

1 Elwood G. Lui (State Bar No. 45538)
Jeffrey A. LeVee (State Bar No. 125863)
2 Courtney M. Schaberg (State Bar No. 193728)
JONES, DAY, REAVIS & POGUE
3 555 West Fifth Street, Suite 4600
Los Angeles, CA 90013-1025
4 Telephone: (213) 489-3939
Facsimile: (213) 243-2539

5 Attorneys for Respondent
6 INTERNET CORPORATION FOR ASSIGNED
NAMES AND NUMBERS
7

8 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**
9 **COUNTY OF LOS ANGELES**

10
11 **KARL AUERBACH,**
12 **Petitioner,**
13 **v.**
14 **INTERNET CORPORATION FOR**
ASSIGNED NAMES AND NUMBERS,
15 **Respondent.**

CASE NO. BS 074771

**RESPONDENT ICANN'S REPLY
MEMORANDUM IN SUPPORT OF ITS
MOTION FOR SUMMARY JUDGMENT
AND IN OPPOSITION TO PETITIONER'S
MOTION FOR SUMMARY JUDGMENT**

(The Honorable Dzintra Janavs)

Date: July 29, 2002
Time: 9:30 a.m.
Dept: 85

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1 **INTRODUCTION**

2 Having now retreated from the position that California law gives him an "absolute" right
3 to inspect ICANN's documents with "no strings attached," Petitioner Karl Auerbach asks the
4 Court to find, as a matter of law, that ICANN's "strings" – the Inspection Procedures that it asks
5 all directors to acknowledge in advance of an inspection – violate California law. He makes this
6 request without actually having reviewed any of ICANN's documents (despite ICANN's repeated
7 offers to permit a review of *all* requested documents), and notwithstanding the fact that ICANN's
8 Inspection Procedures do not ask him to give up *any* of his rights, including his right to seek relief
9 in this Court after conducting his inspection.

10 The procedures in question give ICANN the ability to protect its rights and, at the same
11 time, give ICANN's directors the ability to exercise their rights of inspection and copying, to ask
12 for the corporation's designations of confidentiality to be revisited, to ask the corporation's board
13 of directors to review any disagreements, and to file a lawsuit if any disagreements are not
14 resolved to the director's satisfaction. Those procedures are consistent with ICANN's bylaws,
15 they give directors full rights of inspection, and they are in complete accord with California law.

16 Thus, the Court should grant ICANN's motion for summary judgment for two reasons.
17 First, as a matter of procedure, since Auerbach has not accepted ICANN's repeated invitations to
18 inspect its documents and thereby to test the application of ICANN's Inspection Procedures, the
19 Petition seeks nothing more than an advisory opinion from this Court on what *might* happen if
20 Auerbach ever were to inspect ICANN's documents. The fact that Auerbach and ICANN *might*
21 have a dispute over confidentiality of documents, or *might* have a dispute over copying of
22 documents, or *might* have a dispute over some other request that Auerbach *might* make once he
23 actually sits down to review the documents does not create a ripe dispute.

24 Second, the undisputed facts demonstrate that ICANN's Inspection Procedures are
25 reasonable as a matter of law (and certainly, there is no basis to grant Auerbach's motion that the
26 procedures he has not tested are *unreasonable* as a matter of law). The case law could not be
27 more clear that the right of inspection may be conditioned by reasonable measures designed to
28 protect privacy, confidentiality, the attorney-client privilege and so forth. Thus, for example, the

1 law permits ICANN to establish inspection procedures to balance between the right of a director
2 to inspect confidential corporate documents and the right of the corporation to prevent public
3 disclosure of those documents. To this end, ICANN's Inspection Procedures require Auerbach
4 (and all other directors) to acknowledge that ICANN, and not an individual director, determines
5 whether corporate documents are confidential and may be disclosed to the general public, subject
6 to a process that includes review by the entire board of directors, followed as necessary by
7 judicial review. These procedures are just and reasonable (and, of course, since Auerbach has not
8 inspected any documents, he cannot advise the Court that the parties actually have a disagreement
9 as to which documents Auerbach can make public).

