS GOING TO SEE IT ALL. AND WE'VE NEVER ONCE,
12 THERE ISN'T A SINGLE PIECE OF PAPER - I'VE BROUGHT A LOT OF
13 BINDERS WITH ME TODAY - THERE ISN'T A SINGLE PIECE OF PAPER
14 WHERE ICANN EVER SAID AS TO THAT PIECE OF PAPER OR THAT
15 CATEGORY OF PIECES OF PAPER, "I'M SORRY, YOU CAN'T LOOK AT
16 IT."

17 THE COURT: THAT'S ONE OF THE PROBLEMS HERE.

18 MR. LE VEE: THAT'S WHAT THE CORPORATIONS DID IN
19 CHANTILES AND HAVLICEK.

20 THE COURT: THERE WAS A VERY NARROW REQUEST. AND, OF
21 COURSE, ONE OF THOSE WAS THE VOTING RECORDS. SO IT WAS VERY
22 EASY TO DEAL WITH.

23 MR. LE VEE: SO ITEM ONE WAS THE GENERAL LEDGER. I'M
24 GOING TO SKIP OVER TO ITEM FOUR. WITH RESPECT TO ICANN'S
25 LAW FIRM, ENGAGEMENT LETTERS, CONFLICT NOTICES, WAIVERS; AND
26 THEN ITEM 4D, DETAILED INVOICES FROM THE LAW FIRM SINCE THE
27 INCEPTION OF THE CORPORATION. OF COURSE THOSE DOCUMENTS ARE
28 PRIVILEGED.

35

1 THE COURT: INVOICES? WHY WOULD INVOICES BE
2 NECESSARILY PRIVILEGED?

3 MR. LE VEE: BECAUSE MR. TOUTON ASKS ME IN SOME DETAIL
4 TO EXPLAIN WHAT I DID --

5 **THE COURT:** WELL, THAT CAN BE, I SUPPOSE, IF
6 THAT'S -- FIRST OF ALL, LET ME SAY THAT I VERY RARELY SEE
7 BILLS THAT ARE VERY SPECIFIC ON THAT, ON ANYTHING THAT
8 ANYBODY DOES. AND I REVIEW THESE MYSELF. I AGAIN LOOK AT
9 THEM MYSELF. I LOOK AT THEM VERY CLOSELY FOR VARIOUS
10 PURPOSES, AND I VERY RARELY SEE SOMETHING THAT TRULY CONVEYS
11 AN ATTORNEY-CLIENT TYPE OF INFORMATION. BUT LET'S ASSUME IT
12 DOES. THAT, OF COURSE, CAN BE REMOVED; BUT IT SEEMS TO ME
13 THAT THE BILLS PER SE, GENERALLY SPEAKING, ARE NOT
14 NECESSARILY COVERED BY THE ATTORNEY-CLIENT PRIVILEGE. THEY
15 MAY BE, AGAIN, AS YOU SAY, DEPENDING WHAT'S IN THERE AND SO
16 ON, BUT THE AMOUNTS AND SO ON, THE DIRECTOR SHOULD KNOW HOW
17 MUCH IS BEING SPENT ON LAWYERS FEES.

18 **MR. LE VEE:** AND ALL OF THAT IS IN THE BUDGET. THE
19 DIRECTOR DOES KNOW -- AND I SEE THAT I'M SWIMMING UPSTREAM
20 HERE SO I'M NOT GOING TO SWIM TOO MUCH HARDER FOR TOO MUCH
21 LONGER, AND I APOLOGIZE IF I'M REPEATING MYSELF, BUT I JUST
22 WANT TO MAKE IT SO CLEAR THAT MR. AUERBACH MADE A REQUEST TO
23 SEE MY LAW FIRM'S BILLS AND THE GENERAL LEDGER, AND ICANN IN
24 RESPONSE SAID, "COME IN AND LOOK AT IT." ICANN NEVER SAID,
25 "DON'T LOOK AT A PIECE OF PAPER. WE'RE NOT GOING TO GIVE IT
26 TO YOU."

27 AND SO I TRULY HAVE ALWAYS VIEWED THIS DISPUTE
28 AS A MATTER OF DO I GIVE THE DOCUMENTS AND HOPE THAT THE

36

1 DIRECTOR RESPECTS THE DETERMINATIONS BY THE CORPORATION OF
2 PRIVILEGE, ET CETERA, ET CETERA. WITH NO RESTRICTIONS, NO
3 LETTERS, NO SEVEN PARAGRAPHS OF WHAT THE PROCEDURES WOULD
4 BE, THE DIRECTOR MAKES A REQUEST. IT CAN BE ORAL. HE WANTS
5 TO COME IN, SHE WANTS TO COME IN. AND THEY LOOK AT THE
6 DOCUMENTS, THEY TAKE THE COPIES, AND WE WISH FOR THE BEST.

7 OR WITH RESPECT TO THESE TYPES OF CATEGORIES,
8 DOES THE LAW PERMIT A CORPORATION -- WE DON'T SEE
9 MICROSOFT'S LAW FIRM'S LETTERS OUT IN THE PUBLIC OR IBM'S
10 GENERAL LEDGER IN THE PUBLIC. WE JUST DON'T SEE THAT.

11 **THE COURT:** BUT THE DIRECTORS SHOULD HAVE A RIGHT TO
12 LOOK AT THEM.

13 **MR. LE VEE:** YOU BET, YOUR HONOR, AND MR. AUERBACH WAS
14 GIVEN THAT OPPORTUNITY MANY TIMES.

15 **THE COURT:** AND YOU CAN'T COMPARE MICROSOFT WITH THIS
16 CORPORATION, BECAUSE THIS IS A NONPROFIT PUBLIC CORPORATION.
17 VERY DIFFERENT ANIMAL, SEEMS TO ME. YOU DO HAVE A DUTY TO
18 THE PUBLIC, INTERNATIONAL PUBLIC IF YOU WILL, NOT ONLY THE
19 UNITED STATES, I GUESS, SINCE THIS IS AN INTERNATIONAL
20 ORGANIZATION. AND IT'S VERY DIFFERENT THAN MICROSOFT. SO
21 THAT THE PUBLIC INTEREST AND PUBLIC RIGHT IS PROBABLY
22 SOMEHOW BROADER THAN YOU DO HAVE WHERE IT MAY BE JUST A
23 PRIVATE CORPORATION.

24 OF COURSE, WHERE YOU HAVE A PUBLICLY HELD
25 CORPORATION THAT MAY NOT BE THAT MUCH DIFFERENT, BUT IN ANY
26 CASE --

27 **MR. LE VEE:** IF I REACHED GOING PUBLIC, I APOLOGIZE,
28 BUT I DON'T SEE NOT-FOR-PROFIT CORPORATION GENERAL LEDGERS

37

1 THAT ARE POSTED ON THE INTERNET. I DON'T EVER SEE LAW FIRM
2 BILLS OF PUBLIC, PRIVATE, OR SOLE PROPRIETORSHIPS POSTED ON
3 THE INTERNET. ALL THOSE CORPORATIONS HAVE DIRECTORS. ALL
4 THOSE DIRECTORS HAVE THE RIGHT TO INSPECT. WE BELIEVE 100
5 PERCENT --

6 **THE COURT:** WITHOUT SIGNING CONFIDENTIALITY AGREEMENT,
7 SEEMS TO ME.

8 **MR. LE VEE:** WELL, AND THAT'S OBVIOUSLY WHERE WE PART

9 COMPANY.

10 **THE COURT:** THAT'S ONE, BIG, BIG, PROBLEM, SEEMS TO
11 ME, IN THESE RULES, AMONG OTHERS.

