

AUG 01 2002

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**FILED**  
LOS ANGELES SUPERIOR COURT

AUG 05 2002

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*S. Barrett*  
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9  
10 SUPERIOR COURT FOR THE STATE OF CALIFORNIA  
11 IN AND FOR THE COUNTY OF LOS ANGELES

12 KARL AUERBACH, an individual,  
13 Petitioner,  
14  
15 v.  
16 INTERNET CORPORATION FOR  
17 ASSIGNED NAMES AND NUMBERS, a  
18 California Nonprofit Public Benefit  
19 Corporation,  
20 Respondent

) Case No.: BS 074771  
)  
)  
)  
)  
) ~~PROPOSED~~ JUDGMENT GRANTING  
) PETITIONER'S SUMMARY JUDGMENT  
) MOTION, DENYING RESPONDENT'S  
) SUMMARY JUDGMENT MOTION AND  
) FOR ISSUANCE OF PEREMPTORY WRIT  
) OF MANDAMUS  
)  
) [THE HONORABLE DZINTRA JANAVS]  
)  
)  
) Hearing date: July 29, 2002  
) Time: 9:30 a.m.  
) Department: 85

BY FAX

22  
23 WHEREAS Petitioner Karl Auerbach filed a petition for Writ of Mandate to Compel  
24 Inspection and Copy<sup>ing</sup> of Books, Records and Documents of California Nonprofit Benefit  
25 corporation (the "Petition").

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*pursuant to Court order, the parties filed motions for summary judgment simultaneously,*

1 WHEREAS Petitioner Karl Auerbach brought a motion for summary judgment against  
2 Respondent Internet Corporation for Assigned Names and Numbers (ICANN) on Auerbach's  
3 Petition.

4 WHEREAS Respondent ICANN filed a cross-motion for summary judgment in favor of  
5 ICANN and against Petitioner Auerbach;

6 WHEREAS the Court has read and considered the papers submitted by the parties and the  
7 arguments presented at hearing on the cross motions for summary judgment on July 29, 2002  
8 before Department 85 of this Court. Cindy A. Cohn of the Electronic Frontier Foundation and  
9 James Tyre having represented Petitioner; Jeffrey LeVee, Elwood Lui and Courtney Schaberg of  
10 Jones, Day, Reavis and Pogue having represented Respondent ICANN;

11 WHEREAS in support of his motion for summary judgment Petitioner Karl Auerbach  
12 filed the Declaration of Karl Auerbach dated May 1, 2002; the Second Declaration of Karl  
13 Auerbach dated July 15, 2002; a Request for Judicial Notice and Objections to ICANN's  
14 Evidence;

15 WHEREAS in support of its motion for summary judgment Respondent ICANN filed  
16 Declarations of Stuart Lynn, Louis Touton and Vinton Cerf on May 20, 2002 and filed  
17 Supplemental Declarations of Stuart Lynn and Louis Touton on July 15, 2002;

18 WHEREAS the Court finds the following to be undisputed facts: *to*  
19  
20 Petitioner Karl Auerbach was selected to the Board of Directors of Respondent Internet  
21 Corporation for Assigned Names and Numbers (ICANN) in October, 2000 by internet user vote. *over 6 other candidates*  
22 Auerbach had previous to his election expressed some criticism of ICANN. *online election in 2000*  
23 *and has subsequently*

24 ICANN is a California nonprofit public benefit corporation that, among other things,  
25 manages Internet domain names and numbers. *It has presently 18 directors,  
2/3 of whom reside outside U.S.*

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

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

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

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

11 Auerbach re-iterated his request on 3/3/01, 3/4/01 (Auerbach Dec. Ex. 6, 8) and on  
12 6/22/01 (undisputed Auerbach Fact ¶ 17).

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

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

19 Furthermore, section 5 of the Inspection Procedures provides that "[t]o the extent the  
20 [CEO], in consultation with the General Counsel of the Corporation, determines that compliance  
21 with any request for records necessarily involves issues of confidentiality, privilege, or privacy  
22 of a nature which requires limitation of or conditions on the Director's access or use of the  
23 requested records, the [CEO] shall advise the requesting Director of the issues which require the  
24  
25

1 restrictions and the nature of any proposed restrictions on access or use. . . If the Director accepts  
2 the restrictions by countersigning the statement concerning limitations, the records shall be made  
3 available to the Director . . . ."