10 Auerbach, however, contends that ICANN's procedures are unreasonable because *he* has
11 the unilateral right to determine whether he can publicly disclose corporate documents,
12 irrespective of the corporation's view. In essence, Auerbach proposes that each individual
13 director, instead of the corporation under the ultimate control of its board, is entitled to make
14 decisions regarding the confidentiality of corporate documents. But simply to state this
15 proposition is to see its irrationality, and Auerbach can cite no case authority that even hints at
16 this notion. Auerbach also proposed that, if ICANN disagrees with his confidentiality decisions,
17 he would give ICANN seven days notice to permit it to file an emergency lawsuit to seek a
18 restraining order to block his disclosure; again, no court has ever sanctioned such an approach.
19 Indeed, particularly with respect to a corporation like ICANN that has nineteen directors living in
20 numerous countries throughout the world, it would be almost absurd for ICANN to have to
21 monitor the disclosure requests of each of its directors and then file suit every time a director
22 gives seven days notice of an intent to disclose a confidential document.

23 In sum, Auerbach's Petition is not ripe and proposes an inspection process that would turn
24 California law upside down. And Auerbach's own motion for summary judgment is particularly
25 disturbing in view of his tactical decision to decline to address the reasons that ICANN set forth
26 in its motion as to why ICANN is concerned about having this *particular* director, Karl Auerbach,
27
28

1 make unilateral determinations of confidentiality.¹ ICANN explained to the Court that Auerbach
2 (and those financing this litigation) have publicly threatened ICANN and have repeatedly
3 expressed (and acted on) a desire to create turmoil for ICANN. Rather than respond to ICANN's
4 allegations (several of which ICANN also asserted in its Answer to the Petition) when he filed his
5 motion on May 21, 2002, Auerbach elected to wait for his reply brief in an apparent attempt to
6 hold in reserve evidence that might create a fact issue that would prevent the entry of summary
7 judgment in ICANN's favor. These tactics are to no avail, since there is *no* evidence that could
8 demonstrate, in view of the premature circumstances Auerbach presents to this court, that
9 ICANN's fears concerning Auerbach's potential conduct are unreasonable, and that ICANN's
10 conduct to protect itself -- while still affording Auerbach every right to inspect its documents --
11 likewise was entirely reasonable.

12 ARGUMENT

13 I. ICANN'S MOTION FOR SUMMARY JUDGMENT SHOULD BE 14 GRANTED BECAUSE THE PETITION IS NOT RIPE.

15 Auerbach now concedes that a director's rights under Corporations Code section 6334 to
16 inspect and copy corporate documents "are not literally absolute." [Auerbach Motion for
17 Summary Judgment ("Auerbach Motion") at 14.] In fact, California case law makes clear that a
18 corporation can take reasonable steps to establish conditions for, and in some cases can even limit
19 or deny, the right of a director to inspect documents.

20 But in this case, ICANN has *not* limited Auerbach's right to inspect documents. ICANN
21 has, on several occasions, told Auerbach that it was prepared to show him *all* of the documents he
22 wished to inspect, and ICANN even proposed specific dates for the inspection. [Declaration of
23 M. Stuart Lynn in Support of ICANN's Motion for Summary Judgment ("Lynn Decl."), Exs. 10,
24

25 ¹ ICANN gave Auerbach's counsel copies of its motion for summary judgment on April 19,
26 2002 in conjunction with the *ex parte* application by which the Court established the briefing
27 and hearing schedule for these motions. Thereafter, ICANN's counsel promised Auerbach's
28 counsel that the motion that ICANN would actually file on May 17, 2002 (later changed to
May 20, 2002) would be substantively identical to the draft that ICANN had delivered to
counsel on April 19, which in fact it was. [Declaration of Jeffrey A. LeVeé ("LeVeé Decl."),
¶¶ 2-4.]

1 12 and 14 (Oct. 5, 21 and 31, 2001 letters).] Auerbach refused to conduct any inspection,
2 apparently preferring to stand on ceremony that ICANN *might* violate his rights of inspection
3 *after the inspection* by refusing to allow Auerbach to do things that Auerbach thinks he *might*
4 want to do after he inspects the documents. The speculative nature of Auerbach's grievances is
5 obvious as Auerbach's entire brief is devoted to harms that he *fears* will befall him, not harms that
6 actually have befallen him.