12 **MR. LE VEE:** I'M GOING TO CLOSE THEN, YOUR HONOR,
13 BECAUSE I DO THINK THAT THESE RESTRICTIONS WERE -- DID NOT
14 IN FACT TIE MR. AUERBACH'S HANDS IN ANY RESPECT THAT
15 VIOLATED CALIFORNIA LAW. I THINK THAT THE RESTRICTIONS SET
16 FORTH ONLY PROCEDURES TO TRY TO HAVE DISPUTES RESOLVED. I
17 THINK THAT THE CORPORATION ACTED IN GOOD FAITH, OFFERED TO
18 GIVE HIM EVERYTHING. YES, IT TOOK NINE MONTHS; YES, WE DID
19 HAVE A CEO CHANGE-OUT DURING THAT TIME; YES, THERE WERE
20 OTHER REASONS WHY DIRECTORS HAD NEVER INSPECTED THE
21 CORPORATION'S DOCUMENT, BECAUSE FRANKLY, AS I SAID, THESE
22 DIRECTORS ARE INUNDATED WITH PAPER, AND THEY SEE WHAT THE
23 CORPORATION DOES.
24 AND ICANN VIEWED WHAT IT WAS PROPOSING AS LESS
25 RESTRICTIVE THAN WHAT THE LAW WOULD HAVE PERMITTED IT TO DO,
26 WHICH WAS TO SAY, "NO, AS TO CATEGORY 4 WE'RE NOT GOING TO
27 GIVE IT TO YOU. SUE US."
28 AND I DON'T BELIEVE THAT ASKING ICANN TO

38

1 ASK -- BY HAVING ICANN ASK A DIRECTOR TO SIGN A PIECE OF
2 PAPER THAT SAYS A PROCESS THAT WILL BE FOLLOWED, CULMINATING
3 IN JUDICIAL REVIEW -- I DON'T SEE HOW THAT CAN BE LESS
4 REASONABLE OR LESS JUST THAN FOR ICANN TO HAVE SAID, "I'M
5 NOT GOING TO GIVE IT TO YOU AT ALL UNTIL YOU SUE US." AND
6 THAT'S EXACTLY WHERE WE ARE TODAY.

7 **THE COURT:** OKAY. I'LL HEAR FROM THE OTHER SIDE.

8 **MS. COHN:** SINCE I APPEAR TO HAVE THE DOWNSTREAM
9 SWIMMING POSITION, I'LL KEEP THIS SHORT.

10 **THE COURT:** I DON'T KNOW. THE STREAM SOMETIMES

11 CHANGES.

12 MS. COHN: WOULDN'T BE THE FIRST TIME.

13 WE THINK YOUR HONOR HAS ZEROED IN EXACTLY ON THE
14 QUESTION HERE IN THIS CASE, AND THAT QUESTION IS WHO GETS TO
15 DECIDE THE CONDITIONS UNDER WHICH A DIRECTOR GETS TO INSPECT
16 AND COPY CORPORATE DOCUMENTS.

17 STATUTORY SCHEME AND THE CASES ARE CLEAR THAT
18 THE CORPORATION DOESN'T HAVE THE UNILATERAL ABILITY TO
19 DELAY, DENY OR CONDITION THE RIGHT TO INSPECT IN COPYING.
20 THE COURT MAY DO SO UNDER A PROPER PROTECTIVE ORDER, AND I'M
21 SURE WE'LL GET TO THAT SHORTLY, BUT ICANN DOESN'T HAVE THE
22 UNILATERAL ABILITY TO DO WHAT IT TRIED TO DO HERE TO
23 MR. AUERBACH. AND WHAT IT TRIED TO DO WAS TO CONDITION
24 ACCESS UNDER THE TERM OF PROCESS. AND I THINK YOUR HONOR
25 HAS CORRECTLY RECOGNIZED THAT THE PROCESS HERE WAS JUST
26 PRETTY MUCH A COVER FOR THE DELAY THAT I SUSPECT THEY HOPED
27 WOULD EXTEND LONGER THAN MR. AUERBACH'S TENURE ON THE BOARD,
28 WHICH WE BELIEVE ENDS SEPTEMBER 30TH OF 2002 AT THE SHANGHAI

39

1 MEETING.

2 THERE'S NO QUESTION THAT ICANN IS A CALIFORNIA
3 CORPORATION HERE. IT CHOSE THAT FORM, AND THUS IT'S BOUND
4 BY CALIFORNIA CORPORATE LAW. THE FACT THAT IT HAS A RATHER
5 STRANGE HISTORY OF COMING INTO BEING DOESN'T CHANGE ITS
6 LEGAL DUTIES AND DOESN'T CHANGE ITS GOVERNANCE STRUCTURE,
7 AND THE STATUTORY SCHEME IS VERY CLEAR THAT IT'S GOVERNANT
8 STRUCTURE IS AT THE TOP WITH ITS BOARD OF DIRECTORS.

9 **THE COURT:** WELL, WE TALKED ABOUT THE -- OF COURSE, WE
10 DO HAVE CASES THAT RECOGNIZE THAT IF INDEED THERE'S EVIDENCE
11 THAT A DIRECTOR MIGHT BE MISUSING DELIBERATELY CONFIDENTIAL
12 INFORMATION, THAT INDEED THAT'S GOOD REASON FOR TAKING THE

13 POSITION THAT WE'RE NOT GOING TO GIVE YOU THESE RECORDS.

14 **MS. COHN:** I THINK THAT'S RIGHT, YOUR HONOR, AND I

15 THINK THAT'S ACTUALLY --

16 **THE COURT:** AND THAT'S OBVIOUSLY ONE THING THEY ARE

17 CONCERNED ABOUT, IS MR. AUERBACH.

18 **MS. COHN:** THEY HAVE RAISED THE ISSUES AND A LOT OF

19 SKELETONS, BUT THEY HAVEN'T RAISED ANY EVIDENCE MR. AUERBACH

20 IS INTENDING TO DO ANYTHING IMPROPERLY WITH CONFIDENTIAL

21 INFORMATION. IN FACT, EVEN THE SENTENCE MR. LE VEE POINTED

22 OUT IN THE OCTOBER 15TH, 2001, LETTER FROM MR. AUERBACH THAT

23 HE SAYS HE THINKS IS A COMPLETE MISSTATEMENT OF THE LAW,

24 THAT THE DECISION ABOUT WHAT MATERIAL IS CONFIDENTIAL AND

25 CONFIDENTIAL FROM WHOM IS SUBJECT TO MY OWN DISCRETION

26 LIMITED SOLELY BY THE LAWS OF CALIFORNIA AND THE UNITED

27 STATES.

28 I ACTUALLY THINK THAT IS EXACTLY A CORRECT

40

1 STATEMENT OF THE LAW. MR. AUERBACH'S FIDUCIARY DUTIES AND

2 THE LIMITATIONS ON WHAT HE CAN DO WITH CONFIDENTIALITY ARE

3 COMPLETED LIMITED BY THE LAWS OF THE STATE OF CALIFORNIA.

4 AND HE HAS REPEATEDLY STATED, EVEN IN THIS VERY LETTER, THAT

5 HE WILL ABIDE BY THOSE DUTIES. THEY DON'T HAVE ANY EVIDENCE

6 THAT HE'S NOT GOING TO ABIDE BY HIS DUTIES, AND THEY

7 CERTAINLY HAVEN'T PRESENTED THE KIND OF CASE --

8 **THE COURT:** WELL, NO ONE IS GOING TO SAY, AND I

9 HAVEN'T SEEN ANYONE SAY, "I'M GOING TO VIOLATE MY DUTIES."

10 AND THAT'S NOT SOMETHING WE'RE GOING TO SEE. BUT THE

11 QUESTION IS, IS THERE ENOUGH HERE IN THE CONTEXT OF WHAT HAS

12 BEEN PROVIDED AND ALSO IN HIS POSITION WITH RESPECT TO THE

13 RECORD AVAILABILITY AND SO ON THAT MIGHT RAISE SOME

14 QUESTIONS, SOME BONA FIDE QUESTIONS, AS TO WHETHER HE MIGHT

15 OR MIGHT NOT MISUSE THESE.

16 MS. COHN: AND, YOUR HONOR, I SUBMIT THERE'S NOT.

17 THERE IS A CLEAR AND VOLUMINOUS EVIDENCE THAT MR. AUERBACH
18 WAS SPECIFICALLY ELECTED TO TRY TO BRING A REFORM AGENDA TO
19 THIS ORGANIZATION. THAT'S WHY HE WAS VOTED IN.

