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TENTATIVE DECISION

LOS ANGELES SUPERIOR COURT CENTRAL CIVIL DIVISION

CASE: Karl Auerbach v. Internet Corporation for Assigned Names and Numbers

CASE No.: BS074771

DATE: Monday, July 29, 2002 **TIME:** 9:30 a.m.

JUDGE: Dzintra Janavs **DEPT.:** 85

EVENT: Petitioner's Motion for Summary Judgment; Respondent's Motion for Summary Judgment

Petitioner Karl Auerbach was elected to the Board of Directors of Respondent Internet Corporation for Assigned Names and Numbers (ICANN) in October, 2000 by internet user vote. Auerbach had previous to his election expressed some criticism of ICANN.

ICANN is a California nonprofit public benefit corporation that, among other things, manages Internet domain names and numbers.

Article V, Section 21 of ICANN's Bylaws provides that Directors of the corporation "shall have the right at any reasonable time to inspect and copy all books, records, and documents of every kind, and to inspect the physical properties of the Corporation (Auerbach's Separate Statement of Material Facts (Auerbach Fact) undisputed fact ¶ 8).

After ICANN's November 2000 Annual Meeting, Auerbach made an oral request to inspect and copy ICANN's General Ledger (undisputed Auerbach Fact ¶ 10).

On 12/3/00, Auerbach made a written request to inspect and copy ICANN's General Ledger and other records (ICANN's Separate Statement of Material Facts (ICANN Fact) ¶ 11).

Then-President and CEO of ICANN Michael Roberts responded on 12/6/00 that ICANN needed to establish a written procedure and related agreement (undisputed Auerbach Fact ¶ 12).

Auerbach re-iterated his request on 3/3/01, 3/4/01 (Auerbach Dec. Ex. 6, 8) and on 6/22/01 (undisputed Auerbach Fact ¶ 17).

Finally, on 9/2/01, approximately ten months after Auerbach's first request, ICANN presented its "ICANN Procedures Concerning Director Inspection or Records and Properties" (inspection Procedures) (Auerbach Dec. Ex. 19, 20).

The Inspection Procedures outline basic arrangements to be made for director requests for inspection, including that such requests shall be in writing and that the records be made available during normal business hours on a date convenient to the inspecting director.

Furthermore, section 5 of the Inspection Procedures provides that "[t]o the extent the [CEO], in consultation with the General Counsel of the Corporation, determines that compliance with any request for records necessarily involves issues of confidentiality, privilege, or privacy of a nature which requires limitation of or conditions on the Director's access or use of the requested records, the [CEO] shall advise the requesting Director of the issues which require the restrictions and the nature of any proposed restrictions on access or use. . . If the Director accepts the restrictions by countersigning the statement concerning limitations, the records shall be made available to the Director"

Section 6 of the Inspection Procedures provides that "[i]f the Director believes that any restrictions proposed by the [CEO] are unreasonable, the [CEO] shall submit the request to the Audit Committee of the Board of Directors of the Corporation for resolution." If the Director disagrees with the resolution of the Audit Committee, the director may appeal to the Chairman of the Board, and the entire Board, minus the requesting director, shall make a final and binding decision.

On 9/23/01, Auerbach again requested ICANN records including documentation regarding ICANN's funds, financial obligations, and concerning ICANN's relationships with its lawyers (ICANN Fact ¶ 14).

On 10/5/01, Stuart Lynn, President of ICANN, wrote Auerbach, stating that Auerbach's 9/23/01 request involved confidential information, that if Auerbach had questions about the confidentiality of certain information he should contact Lynn, and outlined measures that ICANN proposed to protect the confidentiality of that information. The measures included that the materials would be available at ICANN offices, that Auerbach sign a statement that he acknowledged his duty of confidentiality, that Auerbach must be present at the inspection, that he could be accompanied by an advisor if Auerbach submits information about the advisor in advance and the advisor agrees to confidentiality restrictions determined by ICANN's general counsel, and that Auerbach would be given access to the materials in paper form but not electronic form because of confidentiality concerns, that if Auerbach wanted to retain copies of the records he would have to request such and ICANN would determine whether the request implicated confidentiality concerns, and that there were no limitations other than those identified in the letter (Lynn Dec. Ex. 10).