7 Auerbach's petition will not be ripe until he can demonstrate that:

- 8 (i) he has actually inspected ICANN's documents;
- 9 (ii) he has made a request (*e.g.*, to make a public disclosure of a document that has
10 been designated as confidential), and ICANN's President has rejected his request;
- 11 (iii) he has employed the internal (and quite reasonable) appeal process set forth in the
12 Inspection Procedures; and
- 13 (iv) ICANN's Board of Directors has rejected his request (which it would do as a final
14 and binding decision that allows no further avenues of review within the corporation and would
15 make judicial review timely and ripe).

16 Until these events occur, there simply is no controversy for this Court to decide. *See*
17 *California Water & Telephone Co. v. County of Los Angeles*, 253 Cal. App. 2d 16, 22 (1967)
18 (facts will not support the existence of a current case or controversy unless they have sufficiently
19 congealed to permit a useful decision to be made); *see also Pacific Legal Foundation v.*
20 *California Coastal Comm'n*, 33 Cal. 3d 158, 170 (1982) ("The ripeness requirement, a branch of
21 the doctrine of justiciability, prevents courts from issuing purely advisory opinions.").

22 **II. ICANN'S MOTION FOR SUMMARY JUDGMENT SHOULD BE**
23 **GRANTED BECAUSE ITS INSPECTION PROCEDURES ARE**
24 **REASONABLE AS A MATTER OF LAW.**

25 The Court can also grant summary judgment in ICANN's favor because ICANN's
26 Inspection Procedures are reasonable, *particularly* as applied to Auerbach. In its moving papers,
27 ICANN explained ICANN's Inspection Procedures, including how they operate and why they
28 were established. Most importantly, the Inspection Procedures do not restrict a director's right to

1 inspect documents. Instead, they merely seek to ensure that directors have access in a manner
2 that also protects privacy interests, confidentiality, and privilege. ICANN further explained that it
3 might be negligent for ICANN *not* to have Inspection Procedures with respect to Auerbach
4 because Auerbach has repeatedly threatened the corporation. ICANN's point in presenting
5 evidence regarding Auerbach's conduct was not to prove that Auerbach *would*, in fact, violate his
6 fiduciary duties to the corporation -- Auerbach's failure to follow the Inspection Procedures and
7 inspect the records makes that impossible -- but merely to explain the reasonableness of ICANN's
8 concerns and procedures as applied specifically to Auerbach's proposed inspection.²

9 Even without Auerbach's "evidence" on these issues, ICANN is confident that Auerbach
10 cannot create a dispute of material fact that would preclude the entry of summary judgment in
11 ICANN's favor. Auerbach does not dispute that ICANN has repeatedly invited Auerbach to
12 inspect the documents. Nor can he dispute that this invitation has remained open through today.
13 Instead, Auerbach quarrels with pieces of the Inspection Procedures, but his arguments, as
14 addressed in the following sections, fall far short of demonstrating that ICANN has violated any
15 of his rights. Instead, the Inspection Procedures are completely consistent with (and do not
16 infringe on) Auerbach's rights.

17 **A. A Director's Right of Inspection Must Be Balanced with Other Legally**
18 **Cognizable Rights.**

19 Auerbach argues that, although the right to inspect and copy is not absolute (contrary to
20 the position he took in his petition), procedures for director inspection under section 6334 must,
21 in all but extremely rare circumstances, extend only to the time when the inspection will take
22 place. The authorities simply do not support that position. In *Chantiles v. Lake Forest II Master*
23 *Homeowners Ass'n*, 37 Cal. App. 4th 914, 925-26 (1995), the petitioner-director argued that

24 _____
25 ² As noted above, despite having all of ICANN's evidence regarding Auerbach's conduct for
26 almost a month before filing his own Motion, Auerbach chose not to address *any* of ICANN's
27 evidence in his papers. Auerbach claims in his motion that it is not his "burden to negate in his
28 moving papers any alleged defense raised by the Amended Answer." [Auerbach Motion at 13
n.4.] But there is no doubt that "[f]actual allegations in an answer to a petition for a writ of
mandate *must be countervailed by proof* at trial or by replication, *or they are taken as true.*"
Elliott v. Contractors' State License Board, 224 Cal. App. 3d 1048, 1054 (1990) (emphasis
added); *see Hunt v. Mayor & Council of Riverside*, 31 Cal. 2d 619, 623 (1948).