20 THE COURT: I THINK IT'S VERY OBVIOUS. I SO STATED
21 EARLIER.

22 MS. COHN: AND I THINK ICANN IS TRYING TO TURN THIS
23 INTO AN ARGUMENT FOR WHY MR. AUERBACH CAN'T BE TRUSTED WITH
24 CONFIDENTIAL DOCUMENTS. AND I DON'T THINK IT TRACKS.
25 THERE'S NOTHING MR. AUERBACH HAS EVER DONE OR EVER SAID HE'S
26 GOING TO DO THAT INDICATES HE'S GOING TO DO ANYTHING
27 IMPROPER WITH CONFIDENTIAL DOCUMENTS. AND THEY TRIED TO USE
28 THIS CHIMERICAL FEAR AS AN EXCUSE TO CONDITION HIS ACCESS IN

41

1 SUCH A WAY THAT I SUBMIT IS REALLY DENYING HIM ACCESS. CALL
2 IT A CONDITION, CALL IT A DENIAL. NEITHER OF THEM IS
3 ACCEPTABLE UNDER CALIFORNIA LAW FOR THE CORPORATION TO DO
4 IT.

5 I DON'T THINK THEY HAVE MADE THEIR CASE THAT
6 MR. AUERBACH IS A TREMENDOUSLY -- IS LIKELY TO VIOLATE HIS
7 CONFIDENTIAL DOCUMENTS. WHAT THEY HAVE INDICATED IS THAT
8 IT'S POSSIBLE MR. AUERBACH WILL EMBARRASS THEM BECAUSE HE'LL
9 FIND THINGS IN THEIR CORPORATE RECORDS THAT THEY WOULD BE
10 EMBARRASSED TO HAVE THEIR DIRECTORS SEE, AND POSSIBLY THAT
11 HE'LL FIND SOME NONCONFIDENTIAL INFORMATION IN THE RECORDS
12 THAT THEY WILL BE EMBARRASSED TO HAVE THE PUBLIC SEE.
13 BUT THEY ARE A PUBLIC, NONPROFIT BENEFIT
14 CORPORATION, AND HE IS THE MEMBER OF THE BOARD OF
15 DIRECTORS. THAT IS EXACTLY HIS ROLE, IS TO SERVE AS
16 OVERSIGHT FOR MANAGEMENT.

17 **THE COURT:** WELL, LET ME ASK YOU THIS QUESTION, I'M
18 NOT SO MUCH CONCERNED ABOUT THE ACTUAL SOMEONE SITTING DOWN
19 THERE, A DIRECTOR SITTING DOWN, GOING THROUGH THESE RECORDS,
20 EVEN MAKING NOTES. I THINK IT BECOMES A VERY DIFFERENT KIND
21 OF SITUATION WHEN ONE STARTS MAKING COPIES, WHOLESAL COPIES
22 OF ALL RECORDS. EVEN IF ONE DOESN'T NECESSARILY GO ON THE
23 INTERNET AND PUT THESE NOW ON THE INTERNET AND SO ON, AS
24 SOON AS COPIES ARE STARTED TO BE MADE AND DELIVERED ALL OVER
25 THE WORLD -- AND OBVIOUSLY, IF YOU DELIVER THEM TO SOMEONE
26 IN CALIFORNIA WHO IS NOT IN MARINA DEL REY, YOU ALSO HAVE TO
27 GIVE THEM TO SOMEONE IN CHILI OR WHEREVER ELSE THESE
28 DIRECTORS MIGHT BE.

42

1 AND ONCE YOU START SENDING AROUND COPIES OF WHAT
2 MIGHT TRULY BE CONFIDENTIAL RECORDS, QUITE APART FROM ANY
3 INTENTIONAL EVEN WRONGDOING, THERE IS A TREMENDOUS,
4 TREMENDOUS CHANCE OF AT LEAST THE MATERIAL BECOMING PUBLIC
5 IN SOME WAY OR ANOTHER.
6 I DON'T ALSO THINK THAT THE CODE, WHEN IT GIVES
7 THE DIRECTORS A BROAD ABILITY TO INSPECT, CONTEMPLATES THAT
8 THEY ARE GOING TO BE GETTING COPIES OF IT REGARDLESS OF
9 WHETHER THEY LIVE IN MARINA DEL REY OR NOT. AND THE ACCESS
10 THAT IS CONTEMPLATED, SEEMS TO ME, IS FAIR, COMPLETE ACCESS
11 AS NECESSARY FOR A DIRECTOR TO PERFORM HIS OR HER FUNCTIONS.
12 DOESN'T SEEM TO ME THAT COPYING EVERYTHING, ALL OF THESE
13 LEDGERS AND ALL OF THESE MATERIALS, IS REQUIRED TO DO THAT
14 JOB.
15 AND SO ANY ORDER THAT THIS COURT WOULD MAKE, ANY
16 OF THESE CASES, IS GOING TO TAKE THAT INTO CONSIDERATION.
17 AND PARTICULARLY THIS DAY IN AGE WHERE IT IS SO EASY TO JUST
18 MAKE MULTIPLE COPIES OF EVERYTHING. AND, YOU KNOW, MAYBE

19 THE DIRECTOR, ONCE HE HAS A COPY HE GOES OUT ON THE BEACH
20 AND LEAVES THIS STUFF ON THE BEACH AND FORGETS A PAGE.
21 MAYBE HE'S SITTING ON A PLANE AND FORGETS SOMETHING ON A
22 PLANE. THESE THINGS CAN HAPPEN. MAYBE HE MAKES AN EXTRA
23 COPY TO TAKE ALONG SOMEPLACE, AND THERE IS NOW ANOTHER COPY
24 FLOATING AROUND.

25 AND I'M NOT TALKING ABOUT JUST THIS CASE. I'M
26 TALKING ABOUT GENERALLY LOOKING AT THE REALITIES OF THESE
27 MATTERS. I KNOW THAT WHEN I HAVE THINGS THAT I THINK ARE
28 VERY SIGNIFICANT, OR AT LEAST IN MY MIND, I DON'T EVEN TAKE

43

1 PLEADINGS OUTSIDE THE COURTROOM OR -- I SHOULDN'T SAY
2 OUTSIDE THE COURTROOM. OUTSIDE THE CHAMBERS. BUT IT'S SO
3 EASY ONCE YOU START MAKING JILLIONS OF COPIES FOR EVERYBODY,
4 AND WE HAVE, WHAT, 19 DIRECTORS ALTOGETHER, 12 OF THEM
5 OUTSIDE OF THE UNITED STATES. WELL, I DON'T THINK THAT'S
6 WHAT'S INTENDED EITHER.

7 SO IN TERMS OF THE LIMITATIONS OR PROTECTIVE
8 ORDERS, I THINK THAT WHAT REALLY NEEDS TO BE FOCUSED IN ON
9 HERE IN THIS PARTICULAR CASE IS NOT THE ACCESS, BUT THE
10 COPYING ASPECTS MORE SO THAN THE REVIEW ASPECTS. AND IT
11 SEEMS TO ME THAT THE REVIEW ASPECTS -- OF COURSE, COUNSEL, I
12 WILL HEAR FROM YOU SPECIFICALLY WHAT YOU THINK OUGHT TO BE
13 DONE WITH RESPECT TO THE REVIEW ASPECTS, BECAUSE IT SEEMS TO
14 ME THAT THE RESPONDENTS ARE ALSO CONCERNED ABOUT
15 MR. AUERBACH JUST LOOKING AT THESE RECORDS, WHETHER OR NOT
16 HE'S ACTUALLY GIVEN COPIES, AND STILL VIOLATING HIS
17 CONFIDENCE. AND IF THERE IS THAT CONCERN, WE NEED TO
18 DISCUSS IT FURTHER.

