

THE .JOBS CHARTER COMPLIANCE COALITION

Attention: John Bell
Chairman & CEO, Boxwood Technology
Executive Plaza III
11350 McCormick Road, Suite 101
Hunt Valley, MD 21031

December 7, 2011

VIA EMAIL

Mr. Stephen Crocker
Mr. Rod Beckstrom
John Jeffrey, Esq.
Internet Corporation for Assigned Names and Numbers
4676 Admiralty Way, Suite 330
Marina del Rey, CA 90292-6601
USA

Re: Employ Media's Request for Arbitration

Dear Messrs. Crocker, Beckstrom and Jeffrey:

The .JOBS Charter Compliance Coalition (the "Coalition") submits this open letter to you regarding the arbitration proceedings initiated by the .JOBS registry operator Employ Media LLC ("Employ Media") against the Internet Corporation for Assigned Names and Numbers ("ICANN") arising from the [breach notice](#) issued by ICANN on February 27, 2011.

I. The Dormant Arbitration With Employ Media

Despite Mr. Beckstrom's claim that the breach notice filed against Employ Media "reflects [ICANN's] serious commitment to contractual compliance with registries and registrars," ICANN has been inactive in enforcing this commitment. It has now been *over four months* since ICANN submitted its [Arbitration Answer](#) on July 22, 2011 to Employ Media's Request for Arbitration. As both ICANN and Employ Media have each nominated their respective arbitrator in their initial filings, the next procedural step under the [applicable arbitration rules](#) is the appointment of a third arbitrator to act as the chairperson of the arbitral tribunal. Based on the lack of information on the [arbitration page on ICANN's website](#) since ICANN filed its Answer, it does not appear that this simple procedural step has occurred. ICANN's failure to keep the ICANN Community apprised of the status of the arbitration is a regrettable standard practice, as noted in our previous [letter](#) dated July 5, 2011.

Unfortunately, this consensual delay plays right into the hands of the rogue registry operator. As the arbitration idles in its dormant state, Employ Media and its alliance partner DirectEmployers Association ("DirectEmployers") have aggressively expanded the reach of non-compliant Dot Jobs Universe, which was the very basis for the issuance of the breach notice. This continuing delay only emboldens the defiance of Employ Media and DirectEmployers in the operation of their non-compliant program, which inflicts continuing harm on members of the

human resources community and other parties adversely affected by Employ Media’s unwarranted expansion of the .JOBS Top-Level Domain (“TLD”).

ICANN’s reluctance to enforce contractual compliance is of grave concern in light of the anticipated launch of the new generic top-level domain (“gTLD”) initiative, as ICANN’s delay gives the impression to the Internet community that ICANN is unable or unwilling to enforce its rules despite overwhelming evidence of a conscious disregard for those rules.

II. ICANN Fails To Disclose Employ Media’s Initial Violation Of The .JOBS Registry Agreement

An alarming issue that was recently revealed in certain [exhibits](#) to ICANN’s Arbitration Answer was the contempt that Employ Media held for contractual compliance when it operated its “beta test” in direct contravention of the .JOBS Registry Agreement. Correspondence in late 2009 between ICANN and Employ Media demonstrates (1) the deceptive interpretations that Employ Media ascribed to the Registry Agreement and Charter and (2) the inability (or unwillingness) of ICANN to detect and prevent Employ Media’s strategy of evading the clear restrictions of the .JOBS Charter.

In a previously undisclosed letter dated December 4, 2009 issued to the then senior director of ICANN’s Contractual Compliance Department, Employ Media delivered its response to a contractual compliance review conducted by ICANN stemming from the operation of the non-compliant “beta test.” See [Exhibit J to ICANN Arbitration Answer](#).¹ In the letter, Employ Media made the implausible argument that domain names that were *explicitly reserved from registration and use* in the .JOBS TLD were nonetheless available to Employ Media to use for its own financial interests.

The Registry Agreement clearly states that certain domain names were “reserved from registration” and that a “reserved list of names will be employed to prevent inappropriate name registrations.” See [.JOBS Registry Agreement at Appendix S](#), Sections IV and VII.2. Before the ICANN Board made its ill-fated decision to approve Employ Media’s amendment in August 2010, this reserved list included certain groups of domains – including a list of occupational, industry and occupational identifiers – and were in addition to the restriction that .JOBS domains comprise only trade names or commonly-known names. See *id.* at VII.2 and [Appendix 6](#). The Registry Agreement states that the reserved list domains “will be registered to the Registry Operator in the registry database *to reflect their status as reserved names*” and therefore prevent prohibited name registrations. See [Appendix S at VII.2](#).