1 conditions may only be placed "on the hours of inspection, not on the manner or extent of his
2 inspection." The *Chantiles* court dismissed this argument outright, stating "[w]e reject Chantile's
3 assertion" that the right of inspection "need not yield to any other right," particularly where the
4 director offers "no compelling argument for concluding that a balancing of rights is
5 inappropriate." See *id.* at 925-26. The *Chantiles* court demonstrated that a director's rights under
6 section 6334 are not infringed by a balancing of the right of inspection with other legally
7 cognizable interests through procedures respecting the time *and manner* of the inspection.³

8 Auerbach next argues that the only circumstances under which a corporation may balance
9 the right of inspection with other legally cognizable interests are those that fall within the precise
10 set of circumstances presented in *Chantiles*, 37 Cal. App. 4th at 925-26, where individual privacy
11 rights were threatened by the inspection, and *Havlicek v. Coast-to-Coast Analytical Services, Inc.*,
12 39 Cal. App. 4th 1844, 1855 (1995), where the inspection would have resulted in a tort committed
13 against the corporation. [Auerbach Motion at 17-18.] Both cases, however, support
14 implementing inspection rights in a way that protects other legal rights and interests generally--
15 including confidentiality interests such as those involved in the present case -- not just in cases of
16 privacy violations and tortuous acts.

17 First, both *Chantiles* and *Havlicek* stand for the proposition that a director's inspection
18 rights under statutory analogs to section 6334 are not absolute. See *Chantiles*, 37 Cal. App. 4th at
19 925-26; *Havlicek*, 39 Cal. App. 4th at 1855-56. Second, neither *Chantiles* nor *Havlicek* ruled that
20 procedures for a director's right of inspection are proper only in situations where an individual's

21 ³ Auerbach's attempt to argue that ICANN is not entitled to have Inspection Procedures because
22 its sole remedy is an action for damages if Auerbach violates his fiduciary duties also fails.
23 First of all, it makes no sense for a corporation to have to wait for a director who believes he is
24 entitled to make confidentiality determinations for the corporation to publicize a confidential
25 document. Second, the cases Auerbach cites are inapposite. *Valtz v. Penta Investment Corp.*,
26 139 Cal. App. 3d 803, 810 (1983), a decision that is questioned by *Havlicek*, 39 Cal. App. 4th
27 at 1852, n.3, does not support Auerbach's point, and the court in *Hoiles v. Superior Court*, 157
28 Cal. App. 3d 1192, 1201 (1984) actually affirmed a superior court's *complete denial of access*
to privileged information in response to a shareholder's writ petition. Indeed, in *dicta*, the
Hoiles court approved "the reasonable solution" employed by the Delaware court in *Henshaw*
v. American Cement Corp., 252 A.2d 125, 130 (Del. Ch. 1969), which, following a
corporation's express refusal to grant a director's inspection request, placed conditions on the
director's right of inspection and specifically held that the director's "personal preference" for
disclosure of confidential information must "give way to protection of the Corporate interest."

1 privacy is threatened or where a corporation needs to protect itself from a tort.⁴ In fact, the court
2 in *Havlicek* actually suggested that other circumstances very well may exist for which tailored
3 procedures would be necessary to balance the director's right of inspection with other legitimate
4 rights. *Havlicek*, 39 Cal. App. 4th at 1856. And in *Chantiles*, the court *explicitly endorsed* the
5 view that a director's right of inspection must be balanced against the corporation's rights to
6 protect confidentiality and privilege interests, in addition to the privacy interests actually involved
7 in that case. *Chantiles*, 37 Cal. App. 4th at 925-27. Thus, the rationales of *Havlicek* and *Chantiles*
8 clearly endorse consideration of other legal interests in general, not just the particular interests
9 actually involved in those cases.