19 IT DOES SEEMS TO ME THAT HE'S NOT ENTITLED TO
20 GET COPIES OF EVERYTHING FOR THE REASONS THAT I DON'T THINK

21 THE CONFIDENTIALITY COULD TRULY BE PROTECTED, PARTICULARLY
22 IN THIS KIND OF CONTEXT, IF INDEED YOU START COPYING 19
23 COPIES OF EVERYTHING.

24 **MS. COHN:** LET ME SUGGEST A PROPOSAL, THEN. I THINK
25 FOR THE THINGS THEY ARE NOT GOING TO DESIGNATE AS
26 CONFIDENTIAL HE OUGHT TO BE GIVEN COPIES. HE'S A BOARD OF
27 DIRECTORS. HE HAS FIDUCIARY DUTIES, AND IT'S NOT FAIR TO
28 FORCE HIM TO COME DOWN AND SPEND A WEEK IN MARINA DEL REY.

44

1 **THE COURT:** WHAT'S UNFAIR ABOUT THAT? IF HE'S GOING
2 TO BE READING THESE THINGS, AND HE WANTS TO LOOK AT THEM,
3 WHAT IS SO UNFAIR TO SPEND A WEEK IN MARINA DEL WAY.

4 **MS. COHN:** IT'S ONE THING FOR MR. AUERBACH, BUT THEY
5 HAVE BOARD OF DIRECTORS IN GHANA. THE BURDEN YOU ARE GOING
6 TO PLACE ON THE BOARD OF DIRECTORS TO EXERCISE THEIR RIGHT
7 OF OVERSIGHT IS THEY HAVE TO AFFORD TO COME TO CALIFORNIA
8 AND HOLE UP FOR AS LONG AS IT TAKES TO REVIEW THESE
9 DOCUMENTS, INCLUDING THEIR ADVISERS.

10 **THE COURT:** I THINK MAKING 19 COPIES EACH TIME IS A
11 TREMENDOUS FINANCIAL BURDEN AS WELL, IN ADDITION TO WHATEVER
12 ELSE. IN ANY CASE, I DON'T THINK THAT'S WHAT'S CONTEMPLATED
13 BY THE LAW AS FAR AS GIVING DIRECTORS RIGHTS TO INSPECT ARE
14 CONCERNED. AND I DON'T THINK YOU HAVE TO MAKE 19, 21, 23
15 COPIES JUST BECAUSE EVERY DIRECTOR WOULD LIKE TO HAVE A
16 COPY.

17 IF INDEED THERE IS A NEED TO COME, AND SOMEONE
18 FEELS THAT THERE IS A NEED TO COME AND LOOK, THEY CAN COME
19 AND THEY CAN LOOK. AND THEN IF THERE ARE PORTIONS OR MAYBE
20 A PART THAT NEEDS TO BE COPIED, THAT MAY BE A DIFFERENT
21 STORY, BUT I DO NOT SEE MAKING A BLANKET ORDER HERE THAT'S
22 GOING TO IMPOSE ON ICANN THE DUTY TO MAKE COPIES OF

23 EVERYTHING THEY HAVE EVERY TIME A DIRECTOR WANTS TO SEE
24 SOMETHING.

25 **MS. COHN:** YOUR HONOR, I WOULD SUBMIT THE VAST
26 MAJORITY OF THESE DOCUMENT ARE IN ELECTRONIC FORM, AND
27 THERE'S NO PHYSICAL COPIES OR COSTS OR BURDEN. THEY USE
28 PEACH TREE ACCOUNTING SOFTWARE. IT'S ALL ELECTRONIC. THEY

45

1 CAN DOWNLOAD IT TO A DISK OR E-MAIL IT TO MR. AUERBACH IN AN
2 ENCRYPTED FORM TODAY. THEY HAVE A BOARD LIST. IT WILL TAKE
3 ONE E-MAIL TO SEND TO ALL BOARD MEMBERS. I DON'T THINK THAT
4 IT IS A BURDEN ON THE ORGANIZATION. IN FACT, I THINK TO A
5 CERTAIN EXTENT IT COULD BE ARGUED IT'S MORE OF A BURDEN ON
6 THE ORGANIZATION TO HAVE A BOARD MEMBER HOLED UP THERE FOR A
7 WEEK LOOKING OVER EVERYBODY'S SHOULDER, REQUESTING COPIES
8 AND ACCESS TO THINGS THAN IT WOULD BE FOR THEM TO E-MAIL OUT
9 THE INFORMATION TO THE BOARD MEMBERS. I THINK THE BURDEN ON
10 BOTH SIDES WOULD ACTUALLY BE LESS.

11 **THE COURT:** I DON'T KNOW THAT ANY LAW HAS REQUIRED
12 THAT YET, THAT EVERY LEDGER HAS TO BE KEPT IN ENOUGH COPIES,
13 WHETHER IT BE ON A DISK OR OTHERWISE, FOR EVERY DIRECTOR TO
14 HAVE IT ACCESSIBLE AT THEIR HOME OR WHEREVER ELSE THEY ARE.
15 IT MAY BE THAT SOME DAY THE LAW WILL REQUIRE THAT, BUT I
16 THINK AT THIS POINT IT HASN'T. IT'S A RIGHT TO INSPECT AND
17 COPY. I THINK IT CONTEMPLATES COPYING MAYBE APPROPRIATE
18 PORTIONS, BUT NOT COPYING EVERYTHING.

19 **MS. COHN:** YOUR HONOR, I HEAR YOU. I UNDERSTAND. I
20 THINK THAT -- I DON'T THINK THE BURDEN ON ICANN IS
21 SIGNIFICANT, BUT ESPECIALLY IN THIS PARTICULAR INSTANCE
22 WHERE WE KNOW WHAT THEIR ACCOUNTING PROGRAM IS AND WE KNOW
23 IT'S IN ELECTRONIC FORM, I DON'T THINK IT'S UNREASONABLE TO
24 HAVE A PRAGMATIC ORDER THAT SAYS BECAUSE THESE RECORDS ARE

25 EASY FOR YOU TO MAKE COPIES OF, YOU CAN MAKE THE COPIES.
26 AND MR. AUERBACH IS WILLING TO ENTER INTO A
27 PROTECTIVE ORDER THAT WILL BE VERY CLEAR ABOUT THE
28 LIMITATIONS ON WHAT HE CAN DO WITH THE INFORMATION.

46

1 **THE COURT:** LET'S HEAR YOU PROPOSE WHAT YOU BELIEVE TO
2 BE A APPROPRIATE PROTECTIVE ORDER.

3 **MS. COHN:** I THINK IF ALL OF THE RECORDS THAT ARE
4 RESPONSIVE TO MR. AUERBACH'S REQUEST THAT ARE NOT
5 CONFIDENTIAL, THAT -- AND TO THE EXTENT THEY ARE ELECTRONIC,
6 THAT ELECTRONIC COPIES OF THOSE BE GIVEN TO
7 MR. AUERBACH. IF THERE'S NOT A CONFIDENTIALITY OR PRIVILEGE
8 INTEREST THERE'S NO REASON WHY THERE SHOULD BE ANY
9 RESTRICTIONS ON THEM OR WHAT HE DOES WITH THEM.

10 AS FOR THOSE SMALLER, AND I HOPE IT WILL BE
11 SMALLER, CATEGORY OF THINGS THAT ICANN BELIEVES ARE
12 CONFIDENTIAL, I WOULD REQUEST THOSE BE GIVEN -- THAT
13 MR. AUERBACH ENTER INTO AN AGREEMENT THAT SAYS HE WILL NOT
14 PUBLICIZE THE INFORMATION ANY FURTHER THAN HIS GROUP OF
15 ADVISORS WITHOUT GIVING ICANN TEN DAYS' NOTICE, AND WE CAN
16 ALL COME BACK HERE AND SEE YOUR HONOR IF THAT'S THE CASE.
17 THIS IS ALL GOING TO HAPPEN VERY QUICKLY BECAUSE
18 MR. AUERBACH'S TENURE IS ENDING, AND THE CASES ARE QUITE
19 CLEAR THAT HIS RIGHTS WILL APPEAR TO END AT THAT POINT.