4 Section 6 of the Inspection Procedures provides that "[i]f the Director believes that any  
5 restrictions proposed by the [CEO] are unreasonable, the [CEO] shall submit the request to the  
6 Audit Committee of the Board of Directors of the Corporation for resolution," If the Director  
7 disagrees with the resolution of the Audit Committee, the director may appeal to the Chairman of  
8 the Board, and the entire Board, minus the requesting director, shall make a final and binding  
9 decision.  
10

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

14 On 10/5/01, Stuart Lynn, President of ICANN, wrote Auerbach, stating that Auerbach's  
15 9/23/01 request involved confidential information, that if Auerbach had questions about the  
16 confidentiality of certain information he should contact Lynn, and outlined measures that  
17 ICANN proposed to protect the confidentiality of that information. The measures included that  
18 the materials would be available at ICANN offices, that Auerbach sign a statement that he  
19 acknowledged his duty of confidentiality, that Auerbach must be present at the inspection, that  
20 he could be accompanied by an advisor if Auerbach submits information about the advisor in  
21 advance and the advisor agrees to confidentiality restrictions determined by ICANN's general  
22 counsel, and that Auerbach would be given access to the materials in paper form but not  
23 electronic form because of confidentiality concerns, that if Auerbach wanted to retain copies of  
24 the records he would have to request such and ICANN would determine whether the request  
25

1 implicated confidentiality concerns, and that there were no limitations other than those identified  
2 in the letter (Lynn Dec. Ex. 10).

3 On 10/15/01, Auerbach responded, among other things, asserting that the restrictions  
4 imposed were improper and that he would not sign the <sup>(Oct. 5, 2001) letter</sup> (Lynn Dec. Ex. 11).

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

8  
9 On 10/27/01, Auerbach stated his need, among other things, to make copies of the  
10 documents and offered to give ICANN seven calendar days notice in advance of any disclosure  
11 of information that he learned from the corporate records (Auerbach Dec. Ex. 28).

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

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

18  
19 Petitioner filed the instant Petition seeking a Writ of Mandate commanding Respondent  
20 to make available to Petitioner for inspection and copying all corporate records which Petitioner  
21 sets forth in the Petition, or which Petitioner may request access to from time to time (Petition p.  
22 14).

23 WHEREAS the court finds the applicable law to be as follows:

24 California Corporations Code section 6334 provides:

25 Every director shall have the absolute right at any reasonable time to inspect and

1 copy all books, records and documents of every kind and to inspect the physical  
2 properties of the corporation of which such person is a director.

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

5 Respondent contends that inspection rights of directors may be restricted by corporate  
6 inspection procedures and cites *Chantiles v. Lake Forest II Master Homeowners Ass'n* (1995) 37  
7 Cal.App.4th and *Havlicek v. Coast-to-Coast Analytical Services, Inc.* (1995) 39 Cal.App.4th 1844  
8 in support of its position.  
9

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

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

17 In *Havlicek*, the Court of Appeals noted that California had a public policy of broad  
18 inspection rights for corporate directors and held that California law favoring inspections by  
19 directors, rather than Delaware law, applied. The court acknowledged that the trial court could  
20 impose reasonable conditions on inspection and had broad discretion to fashion an appropriate  
21 protective order. Nevertheless, "upon a director's request for inspection . . . the corporation must  
22 demonstrate, by evidentiary showing that a protective order is necessary to prevent a tort against  
23 the corporation."  
24

25 Neither *Chantiles* nor *Havlicek* as much as even suggest that a corporation may restrict

1 directors' inspection rights by "inspection procedures".

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

4 Having considered the applicable law and the undisputed facts and presented herein,

5 IT IS HEREBY ORDERED, ADJUDGED AND DECREED as follows:

6 **A. EVIDENCE:**

7  
8 1. Petitioner's Request for Judicial Notice and request for entry into evidence of the  
9 Declaration of Karl Auerbach dated May 1, 2002; the Second Declaration of Karl Auerbach  
10 dated July 15, 2002 is granted.

11 2. Respondent's request for entry into evidence of the declarations of Stuart Lynn,  
12 Louis Touton and Vinton Cerf on May 20, 2002 and filed Supplemental Declarations of Stuart  
13 Lynn and Louis Touton on July 15, 2002 is granted, subject to the objections discussed below.

14 3. Petitioner's Objections to Evidence are adjudged as follows:

15 a. Objections 1, 2 and 3 to the Declaration of Stuart Lynn are overruled.

16 b. Objections 4, 5, 6 and 7 to the Declaration of Stuart Lynn are sustained.

17 c. Objections 9, 10, 11, 12, 13, to the Declaration of Louis Touton are  
18 sustained.

19 d. Objections 14, 15 to the Declaration of Louis Touton are overruled.

20 e. Objection 16 to the Declaration of Vinton Cerf is sustained.

21  
22 **B. CROSS MOTIONS FOR SUMMARY JUDGMENT**

23 4. Paragraphs 3, 5, and 6 of the Inspection Procedures conflict with section 6334 and  
24 Art. V, §21 of the Bylaws by unreasonably restricting directors' access to corporate records and  
25 depriving directors of inspection rights afforded them by law.