10 The lack of authority for Auerbach's argument is further exposed by the plain reading of
11 California Corporations Code section 6336(a). That section provides that a superior court may
12 enforce a director's right "with just and proper conditions." It expresses no limitation that the
13 conditions may protect only particular kinds of interests. Because the statutory scheme supports
14 the use of reasonable conditions to balance a director's right of inspection with other legally
15 cognizable interests without specification, Auerbach's position that only privacy and the
16 prevention of torts matter is plainly incorrect.

17 Indeed, the "Rights of Inspection" section of ICANN's bylaws (which even Auerbach
18 acknowledges are in accord with California law [Auerbach Motion at 18:5-6]) *expressly requires*
19 ICANN to "establish reasonable procedures to protect against the inappropriate disclosure of
20 confidential information." Auerbach's argument that conditions for inspection can only be
21 established in cases of privacy violations or torts simply cannot be squared with this clear
22 command in the bylaws to protect confidentiality interests as well.

23 ⁴ Auerbach argues that ICANN has not presented sufficient evidence to establish that Auerbach
24 is likely to commit a tort against ICANN and therefore cannot propose arrangements for his
25 access to corporate documents. [Auerbach Motion at 17-18.] That argument merely reflects
26 ICANN's point that Auerbach's claims are not ripe because he has refused to conduct any
27 inspection of documents, after which specifics would emerge as to what Auerbach wishes to
28 publicize. Nor has Auerbach rebutted ICANN's evidence that Auerbach does not support
ICANN's objectives or that Auerbach believes that he, rather than the corporation, has the final
word regarding the confidentiality and use of ICANN's corporate documents. In fact, under
these circumstances, the law may well allow ICANN to *deny* Auerbach's request outright since
Havlicek held that "[w]here the corporation determines that an unfettered inspection will result
in a tort against the corporation, it may decline the request for inspection" in its entirety.
Havlicek, 39 Cal. App. 4th at 1856. Of course, ICANN has not proposed such a remedy, and
its procedures allow Auerbach access to *all* of the records he seeks.

1 **B. The Corporation, Not Its Individual Directors, Must Determine What**
2 **Materials Are Confidential, Subject to Judicial Review.**

3 Auerbach argues that ICANN's Inspection Procedures (unlike the bylaws that require
4 them to be established) “conflict with the meaning of” section 6334 because Auerbach, and not
5 the corporation, should make decisions on the confidential nature of documents. This argument
6 turns the law on its head. Auerbach argues that ICANN's President and CEO has improperly
7 reserved "to himself the right to determine if any particular document, or even all the requested
8 documents, were confidential." [Auerbach Motion at 10, 20.] But ICANN’s President is not only
9 statutorily authorized to make confidentiality determinations for the corporation, he is also
10 lawfully directed to make these determinations by ICANN’s corporate bylaws.

11 **1. ICANN'S Board of Directors has properly delegated**
12 **management responsibility to its President.**

13 Auerbach argues, contrary to California law, that ICANN’s President should not have the
14 initial authority to determine confidentiality. Section 300(a) of the California Corporations Code
15 states that the board of directors shall manage the corporation and "all corporate powers shall be
16 exercised by or under the direction of the board." Cal. Corp. Code § 300(a). Under the code, the
17 board *acting as a whole* “may delegate the management of the day-to-day operation of the
18 business of the corporation to a management company or other person” *Id.* Applying these
19 principles, the court of appeal has held that "[m]anagement, of course, is the very essence of an
20 officer's role. 'Executive officers normally manage the day-to-day operations of the business of
21 the corporation pursuant to provisions of the bylaws or delegation of the board.' . . . And, as any
22 student of business knows, *management necessarily involves the exercise of discretion.*" *GAB*
23 *Business Services, Inc. v. Lindsey & Newsom Claim Services, Inc.*, 83 Cal. App. 4th 409, 420
24 (2000) (citations omitted) (emphasis added).