20 AND THEN WE'LL GO FORWARD FROM THERE. NOW, I
21 THINK ICANN NEEDS TO GIVE US SOME INFORMATION ABOUT WHAT'S
22 IN ELECTRONIC FORM AND WHAT ISN'T, TO DECIDE WHETHER
23 MR. AUERBACH HAS TO COME TO MARINA DEL REY TO LOOK AT SOME
24 OF THE INFORMATION. BUT AS TO THE NONCONFIDENTIAL
25 INFORMATION, ESPECIALLY IN ELECTRONIC FORM, I SEE NO BASIS
26 FOR REQUIRING HIM TO COME DOWN AND LOOK ON THEIR COMPUTERS

27 AS OPPOSED TO LOOKING ON HIS OWN. THIS IS AN INTERNATIONAL
28 ORGANIZATION THAT'S BASED UPON THE WONDERS OF ELECTRONIC

47

1 TECHNOLOGY, AND IT STRIKES ME AS SOMEWHAT STRANGE TO REQUIRE
2 A HORSE-AND-BUGGY DOCUMENT REVIEW.

3 **THE COURT:** WELL, I DON'T MAKE LAWS. I ONLY INTERPRET
4 THEM. AND I DON'T KNOW OF ANY LAW THAT REQUIRES A COMPANY
5 TO MAKE HARD COPIES, FOR EXAMPLE, OF EVERYTHING THAT THEY
6 HAVE FOR EVERY SINGLE DIRECTOR JUST BECAUSE THEY REQUEST. I
7 SUPPOSE THERE IS A RECOGNITION THAT THEY CAN GET COPIES OF
8 THINGS, BUT I THINK REASONABLY IT WOULD NOT HAVE TO DO 19
9 COPIES OR WHATEVER OF THE SAME RECORDS JUST SO EVERYONE HAS
10 THEM ACCESSIBLE.

11 **MS. COHN:** I SUBMIT THAT A SINGLE E-MAIL WOULD DO THAT
12 AUTOMATICALLY. I DO POINT OUT THAT THE CORPORATIONS CODE
13 SECTION SAYS "INSPECT AND COPY ALL BOOKS AND RECORDS"
14 WITHOUT ANY DEFERENCE IN THE TREATMENT BETWEEN THE TWO. THE
15 STATUTE DOESN'T DISTINGUISH BETWEEN INSPECTION AND COPYING,
16 AND I WOULD SUBMIT THAT THE STATUTORY INTERPRETATION OF THIS
17 CREATING A BIG DECISION, A SIGNIFICANT DISTINCTION BETWEEN
18 THE TWO, ISN'T CONSISTENT WITH THE STATUTE.

19 BUT AS I SAID, MR. AUERBACH IS WILLING TO ENTER
20 INTO A PROTECTIVE ORDER WITH REGARD TO CONFIDENTIAL
21 DOCUMENTATION. I DO A LOT OF INTELLECTUAL PROPERTY
22 LITIGATION. WE'RE IN PROTECTIVE ORDERS IN THE VAST MAJORITY
23 OF THE CASES. EXTREMELY CONFIDENTIAL DOCUMENTS GET COPIED
24 AND SENT AND ARE COVERED BY PROTECTIVE ORDERS AND PROTECTED.
25 IN ANY EVENT, IF IT WOULD MAKE YOUR HONOR FEEL
26 BETTER, OUR ORGANIZATION, WHICH HAS ATTORNEY - MY BAR CARD
27 IS AT STAKE - WILL HOLD THE DOCUMENTS SO MR. AUERBACH CAN
28 VISIT THEM IN SAN FRANCISCO RATHER THAN COME DOWN AND CAMP

48

1 IN MARINA DEL REY IF THAT WILL GIVE YOUR HONOR A GREATER
2 FEELING OF PROTECTION FOR THIS SUBSET THAT ARE MARKED AS
3 CONFIDENTIAL. THAT'S HOW IT'S HANDLED IN MOST LAWSUITS
4 WHERE THERE'S A PROTECTIVE ORDER, AND I THINK IT WOULD BE
5 REASONABLE TO DO THE SAME THING IN THIS INSTANCE.

6 **THE COURT:** WELL, THEN WE DO HAVE THE MASTER, OF
7 COURSE, POSSIBILITY AS WELL.

8 **MS. COHN:** THAT'S A POSSIBILITY AS WELL.

9 **THE COURT:** AND THE STATUTE DOES TALK ABOUT THE
10 MASTER.

11 **MS. COHN:** THE OTHER THING I WANTED TO LET YOUR HONOR
12 KNOW IS WE DO HAVE A SUPPLEMENTAL LIST OF MATERIALS.
13 MR. AUERBACH REQUESTED THINGS THAT ARE ABOUT 18 MONTHS OLD
14 NOW.

15 **THE COURT:** WHAT DO YOU MEAN, SUPPLEMENTAL LIST?

16 **MS. COHN:** A LIST OF OTHER DOCUMENTS THAT MR. AUERBACH
17 WOULD LIKE TO REVIEW.

18 **THE COURT:** THIS IS SOMETHING YOU ARE JUST GOING TO
19 HAND TO US RIGHT NOW?

20 **MS. COHN:** I WAS PLANNING ON IT.

21 **THE COURT:** I'M NOT GOING TO READ IT IN THE MIDDLE OF
22 THE HEARING AND TRIAL. SEEMS TO ME IF YOU HAD ANY KIND OF
23 REQUEST TO MAKE, IT SHOULD HAVE BEEN MADE IN WRITING WITH A
24 LIST THAT'S SUBMITTED TO THE OTHER SIDE. I'M NOT GOING TO
25 RULE ON SOMETHING THAT YOU JUST HAND OUT LIKE THAT.

26 **MS. COHN:** FAIR ENOUGH, YOUR HONOR. I WILL SUBMIT IT
27 TO COUNSEL, BUT WHAT I WOULD LIKE TO MAKE SURE IS THAT THE
28 LIST THAT WAS FOUGHT OVER, THE 18-MONTH-OLD LIST, ISN'T THE

49

1 SUM TOTAL OF MR. AUERBACH'S INSPECTION AND COPYING RIGHTS.

2 **THE COURT:** I'M NOT GOING TO RULE ON ANYTHING ELSE
3 OTHER THAN WHAT'S BEFORE ME. HE HAS WHAT RIGHTS HE HAS WITH
4 RESPECT TO ANYTHING, BUT I'M ONLY GOING TO RULE ON WHAT'S
5 BEFORE ME.

6 **MS. COHN:** OKAY.

7 **THE COURT:** YOU CAN'T JUST PULL OUT SOMETHING IN THE
8 MIDDLE OF A HEARING AND SAY, OH, WE WANT THIS ADDITIONAL
9 STUFF, JUST LIKE THAT. TOTALLY IMPROPER.

10 **MS. COHN:** WELL, YOUR HONOR, I FELT THIS HEARING WAS
11 ABOUT WHETHER --

12 **THE COURT:** NO, THAT IS NOT WHAT THIS HEARING IS
13 ABOUT. THIS HEARING IS A HEARING WHERE BOTH SIDES HAVE HAD
14 AN OPPORTUNITY TO RESPOND TO EACH OTHER'S CONTENTIONS. THIS
15 HEARING IS NOT ABOUT SOMEONE PULLING OUT SOMETHING OUT OF
16 THEIR POCKET AND THEN SAYING, OH, THIS IS IN ADDITION WHAT
17 WE WANT TO TALK ABOUT AND DEAL WITH. IT'S UNFAIR TO THE
18 OTHER SIDE, COMPLETELY UNFAIR.