On 10/15/02, Auerbach responded, among other things, asserting that the restrictions imposed were improper and that he would not sign the letter (Lynn Dec. Ex. 11).

Lynn responded on 10/21/01 defending ICANN's restrictions and stating that he was referring the matter to the Audit Committee pursuant to paragraph 6 of the Inspection Procedures (Auerbach Dec. Ex. 27).

On 10/27/01, Auerbach stated his need, among other things, to make copies of the documents and offered to give ICANN seven calendar days notice in advance of any disclosure of information that he learned from the corporate records (Auerbach Dec. Ex. 28).

Lynn did not agree to the compromise offered by Auerbach (Auerbach Dec. Ex. 29), the parties could not reach an agreement on the terms of the inspection, and Lynn referred the matter to the Board's Audit Committee for review (Auerbach Dec. Ex. 27, 30).

On 11/15/01, the Audit Committee "considered the lack of agreement on the arrangements determined that the safeguards of Lynn's 10/5/01 letter were reasonable, and urged Auerbach to agree to them (Auerbach Dec. Ex. 30).

Petitioner filed the instant Petition seeking a Writ of Mandate commanding Respondent to make available to Petitioner for inspection and copying all corporate records which Petitioner sets forth in the Petition, or which Petitioner may request access to from time to time (Petition p. 14).

Petitioner and Respondent have filed cross motions for summary judgment.

Cal Corp Code section 6334 provides:

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

Cal. Corp. Code section 6336(a) provides that upon refusal of a lawful demand for inspection, the court may enforce the demand with just and proper conditions.

Respondent contends that inspection rights of directors may be restricted by corporate inspection procedures and cites Chantiles v. Lake Forest II Master Homeowners Ass'n (1995) 37 Cal.App.4th and Havlicek v. Coast-to-Coast Analytical Services, Inc. (1995) 39 Cal.App.4th 1844 in support of its position.

Neither section 6334 nor section 6336(a) provide for or permit a corporation to impose restrictive conditions on directors' inspection rights and burdensome review when such rights are denied.

Chantiles involved a homeowners' association, the members of which have constitutionally protected privacy rights. After balancing these privacy rights against the director's rights to inspect the ballots, the court ordered inspection subject to court ordered procedures designed to protect the interests of all parties.

In Havlicek, the Court of Appeals noted that California had a public policy of broad inspection rights for corporate directors and held that California law favoring inspections by directors, rather than Delaware law, applied. The court acknowledged that the trial court could impose reasonable conditions on inspection and had broad discretion to fashion an appropriate protective order. Nevertheless, "upon a director's request for inspection . . . the corporation must demonstrate, by evidentiary showing that a protective order is necessary to prevent a tort against the corporation."

Neither Chantiles nor Hayliceck as much as even suggest that a corporation may restrict directors' inspection rights by "inspection procedures".

Article V, Section 21 of ICANN's Bylaws appears to be consistent with California law regarding directors' inspection rights.

Having considered the applicable law and the undisputed facts presented herein, he court concludes that paragraphs 3, 5, and 6 of the Inspection Procedures conflict with section 6334 and Art. V, §21 of the Bylaws by unreasonably restricting directors' access to corporate records and depriving directors of inspection rights afforded them by law.

Furthermore, Lynn's 10/5/01 letter violates both section 6334 and Bylaws Article V, Section 21 because it deprives Auerbach of the inspection rights he has under law and imposes such unreasonable requirements as having to sign a confidentiality agreement and having to pursue burdensome review in any effort to enforce his inspection rights.

Additionally, the Inspection Procedures here apparently have not even been adopted by the ICANN Board of Directors, but were promulgated by an ad hoc group of functionaries consisting of the Audit Committee, Louis Touton, Diane Schroeder, and Lynn (Auerbach Dec. Ex. 17, 18, 21).

Based on the undisputed facts, there is no triable issue as to any material fact and Petitioner Auerbach is entitled to judgment as a matter of law granting his Petition for Writ of Mandate.

Respondent's Motion for Summary Judgment is denied.

A Writ shall issue, the terms to be determined at the hearing after argument.

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