25 ICANN’s Board has delegated, through its bylaws, the management of the day-to-day
26 operations of ICANN to its officers, and to its President in particular. Article VIII, Section 4 of
27 ICANN's bylaws states that ICANN's President is "in charge of all of [ICANN's] activities and
28 business." [Supplemental Declaration of Louis Touton ("Supp. Touton Decl."), ¶ 3, Ex. 21.]

1 Being in charge of all of ICANN's activities and business necessarily requires ICANN's
2 President, Stuart Lynn, to determine what documents to treat as confidential,⁵ subject of course to
3 specific, contrary instructions from ICANN's full Board of Directors, and to judicial review.

4 Similarly, ICANN's Inspection Procedures, which have been endorsed by the Board's
5 Audit Committee, recognize that the responsibility for determining what documents to treat as
6 confidential properly lies with ICANN's management. Section 5 of the Inspection Procedures
7 states that "[t]o the extent that the Chief Executive Officer, in consultation with the General
8 Counsel of the Corporation, determines that compliance with any request for records necessarily
9 involves issues of confidentiality, privilege or privacy," the CEO shall advise the requesting
10 director of the proposed arrangements for access or use. [Petition, Ex. 2.] This is *precisely* the
11 type of delegation of authority that is contemplated by statute and ICANN's bylaws.

12 **2. ICANN's President did nothing more than ask Auerbach to**
13 **comply with the Inspection Procedures.**

14 Auerbach argues that the October 5, 2001 letter that he received from ICANN's President
15 [Auerbach Decl., Ex. 25], which asked that he countersign the letter in order to "acknowledge the
16 above terms," somehow asked Auerbach to sacrifice his rights because it *could* result in a conflict
17 between those procedures and the law. [Auerbach Decl., Ex. 23.] (Of course, Auerbach's own
18 words demonstrate the ripeness problem discussed in Part I of this memorandum.) In particular,
19 Auerbach points to paragraph 2 of the letter, which states that by signing the letter, Auerbach
20 would "acknowledge your duties as Director to preserve confidentiality." Auerbach complains
21 about this paragraph even though paragraph 8 of the letter specifically references section 5 of
22 ICANN's Inspection Procedures and lays out the process that Auerbach should follow if he
23 disagrees with the corporation's determinations of confidentiality. Indeed, there is no way to read
24

25 ⁵ In determining which documents to treat as confidential, Lynn may call upon ICANN's Vice
26 President and General Counsel, Louis Touton, for assistance. ICANN's Board appointed
27 Touton in Board Resolution 99.108, which states that he "shall have such duties and authority
28 as he may be assigned by the Board, the President, and the Bylaws" and that "he shall be
responsible for handling the legal affairs of the Corporation, [and] advising the Board and
Chief Executive Officer on legal matters pertinent to the Corporation." [Supp. Touton Decl.,
¶ 4, Ex. 22.]

1 this letter other than as: (i) an invitation to Auerbach to inspect ICANN's documents; (ii) a
2 request that he do so pursuant to ICANN's Inspection Procedures, and (iii) a request that he agree
3 to comply with those procedures. The letter does not ask him to waive *any* of his rights, only to
4 acknowledge that he is conducting the inspection pursuant to the procedures and that he
5 understands that he has fiduciary obligations.

6 Auerbach expresses frustration that he was not able to obtain electronic copies of the
7 records he requested, and that ICANN would not agree in advance to provide paper copies of all
8 of the documents after the inspection. [Auerbach Motion at 10:1-23.] The problem, of course,
9 was that Auerbach requested so many documents that Lynn determined that having Auerbach
10 inspect the actual documents themselves -- before making any determinations on the request for
11 copies -- was the best way to limit the risk of inadvertent dissemination or alteration of
12 confidential documents. Auerbach does not disagree that Lynn's concerns were legitimate, and
13 since he refused to conduct any inspection, he does not know whether Lynn would have refused
14 to provide copies of specific documents following the inspection.⁶

15 Auerbach then argues that Paragraph 6 of the Inspection Procedures [Petition, Ex. 2]
16 provides that, if the director disagrees with the Audit Committee's decision and then appeals that
17 decision to the Board, the Board is then to make a "final and binding decision concerning the
18 production of the records involved" According to Auerbach, this would eliminate his right
19 to seek judicial review, even though the Inspection Procedures do not state that he would be
20 giving up this right. [Auerbach Motion at 19:19-20:2.]