19 AND YOU'VE HAD PLENTY OF TIME, TEN MONTHS, TO IN
20 FACT DECIDE - I SUPPOSE MR. AUERBACH HAS - WHAT ELSE HE
21 WANTED. SO WE'RE JUST GOING TO -- AS FAR AS THIS COURT IS
22 CONCERNED, MY ORDER IS GOING TO DEAL ONLY WITH WHAT IS
23 BEFORE ME PROPERLY.

24 **MS. COHN:** THANK YOU, YOUR HONOR.

25 **THE COURT:** NOW, YOU HAVE HEARD FROM COUNSEL WHAT SHE
26 BELIEVES OUGHT TO BE THE APPROPRIATE PROTECTIVE ORDER. BY
27 THE WAY, THE COURT'S RULING IS GOING TO BE IN ACCORDANCE
28 WITH THE TENTATIVE. THE COURT DOES FIND THAT THE RULES THAT

50

1 HAVE BEEN PROMULGATED DO IN ESSENCE, AT LEAST IN THE CASE,
2 AS APPLIED, DEPRIVE HIM OF HIS RIGHT TO GET THE RECORDS THAT
3 HE'S ENTITLED TO GET UNDER THE LAW. AND SO THE QUESTION IS

4 ONLY GOING TO BE ON WHAT BASIS.

5 **MR. LUI:** THANK YOU, YOUR HONOR.

6 WE UNDERSTAND COMPLETELY YOUR FEELING ON THE
7 INFORMATION. TURNING NOW TO THE COMMENTS COUNSEL JUST MADE,
8 I THINK IT'S ABSOLUTELY IMPORTANT THAT THE INSPECTION BE
9 DONE AT THE CORPORATE OFFICES. MR. AUERBACH IS A DIRECTOR
10 OF THE CORPORATION. HE ACCEPTED THE RESPONSIBILITY.
11 VIEWING THE RECORDS IN THEIR HARD COPY FORM IN THE OFFICES
12 OF THE CORPORATION IS THE MOST EXPEDITIOUS WAY TO HANDLE
13 THAT, AND WE'LL MAKE THAT PREPARATION AS SOON AS POSSIBLE.
14 ON THE ISSUE OF THE PROTECTIVE ORDER, I THINK
15 IT'S PREMATURE. WE HAVE TO FIGURE OUT BETWEEN US WHETHER OR
16 NOT THERE'S GOING TO BE A DISPUTE BEFORE INVOLVING YOU IN
17 THAT DISPUTE.

18 **THE COURT:** NO. YOU -- THIS IS THE ONE PROBLEM.

19 OBVIOUSLY, MR. LUI, JUSTICE LUI, IF THERE IS ANY FURTHER
20 DELAY, IF THERE IS ANY FURTHER DELAY AT ALL, EVEN NOW - YOU
21 KNOW, OBVIOUSLY, YOU CAN APPEAL ANY RULING I MAKE, AND
22 PROBABLY ANY APPEAL IS GOING TO MAKE THIS WHOLE THING MOOT
23 BECAUSE OF THE FACT THAT BY THE TIME, YOU KNOW, IT TAKES
24 AWHILE TO DO THESE THINGS ON APPEAL. AND I'M NOT GOING TO
25 ALLOW FOR ANY KIND OF DELAY WHATSOEVER. I'M GOING TO MAKE
26 AN ORDER RIGHT NOW WHICH WILL PROVIDE THAT EITHER HE'LL BE
27 MADE AVAILABLE CERTAIN RECORDS THAT ARE NOT GOING TO BE
28 CLAIMED CONFIDENTIAL, AND THE ONES THAT ARE CLAIMED

51

1 CONFIDENTIAL ARE GOING TO BE MADE AVAILABLE UNDER CERTAIN
2 ORDERS.

3 **MR. LUI:** ALL RIGHT. I DID NOT HAVE ANY OF THAT IN
4 MY -- WHAT WE'RE ASKING FOR IS THAT THE ORDER PROVIDE US FOR
5 TO PROVIDE HARD COPIES, NOT ELECTRONIC COPIES, HARD COPIES

6 OF THESE DOCUMENTS.

7 **THE COURT:** I HAVE NOT DECIDED ON THAT YET. SEEMS TO
8 ME THAT THE NONCONFIDENTIAL ONES AT THIS POINT, GIVEN THE
9 SHORT PERIOD OF TIME THAT IS LEFT HERE -- AND I'M THINKING
10 IN TERMS OF JUST THIS CASE BECAUSE IT MIGHT BE DIFFERENT IN
11 ANOTHER CASE, BUT HERE IS A DIRECTOR WHO HAS FOR TEN MONTHS
12 NOT GOTTEN ANYTHING, AND NOW HE'S BEEN PUT THROUGH ALL THESE
13 RULES THAT HE'S SUPPOSED TO BE FOLLOWING BEFORE HE'S GOING
14 TO BE GETTING ANYTHING. I THINK THAT THOSE RECORDS WHICH
15 ARE NOT CONFIDENTIAL HE OUGHT TO BE ABLE TO GET ELECTRONIC.
16 THOSE ELECTRONIC RECORDS, HE OUGHT TO BE ABLE TO GET DISCS
17 OR WHATEVER FORM YOU CAN PROVIDE THEM IN. THAT'S THE ONLY
18 WAY HE'S GOING TO BE ABLE TO SEE ANYTHING BEFORE HIS TIME
19 EXPIRES.

20 AND THEN ON THE CONFIDENTIAL, I'M SURE THERE
21 WILL BE ENOUGH MARKED CONFIDENTIAL THAT, YOU KNOW, THEN
22 THOSE CAN BE DEALT WITH A LITTLE DIFFERENTLY.

23 **MR. LUI:** I WAS TRYING TO EXPEDITE THINGS RATHER THAN
24 NOT EXPEDITE THINGS. THINGS THAT ARE IN HARD COPY NOW THAT
25 ARE AVAILABLE FOR INSPECTION THIS MOMENT, TO BE PUT IN
26 ELECTRONIC FORM WOULD TAKE MORE TIME.

27 **THE COURT:** NO. I UNDERSTAND THEY ARE ALREADY IN
28 ELECTRONIC FORM. AT LEAST, COUNSEL WAS REPRESENTING THERE

52

1 ARE RECORDS THAT ARE IN ELECTRONIC FORM.

2 **MR. LE VEE:** SOME OF THE RECORDS ARE, YOUR HONOR, AND
3 SOME ARE NOT.

4 **THE COURT:** ALL RIGHT. THOSE WHICH ARE IN ELECTRONIC
5 FORM. WE'RE TALKING ONLY ABOUT THOSE THAT ARE IN ELECTRONIC
6 FORM. THOSE WHICH ARE IN ELECTRONIC FORM RIGHT NOW AND
7 WHICH ARE NOT CONFIDENTIAL, WHY SHOULD THEY NOT BE GIVEN TO

8 HIM ON A DISK?

9 **MR. LE VEE:** THAT'S FINE, YOUR HONOR.

10 **THE COURT:** WELL, THAT'S WHAT WE WERE TALKING ABOUT
11 HERE, I UNDERSTOOD.

12 **MR. LE VEE:** THE ONLY -- THE DOCUMENTS THAT ARE NOT
13 CONFIDENTIAL I DON'T THINK WE'RE REALLY DEBATING ABOUT, AND
14 I APOLOGIZE IF WE'VE GOTTEN TO THAT SUBJECT BECAUSE, BASED
15 ON YOUR HONOR'S TENTATIVE AND FINAL DECISION, WE WILL NOT
16 OBJECT TO THAT.