Incredibly, Employ Media argued that it was free to ignore this unequivocal contractual language as mere “*dicta*” and was therefore not bound by those provisions. See [Exhibit J at pp. 7-8](#). Employ Media asserted it was entitled to the unfettered use of geographic, industry and occupational second-level domain names – names which were *explicitly reserved from*

¹ Given ICANN’s purported commitment to transparency, it is troublesome that ICANN did not disclose this correspondence to the ICANN Community in advance of the public comment period for the amendment proposed by Employ Media. The proposed amendment, which the ICANN Board approved on August 5, 2010, eventually resulted in Employ Media implementing the prohibited program which is the subject of the breach notice.

registration pursuant to the Registry Agreement. Employ Media used these reserved names in the operation of the non-compliant beta test along with its alliance partner DirectEmployers to exclusively serve their joint business interests.

Moreover, Employ Media claimed it was not subject to ICANN's compliance authority, stating that "once [reserved domain] names are registered, how such name[s] are used is not governed by the terms of the registry agreement, and as such, is not proper subject matter for a contractual compliance review." *Id.* at p. 6. Finally, Employ Media had the audacity to attach a "draft" Memorandum of Understanding to the letter, which it asked ICANN to execute signifying its agreement to these absurd arguments.²

In its email response to Employ Media dated January 20, 2010, ICANN's Contractual Compliance Department correctly noted that Employ Media's use of the reserved domain names for the beta test was "***in violation of the Registry Agreement.***" See [Exhibit K to ICANN Arbitration Answer](#).³ ICANN pointedly admonished Employ Media that it could not "register and actively use the [reserved] names as [it] sees fit," and demanded that Employ Media "remedy this situation" and "return to compliance." *Id.* at pp. 4, 7. Employ Media and DirectEmployers terminated the beta test soon thereafter, although Bill Warren, the Executive Director of DirectEmployers, characterized this ICANN-mandated termination as a voluntary shutdown for "making enhancements" in his [February 2010 blogpost](#).

ICANN never disclosed to the ICANN Community that the .JOBS registry operator was found by ICANN to be in violation of the Registry Agreement through its non-compliant operation of the beta test. This glaring lack of transparency was exacerbated by the fact that the beta test framework had the same "self-managed" aspect of Employ Media's planned implementation of the .JOBS TLD – *i.e.*, that Employ Media sought to register all of the valuable .JOBS domain names to itself. Although Employ Media eventually terminated its beta test, the non-compliant framework was nevertheless maintained in the eventual implementation of the Dot Jobs Universe. Accordingly, the question arises as to why ICANN took the steps it subsequently did during 2010 that permitted Employ Media to launch the non-compliant Dot Jobs Universe in January 2011 when the rogue registry operator had previously signaled its improper intent and bad faith through its operation and purported justification of the beta test.

It is noteworthy that Kurt Pritz, the leader of ICANN's implementation of the new gTLD program, was also a key member of the ICANN Staff that was responsible for coordinating with Employ Media in the lead-up to Employ Media's Phased Allocation Program, which resulted in the launch of the non-compliant Dot Jobs Universe. In fact, before the ICANN Board voted in August 2010 to approve Employ Media's Phased Allocation Program, it was Mr. Pritz who [advised the Board](#) that the Program did not modify the Charter, and that the "universe of registrants is unchanged; it's still the hiring managers and the entities that employ people." It is

² In fact, Employ Media marked the entire letter with the header "DRAFT 12/4/2009." Given that ICANN Staff members and Employ Media representatives worked closely during 2010 in advance of the launch of the non-compliant Dot Jobs Universe, it is unclear why Employ Media was ***sharing with ICANN*** its draft responses to an ICANN contractual compliance review.

³ This email also was not disclosed to the ICANN Community until only recently when it was included as an exhibit to ICANN's Arbitration Answer.

unclear why Mr. Pritz would have advised the Board in this manner despite having been involved in the prior communications regarding the non-compliant beta test (*see* [Exhibit K at p. 1](#)) that described in great detail Employ Media’s improper plans for a self-managed class of domains, as well as the ICANN Contractual Compliance Department’s position that the operation of the beta test constituted a violation of the .JOBS Registry Agreement.

III. ICANN Recently Permits Employ Media To Make A Fundamental Change To The .JOBS IANA Database Description

On July 8, 2011, the Coalition submitted an [open letter](#) to ICANN regarding a *fundamental change* that was recently made to the designated “purpose” of the .JOBS TLD that is described in the Internet Assigned Numbers Authority’s (“IANA”) [Root Zone Database](#). Part of the information maintained in the Root Zone Database, which purports to be the “*the authoritative record*” regarding certain TLD data, includes a “Purpose” field, which in the case of sponsored TLDs, describes the limited community that the sponsored TLD is designated to serve.