21 Had Auerbach ever asked ICANN whether he was giving up his right to seek judicial
22 review following an adverse Board decision with respect to one of his requests, the answer
23 obviously would have been "no." The fact that the Board's determination is "final and binding"
24 simply means that there are no further avenues of review *within the corporation*. As noted
25

26 ⁶ Auerbach complains that Lynn "reserved to himself the right to veto the person(s)" who would
27 accompany Auerbach during the inspection [Auerbach Motion, 10:9-10], but Auerbach made
28 no objection to this aspect of Lynn's letter at the time, and in fact he designated advisors to
whom Lynn *did not object!* [Auerbach Decl., Exs. 26, 28; Supplemental Declaration of M.
Stuart Lynn ("Supp. Lynn Decl."), ¶ 4.]

1 earlier, the categorization of a corporate decision as “final and binding” removes the tentative
2 status of that decision and makes it clearly ripe for judicial review.⁷ Auerbach’s argument would
3 stand the phrase on its head by making a decision’s “final and binding” status *preclude*, rather
4 than *enable*, judicial review. And it clearly would be contrary to public policy for a corporation
5 (or an employer or any other entity) to require a waiver of judicial review without an express
6 statement that the director (or employee) was in fact giving up his/her right to seek judicial
7 review of a particular decision. *See El Camino Community College District v. Superior Court*,
8 173 Cal. App. 3d 606, 617 (1985) (“[I]t is well settled that the forfeiture of the right to a judicial
9 forum must be *expressly* agreed upon.” (Emphasis added)).⁸

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19 ⁷ This “final and binding” terminology has exactly the same effect as applied in the court system
20 itself. This Court makes “final and binding” judgments, but that does not mean that its
21 judgments cannot be appealed. For example, Section 1062.5 of the Code of Civil Procedure
22 refers to the court making “binding” declarations of insurers’ rights, which declarations shall
23 have the force and effect of a “final” judgment. The provision then goes on to expressly
24 discuss what happens when “the declaration is appealed.” Similarly, Section 86(a)(1)(B) of
25 the Code of Civil Procedure refers to judicial review of a “binding” arbitration award.

26 ⁸ Auerbach also asserts that ICANN took too long to address his inspection requests, although
27 he does not dispute that: (i) ICANN was a new corporation that did not have any procedures
28 for director inspection at the time he made his initial request, (ii) Auerbach waited three
months after ICANN appointed its new President, Mr. Lynn, to renew his inspection request,
(iii) Auerbach expressed satisfaction following the adoption of ICANN’s Inspection
Procedures, (iv) Mr. Lynn responded to Auerbach’s various e-mail and letters typically within
a matter of days, and (v) Auerbach waited four months after hearing from ICANN’s Audit
Committee to file this lawsuit (during which time he did not have a *single communication* with
ICANN on this subject). [Auerbach Decl., ¶¶ 11, 12, 14, 18, 19, 24, 33; Supp. Lynn Decl.,
¶ 2.] In short, there is no way to fault ICANN’s responsiveness to Auerbach’s requests, and
certainly Auerbach does not (and cannot) contend that the timing of the parties’ requests and
responses to one another should have any legal significance.

1 **3. Individual directors have a fiduciary duty to respect the**
2 **confidentiality determinations of the corporation.**

3 Auerbach's most dangerous – and clearly incorrect – argument is that, even assuming
4 Lynn has the initial right to make confidentiality determinations, Auerbach has an equal (or
5 apparently superior) right to decide for himself whether ICANN's confidential documents should
6 remain confidential. [Auerbach Motion at 11:23-12:5, 20:13-18; Lynn Decl., Exs. 11, 13;
7 Declaration of Louis Touton in Support of ICANN's Motion for Summary Judgment ("Touton
8 Decl."), Ex. 1.] In Auerbach's view, Auerbach (or any other individual director) can "exercise
9 their fiduciary duties" by independently assessing the confidentiality of the corporation's
10 documents – irrespective of the corporation's assessment – and then elect to disagree with the
11 corporation's assessment by disclosing documents to the public. Auerbach's *compromise* position
12 is that he would give ICANN seven days notice so that ICANN could run to court to seek an
13 emergency restraining order. [Id.]