17 THE DOCUMENTS THAT ARE CONFIDENTIAL AND THE
18 DOCUMENTS THAT ARE NOT PRESENTLY IN ELECTRONIC FORM -- FOR
19 EXAMPLE, I CAN TELL THAT YOU MY LAW FIRM DOES NOT SEND
20 ELECTRONIC COPIES OF OUR BILLS. THEY ARE SPECIFICALLY
21 REQUESTED. WE CAN TAKE THE TIME TO CONVERT THEM INTO
22 ELECTRONIC OR WE CAN PUT THEM INTO A CONFERENCE
23 ROOM.

24 WHAT JUSTICE LUI WAS SUGGESTING IS THAT IT WOULD
25 ACTUALLY BE FASTER TO MAKE THEM AVAILABLE IN OUR CONFERENCE
26 ROOM IN MARINA DEL REY, WHICH IS WHAT WE HAVE TRIED TO DO,
27 BUT HAD SOME DISAGREEMENT AS TO THE PROCEDURES.

28 **THE COURT:** I GUESS MAYBE I WASN'T SUFFICIENTLY

53

1 CLEAR. MY ORDER IS THAT AS FAR AS ANY ELECTRONIC
2 NONCONFIDENTIAL RECORDS ARE CONCERNED - ELECTRONIC,
3 NONCONFIDENTIAL -

4 **MR. LE VEE:** MAY I ALSO ASK, YOUR HONOR?

5 **THE COURT:** I HADN'T FINISHED.

6 **MR. LE VEE:** I APOLOGIZE.

7 **THE COURT:** I WAS TRYING TO MAKE AN ORDER NOW, BUT IF
8 YOU HAVE SOMETHING TO SAY BEFORE, GO AHEAD.

9 **MR. LE VEE:** NO. YOU GO AHEAD.

10 **THE COURT:** AS TO ELECTRONIC, NONCONFIDENTIAL RECORDS,
11 IT IS ORDERED THAT THOSE SHALL BE PROVIDED TO -- HOW QUICKLY
12 CAN THEY BE PROVIDED?

13 **MR. LE VEE:** ACTUALLY, YOUR HONOR, THAT WAS THE ISSUE
14 I WAS GOING TO ADDRESS. WE WILL THIS AFTERNOON COMMUNICATE
15 YOUR HONOR'S DECISION TO THE BOARD. BECAUSE OF THE TIME,
16 ABOUT TWO-THIRDS OF THE BOARD MEMBERS WILL BE ASLEEP, AND WE
17 WILL HAVE TO CONVENE A TELEPHONE CONVERSATION OF THE BOARD
18 TO GET DIRECTION. THERE IS, OF COURSE, THE POSSIBILITY THAT
19 THE BOARD WOULD ASK US TO SEEK FURTHER REVIEW OF
20 YOUR HONOR'S ORDER.

21 **THE COURT:** I WOULDN'T BE SURPRISED.

22 **MR. LE VEE:** AND SO I WOULD ASK FOR A VERY BRIEF
23 PERIOD OF TIME. I'M VERY SYMPATHETIC TO THE TIMING ISSUE,
24 BUT BECAUSE OF OUR -- THE NATURE OF OUR BOARD, A VERY BRIEF
25 PERIOD OF TIME WHERE - SEVEN DAYS - WHERE WE CAN --

26 **THE COURT:** THAT'S NOT VERY BRIEF, ACTUALLY, GIVEN THE
27 CIRCUMSTANCES.

28 **MR. LE VEE:** WELL, FOR THIS CORPORATION TO ACT, IT IS.

54

1 **THE COURT:** BUT YOU ARE THE INTERNET. YOU ARE RIGHT
2 THERE, AS CLOSELY CONNECTED AS ANYBODY CAN BE. PROBABLY
3 HAVE SOME DIRECT CONNECTIONS THAT THE REST OF US DON'T EVEN
4 HAVE AND KNOW ABOUT.

5 **MR. LE VEE:** IF ONLY THAT WERE TRUE, YOUR HONOR. WE
6 HAVE THE --

7 **THE COURT:** I'LL GIVE YOU TO -- THE RECORD SHALL BE --
8 THE NONCONFIDENTIAL ELECTRONIC RECORDS SHALL BE SUBMITTED TO
9 COUNSEL FOR MR. AUERBACH BY NOON ON AUGUST THE 2ND, FRIDAY.
10 SEEMS TO ME THAT'S NOT -- WE'RE TALKING
11 NONCONFIDENTIAL RECORDS, NOW.

12 **MR. LE VEE:** THANK YOU, YOUR HONOR.

13 **THE COURT:** AND SO THAT GIVES YOU ENOUGH TIME ON THAT.

14 NOW WE'RE GOING TO GO ON TO THE NEXT GROUP, THE

15 NONCONFIDENTIAL, NONELECTRONIC RECORDS.

16 NOW, THOSE I'M GOING TO ORDER THAT THOSE BE MADE

17 AVAILABLE AT THE MARINA DEL REY OFFICES AT A TIME MUTUALLY

18 CONVENIENT. AND IF MR. AUERBACH NEEDS COPIES OF CERTAIN

19 PORTIONS, I SUPPOSE HE CAN REQUEST COPIES OF THOSE

20 PORTIONS. I ASSUME YOU CAN AGREE ON MUTUALLY CONVENIENT

21 DATES FOR THAT, WITHIN THE WEEK I ASSUME. YOU WANT TO SEE

22 IT AS QUICKLY AS POSSIBLE.

23 **MS. COHN:** I THINK WE CAN AGREE ON --

24 **THE COURT:** HOW ABOUT MONDAY NEXT WEEK?

25 **MR. LE VEE:** I CAN'T IMAGINE A PROBLEM NEXT WEEK,

26 YOUR HONOR, NO.

27 **THE COURT:** SO BY --

28 **MR. LE VEE:** BY AUGUST 9TH.

55

1 **THE COURT:** BY AUGUST 9TH. INSPECTION BY AUGUST 9TH.

2 IS THERE A PROBLEM WITH THAT DATE?

3 **MS. COHN:** I'M NOT SURE.

4 NO, YOUR HONOR, I DON'T THINK THERE WILL BE A

5 PROBLEM. WE MAY HAVE TO SWITCH ACCOUNTANTS TO ONE THAT'S

6 NOT ON VACATION.

7 **THE COURT:** THE REMAINING GROUP OF DOCUMENTS, I GUESS,

8 WOULD BE CONFIDENTIAL DOCUMENTS OR ONES AT LEAST CLAIMED TO

9 BE CONFIDENTIAL BY THE CORPORATION.

10 **MR. LE VEE:** OR PRIVILEGED, YOUR HONOR.

11 **THE COURT:** I'M SORRY?

12 **MR. LE VEE:** INCLUDING PRIVILEGED.

13 **THE COURT:** WELL, YES. CONFIDENTIAL, INCLUDING

14 PRIVILEGED. I'M USING THE WORD CONFIDENTIAL BROADLY IN THIS
15 SENSE. THE COURT IS GOING TO ORDER THAT THOSE SHALL BE MADE
16 AVAILABLE TO MR. AUERBACH FOR REVIEW AT THE MARINA DEL REY
17 OFFICES, AND -- BY WHAT DATE? SAME DATE, BY NINTH.

18 **MS. COHN:** SAME DATE WILL WORK FOR US, YOUR HONOR.

19 **THE COURT:** ALL RIGHT.

20 AND THEY WILL BE MADE AVAILABLE TO HIM SUBJECT
21 TO A PROTECTIVE ORDER. AND I THINK THAT, GIVEN THE
22 SUGGESTION BY THE PETITIONERS AND NOTHING CONTRARY IN
23 ESSENCE BY THE RESPONDENTS IN TERMS OF THE NATURE OF THE
24 PROTECTIVE ORDER, THE COURT IS GOING TO ORDER THAT NO
25 INFORMATION IN THE DOCUMENTS THAT ARE CLAIMED TO BE
26 CONFIDENTIAL, INCLUDING PRIVILEGED, SHALL BE DISCLOSED
27 PUBLICLY BY MR. AUERBACH WITHOUT GIVING AT LEAST TEN DAYS
28 NOTICE TO THE CORPORATION.