Since the inception of the .JOBS TLD and up until recently, the IANA Root Zone Database clearly and correctly stated that the limited “purpose” of the .JOBS TLD was “[r]eserved for human resource managers.” The Coalition cited this language in its [open letter](#) to John Jeffrey of ICANN on May 11, 2011 in support of its position that the .JOBS Charter language limits the class of persons eligible to register a second-level domain name in the .JOBS TLD to those individuals who work in the human resource function within their respective companies and organizations. ICANN confirmed this interpretation when it eventually submitted its [Arbitration Answer](#) on July 22, 2011.⁴

The Coalition discovered, however, that the “reserved for human resource managers” language which confirmed the restrictive parameters of the .JOBS Charter was *replaced* with the following description: “[r]eserved to serve needs of the international human resource community.” The expansive language in this change was clearly fabricated *after* the Coalition’s May 11th letter, which cited the earlier restrictive language in support of its position. The facts and timeline strongly suggested that Employ Media made this fundamental and non-transparent change, and the Coalition requested certain information and documents regarding the alteration pursuant to ICANN’s Documentary Information Disclosure Policy (“DIDP”) in its July 8th letter.

On August 5, 2011, ICANN provided its [response](#) to the Coalition’s DIDP request, which included a so-called “[supporting document](#).” ICANN’s response was troublesome on many fronts. First, it confirmed that Ray Fassett, Founder and Executive Vice President of Operations and Policy at Employ Media, sent an email to ICANN on May 13th – *two days after the Coalition cited the supporting IANA database language in its May 11th letter* – and requested that ICANN change the longstanding description in the “Purpose” field. No reason was given by Mr. Fassett for this alteration despite the fact the language had gone unchanged for approximately six years. Mr. Fassett’s request made clear Employ Media’s acknowledgement

⁴ “Based on the specific intent behind creation of .JOBS, the .JOBS Registry Agreement contractually requires Employ Media to limit domain name registrations within .JOBS to individual human resource managers seeking to promote employment opportunities *within their own organizations*.” ICANN Arbitration Answer at p. 2 (emphasis supplied).

that the language in the IANA Root Zone Database directly refuted their position regarding the interpretation of the Charter. The retroactive change request was nothing less than an overt admission by Employ Media that it is in breach of the .JOBS Registry Agreement and Charter. Employ Media simply wanted to “change the rules” because the controlling language in the Registry Agreement, Charter and IANA Database refuted its position.

There were, however, other troubling aspects to ICANN’s DIDP response. ICANN *inexplicably granted Employ Media’s request* and authorized the change in the “Purpose” field for the .JOBS TLD in the IANA Root Zone Database. Although this change had no effect on the controlling language of the Registry Agreement and Charter, it is unclear why ICANN granted this request to a non-compliant registry operator that: (1) was previously determined by ICANN to be in breach of the .JOBS Registry Agreement and Charter; (2) had commenced arbitration proceedings against ICANN *only ten days earlier*; and (3) requested the change after the Coalition cited the previous IANA Database language in its letter filed with ICANN *two days before Employ Media made its request*.

Moreover, ICANN’s “disclosure” under the Coalition DIDP request was extremely limited. The “[supporting document](#)” – which consists of the email trail beginning with Ray Fassett’s change request and ending with ICANN’s approval – has been nearly entirely redacted by ICANN based on a purported claim of attorney-client privilege. ICANN has [previously maintained](#) that it is not obligated to produce a privilege log in these situations so it is therefore impossible to determine whether ICANN’s extensive claim of privilege here is appropriate.

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In his [address](#) at the opening ceremony at ICANN’s March 2011 meeting in San Francisco, U.S. Commerce Assistant Secretary Larry Strickling emphasized that ICANN and its Board needed to focus on developing improvements to its accountability and transparency. However, given the launch of the new gTLD initiative in which ICANN will be responsible for the oversight of hundreds of new gTLDs, the deficient manner in which ICANN has prosecuted a clear case of non-compliance raises serious doubts as to the credibility of ICANN’s governance methods, and runs counter to Secretary Strickling’s goal that ICANN maintain a foundation of strong accountability and transparency.

The Coalition requests that (1) ICANN post this letter on the “Correspondence” page of its website and (2) the ICANN Secretary circulate this letter to the members of the ICANN Board of Directors.

Sincerely,



John Bell
Chairman, .JOBS Charter Compliance Coalition

cc: ICANN Board of Directors
Maguy Serad
Eric Enson, Esq.