14 Auerbach's argument finds no legal support. There is, in fact, considerable authority to
15 the contrary. An individual director's fiduciary duty of loyalty is to the best interests of the
16 corporation, not to his own idiosyncratic view of those interests. *See* Cal. Corp. Code 5231(a);
17 *see also Bancroft-Whitney Co. v. Glen*, 64 Cal. 2d 327, 345 (1966). A director's self-interest
18 cannot be pursued at the expense of the corporation's interests. *Professional Hockey Corp. v.*
19 *World Hockey Ass'n*, 143 Cal. App. 3d 410, 414 (1983). Where, as here, the corporation has
20 lawfully delegated the responsibility for confidentiality determinations to its president, the
21 director's fiduciary duty obligates him to respect the president's determinations, at least until the
22 board of directors (or a court) rules otherwise.⁹ (Of course, in this case, the Court has no ability
23 to rule otherwise because Auerbach has not actually inspected ICANN's documents and, thus,

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25 ⁹ Auerbach argues [Auerbach Motion at 16 n.8] that he might owe a fiduciary duty to the
26 general public, in addition to the duty owed to the corporation, because ICANN is a nonprofit
27 public benefit corporation. But Auerbach cites no law that supports the notion that his "duty"
28 to the general public could override his duty to the corporation, which is clearly stated in Cal.
 Corp. Code section 5231(a). And he clearly is wrong in implying that his "duty" to the general
 public could, for example, permit him to disclose to the general public documents that the
 corporation appropriately decides to treat as confidential.

1 cannot present the Court with a specific document or category of documents as to which there is
2 any disagreement regarding confidentiality.)

3 **C. ICANN Has Special, and Reasonable, Concerns Related to Auerbach's**
4 **Inspection Requests.**

5 Finally, Auerbach does not – and cannot – argue that ICANN's concerns with respect to
6 his inspection requests were unreasonable. There can be no doubt that the law gives a corporation
7 the right to be particularly cautious and vigilant when a director has taken actions similar to those
8 that Auerbach has taken. Indeed, Auerbach's own motion quotes the court in *Havlicek*, 39 Cal.
9 App. 4th at 1855-56, with respect to the obligations of a corporation vis-à-vis a "disgruntled
10 director." [Auerbach Motion at 16.] The fact that Auerbach had promised to be "good" and to
11 comply with *his own perspective* of his fiduciary obligations gives ICANN little solace in view of
12 his (and his financiers') very public statements attacking – and threatening the very existence of –
13 ICANN. In these circumstances, the procedures for inspection are particularly reasonable
14 accommodations to allow full inspections while carrying out the bylaws' command to "establish
15 reasonable procedures to protect against the inappropriate disclosure of confidential information."

16 **CONCLUSION**

17 For the reasons set forth herein, ICANN urges the Court to grant ICANN's motion for
18 summary judgment and to deny Auerbach's. In particular, ICANN asks that the Court find that
19 this dispute is not ripe for adjudication, and that ICANN's Inspection Procedures reasonably and
20 lawfully protect both the interests of the corporation and the interests of its directors.

21 To the extent the Court wishes to proceed even further, ICANN urges the Court to order
22 Auerbach to conduct his inspection pursuant to ICANN's Inspection Procedures. Those
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1 procedures are far less intrusive than a court-issued protective order to preserve confidentiality,
2 but such a protective order (which likely would involve the Court on a continuing basis in the
3 parties' dispute) also could be issued in order to protect ICANN, as well as its directors.

4 Dated: July 15, 2002

JONES, DAY, REAVIS & POGUE

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By: _____
Jeffrey A. LeVee

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Attorneys for Respondent
INTERNET CORPORATION FOR
ASSIGNED NAMES AND NUMBERS

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