56

1 AND I THINK THAT TAKES CARE OF YOUR CONCERNS.
2 AND IF THERE IS SOMETHING THAT IS PROPOSED TO BE DISCLOSED,
3 YOU CAN COME RIGHT BACK AND WE WILL SEE WHETHER THERE IS A
4 LOT OF IT OR A LITTLE. AND IF THERE'S JUST A LITTLE, I'LL
5 TAKE CARE OF IT MYSELF VERY QUICKLY. IF NOT, THEN WE'LL
6 HAVE TO THINK ABOUT A MASTER. AND I BELIEVE PROBABLY BEFORE
7 APPOINTING A MASTER WILL WANT TO HAVE FAIRLY DETAILED
8 INFORMATION ABOUT WHAT THAT IS WE'RE TALKING ABOUT BECAUSE I
9 ALSO DON'T THINK IT WOULD BE APPROPRIATE, NECESSARILY, TO
10 CLAIM SOMETHING CONFIDENTIAL THAT'S QUESTIONABLY SO. AND IF
11 I CONCLUDE SOMETHING ON ITS FACE IS NOT CONFIDENTIAL, I MAY
12 TAKE THAT INTO CONSIDERATION IN DETERMINING WHETHER OR NOT A
13 MASTER SHOULD BE APPOINTED.
14 ALL RIGHT. THEN, THAT'S THE COURT'S ORDER. IT
15 IS IN ACCORDANCE WITH THE TENTATIVE IN TERMS OF THE SUMMARY

16 JUDGMENT MOTION, AND I'M GOING TO ORDER THAT COUNSEL FOR
17 PETITIONER PREPARE THE PROPOSED JUDGMENT. IT SHOULD INCLUDE
18 A RULING ON THE ENTIRE CASE, NOT JUST GRANTING THE
19 PLAINTIFF'S JUDGMENT, AND IT SHOULD INCLUDE THE DENIAL OF
20 THE DEFENDANT'S SUMMARY JUDGMENT, GRANTING OF THE
21 PLAINTIFF'S, AND THEN THE REST OF IT.

22 AND LET'S HAVE THAT PROPOSED JUDGMENT -- HOW
23 QUICKLY CAN YOU GET THAT DRAFTED?

24 **MS. COHN:** CERTAINLY BY THE END OF THE WEEK.

25 **THE COURT:** WELL, I'M NOT GOING TO GIVE YOU ANY LONGER
26 THAN THAT. I WAS HOPING YOU WOULD SAY BY --

27 **MS. COHN:** I HAVE TO FLY UP TO SAN FRANCISCO. I COULD
28 DO IT BY THE END OF THE DAY AFTER THAT, WEDNESDAY.

57

1 **THE COURT:** LET'S SAY BY END OF THE DAY WEDNESDAY
2 SERVE IT ON COUNSEL FOR THE RESPONDENT, LODGE IT WITH THE
3 COURT. HOW MUCH TIME FOR OBJECTIONS, IF ANY? I ASSUME IT'S
4 BASICALLY TO THE FORM.

5 **MR. LE VEE:** I WILL BE OUT OF TOWN, YOUR HONOR, IN
6 DEPOSITION I BELIEVE, FRIDAY AND POSSIBLY MONDAY AND
7 TUESDAY.

8 **THE COURT:** THAT'S MUCH TOO LONG.

9 **MR. LE VEE:** I WAS JUST GOING TO EXPLAIN I WAS GOING
10 TO ASK UNTIL EARLIER THE FOLLOWING WEEK.

11 **THE COURT:** NO. THAT'S MUCH TOO LONG. I DON'T WANT
12 TO HOLD IT UP TO THE FOLLOWING WEEK. NO. OBJECTIONS, IF
13 ANY, I SAID --

14 **MS. COHN:** THIRTY-FIRST, END OF THE DAY SERVE AND
15 LODGE?

16 **THE COURT:** OBJECTIONS IF ANY BY 4 O'CLOCK, WHICH IS
17 THE END OF THE DAY, BY THE WAY. 4 O'CLOCK TO YOU IS END OF

18 THE DAY ALSO BECAUSE OF THE -- SO 4 O'CLOCK ON THE SECOND,
19 OBJECTIONS IF ANY.

20 MR. LE VEE: THANK YOU, YOUR HONOR.

21 THE COURT: AND SERVICE, I ASSUME EVERYONE IS WILLING
22 TO STIPULATE SERVICE BY FAX?

23 MS. COHN: YES, YOUR HONOR.

24 MR. LE VEE: THAT WILL BE FINE.

25 MR. TYRE:: YOUR HONOR, MAY I ASK ONE VERY QUICK
26 CLARIFICATION, EITHER FROM OPPOSING COUNSEL PREFERABLY, OR
27 FROM THE COURT IF NECESSARY.

28 MR. AUERBACH HAD ALREADY PROPOSED THE NAMES OF
1 ADVISORS TO ACCOMPANY HIM TO ICANN'S HEADQUARTERS FOR
2 PURPOSES OF THIS INFORMATION. WILL COUNSEL STIPULATE THIS
3 LIST MAY INCLUDE MR. AUERBACH'S CURRENT COUNSEL OF RECORD IN
4 THAT MATTER? WE'RE NOT ALL GOING TO DESCEND ON YOU AS A
5 PACK. NEITHER MISS COHN NOR I WERE ON THE LIST BECAUSE WE
6 WERE NOT HIS LAWYERS AT THAT TIME.

7 MR. LE VEE: WE WOULD BE HAPPY TO ACCOMMODATE.

8 MS. COHN: I THINK GIVEN THE VACATION SCHEDULE WE
9 MIGHT HAVE A DIFFERENT ACCOUNTANT.

10 MR. LE VEE: IF YOU WILL LET US KNOW.

11 MS. COHN: WE'LL BE HAPPY TO.

12 MR. LUI: WHAT IS YOUR HONOR'S SCHEDULE? YOU'RE GOING
13 TO BE OUT OF TOWN IN AUGUST.

14 THE COURT: I'M NOT GOING TO BE OUT OF TOWN. I'M
15 GOING TO BE HOME NOT WORKING, HOPEFULLY. THE ONLY THING
16 I'VE PUT IN WOULD BE THE WEEK OF THE NINETEENTH.

17 MR. LUI: THANK YOU.

18 THE COURT: OKAY. COURT IS IN RECESS.

19 MS. COHN: THANK YOU, YOUR HONOR.

20 (PROCEEDINGS CONCLUDED.)

21 SUPERIOR COURT OF THE STATE OF CALIFORNIA

22 FOR THE COUNTY OF LOS ANGELES

23 DEPARTMENT NO. 85 HON. DZINTRA JANAVS, JUDGE

24

25 KARL AUERBACH, AN INDIVIDUAL,)) 26 PETITIONER,)) 27 V.) CASE BS 074771) 28
INTERNET CORPORATION FOR ASSIGNED NAMES) AND NUMBERS, A CALIFORNIA NONPROFIT)

59

1 PUBLIC BENEFIT CORPORATION,)) 2 RESPONDENT.)
_____) 3

4 I, DARYL C. CASE, OFFICIAL REPORTER OF THE

5 SUPERIOR COURT OF THE STATE OF CALIFORNIA, FOR THE COUNTY OF

6 LOS ANGELES, DO HEREBY CERTIFY THAT THE FOREGOING PAGES 1

7 THROUGH , INCLUSIVE, COMPRISE A FULL, TRUE AND CORRECT

8 TRANSCRIPT OF THE TESTIMONY AND PROCEEDINGS TAKEN ON THE

9 ABOVE-ENTITLED MATTER ON JULY 29, 2002.

10 DATED THIS 19TH DAY OF AUGUST 2002.

11

12 , CSR #8739

13 OFFICIAL REPORTER

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