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

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

9 7. Based on the undisputed facts, there is no triable issue as to any material fact and  
10 Petitioner Auerbach is entitled to judgment as a matter of law granting his Petition for Writ of  
11 Mandate.  
12

13 8. Respondent's Motion for Summary Judgment is denied.

14 9. That Petitioner be awarded costs in the amount of \_\_\_\_\_ and <sup>may apply for</sup> reasonable  
15 attorneys' fees <sup>if appropriate</sup> ~~in the amount of \_\_\_\_\_~~; and

16 10. That, pursuant to Code of Civil Procedure § 1097, this Court retains jurisdiction  
17 over the matter to insure compliance <sup>D</sup> ~~by Respondent~~, to resolve any issues concerning  
18 confidentiality and disclosure of documents, and, if necessary or appropriate, to impose fines  
19 and/or to make any orders necessary and proper for the complete enforcement of the writ.  
20

21 **C. PEREMPTORY WRIT OF MANDATE**

22 11. That a peremptory Writ of Mandate issue, ordering and directing Respondent  
23 <sup>D</sup> ~~immediately~~ to make available to Petitioner for inspection and copying all corporate records of  
24 Respondent which <sup>are</sup> ~~petitioner sets forth in Paragraph 16 of his Petition (as follows), or which~~ <sup>below</sup>  
25 ~~Petitioner may request access to from time to time, as follows:~~ <sup>D</sup>



1 a. All requested documents that are not confidential (that is, subject to legal  
2 privilege, privacy interests or legitimate corporate confidentiality concerns) and  
3 that currently exist in electronic format shall be sent in electronic form by ICANN  
4 to counsel for Petitioner no later than noon on August 2, 2002

5  
6 b. All requested documents that are not confidential that do not currently  
7 exist in electronic form shall be made available to Petitioner for physical  
8 inspection and copying *as reasonable* at ICANN's offices no later than Friday, August 9, 2002.

9 c. All requested documents that are confidential shall be made available to  
10 Petitioner for physical inspection and to request copies at ICANN's offices no  
11 later than Friday, August 9, 2002. ICANN shall clearly indicate which of its  
12 specific records it reasonably believes are confidential (or which portions of  
13 documents) and on what basis it makes this claim. For instance, ICANN shall  
14 mark correspondence with its attorneys about specific litigation as "Confidential-  
15 Privileged."

16 d. Should Petitioner wish to disclose records marked by ICANN as  
17 confidential to anyone *other than designated* agents and advisors, he shall give ICANN  
18 notice 10 calendar days prior to such disclosure. ICANN may then seek

19 *immediate* relief from this Court *during the 10 day period*. No particular form of notice is required, *as long*

20 *as* the notice *must* clearly indicates which confidential documents Petitioner wishes to

21 disclose. Notice *must be in writing and must* may be given by facsimile or e-mail to ICANN's *General* President or

22 counsel *and outside counsel. If ICANN requests court relief* 10 days, *Auerbach may not disclose until the Court rules.*

23 12. Paragraph 16 of the Petition includes the following records *are ordered produced pursuant to this judgement and writ:*

24 a. ICANN's General Ledger reports (chart of accounts, transaction journal,  
25

1 and account balances) from corporate inception to the present (or as close to  
2 present as is reasonably feasible.)

3 i. These reports should include, at a minimum, the following  
4 standard accounting reports.

5 a. Chart of Accounts

6 b. The daily transaction journal showing for each account in  
7 the chart of accounts all amounts and transactions that have been  
8 debited or credited to that account.  
9

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

15 c. With regard to employee hiring and employee policies:

16 i. The corporate employee handbook, if any.

17 ii. All materials, if any, that an employee of ICANN is expected to  
18 enter into when he or she is hired. These would include, for example, offer  
19 letter forms that are typically used, employment agreements, intellectual  
20 property agreements, non-disclosure agreements, and the like.  
21

22 d. With regard to ICANN's law firm:

23 i. Engagement letters

24 ii. Conflict notices and requests for waivers that have been received  
25 from the law firm.

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- iii. Waivers granted by ICANN to the law firm.
- iv. Detailed invoices from the law firm since the inception of the corporation.
- e. Logs of all international travel not directly associated with one of the regular public meetings made by ICANN officers other than the President from January 1, 2001 until the present (or as close to present as is reasonably feasible).

*forth above* Judgment is granted and shall be entered as set &

Dated: 8/5/02

*Dzintre Janans*  
JUDGE OF THE SUPERIOR COURT

Approval as to form:

\_\_\_\_\_  
Attorneys for Respondent ICANN