

**THE .JOBS CHARTER COMPLIANCE COALITION**  
Attention: John Bell  
Chairman & CEO, Boxwood Technology  
Executive Plaza III  
11350 McCormick Road, Suite 101  
Hunt Valley, MD 21031

April 3, 2012

**VIA EMAIL**

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

Re: DIDP Information Request Regarding ICANN-Employ Media Arbitration Materials and Information

Dear Messrs. Crocker, Beckstrom and Jeffrey:

The .JOBS Charter Compliance Coalition (the "Coalition") submits this letter to you regarding documents, communications and information relating to the arbitration initiated by 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.

From the time the arbitration commenced in May 2011, ICANN's disclosure of documents and information relating to the proceeding has been inconsistent. This is incompatible with the principles of transparency set forth in ICANN's bylaws, which promise that ICANN "shall operate to the maximum extent feasible in an open and transparent manner and consistent with procedures to ensure fairness." Moreover, this lack of transparency is contrary to ICANN's Documentary Information Disclosure Policy ("DIDP"), which ensures that "information contained in documents concerning ICANN's operational activities, and within ICANN's possession, custody, or control, is made available to the public unless there is a compelling reason for confidentiality." As demonstrated below, ICANN itself has taken the position that there are no such confidentiality concerns regarding arbitration-related documents and information.

As an example of its unpredictable disclosure pattern, the ICANN webpage devoted to the arbitration contained no updates for *over six months* since the filing of ICANN's Arbitration Answer in July 2011 despite numerous requests from the Coalition seeking additional information from ICANN on this critical matter. ICANN subsequently posted on its website a letter dated February 3, 2012 from its outside counsel to the International Chamber of Commerce

(“ICC”) seeking a purported “expedited” appointment of a third arbitrator/chairperson to the arbitral tribunal. (Exhibit A). Notwithstanding the fact that ICANN waited since July 2011 to seek this “expedited” appointment, the letter revealed that prior correspondence relating to the arbitration had been exchanged with the ICC (“As noted in my previous letter to you . . .”). This prior correspondence has *not* been posted to the ICANN website. In response, the ICC submitted a letter dated February 10, 2012 to ICANN’s outside counsel stating that “[w]e have taken the necessary steps for the appointment of the Chairman, taking into account the particular characteristics of this file *and the parties’ requests to that effect.*” (Exhibit B). Once again, ICANN has *not* disclosed any documents or information relating to the “parties’ requests” referenced in the ICC letter.

As stated above, ICANN’s DIDP Policy ensures that “information contained in documents concerning ICANN’s operational activities, and within ICANN’s possession, custody, or control, is made available to the public *unless there is a compelling reason for confidentiality.*” There are, however, no such confidentiality concerns in this arbitration. In fact, ICANN’s outside counsel argued this very point in previous correspondence to outside counsel for Employ Media. In a letter dated April 26, 2011, ICANN’s counsel rejected Employ Media’s request to refrain from publicly posting correspondence between the parties regarding the dispute, stating that “ICANN endeavors to operate to the maximum extent feasible in an open and transparent manner . . . . These policies and objectives require that, from time to time, *ICANN publicly post relevant materials in order to apprise interested parties of developments and happenings within the Domain Name System.*” (Exhibit C). The correspondence, materials and information sought by this DIDP Request are especially relevant and are of great interest to the Coalition as well as many other members of the ICANN community given the significance of the arbitration. Moreover, in light of the new gTLD program, the ICANN community has a critical interest in knowing whether ICANN has the ability and resolve to aggressively pursue remedies against noncompliant registry operators, and whether the ICC provides an effective and efficient forum for resolving disputes with registry operators.

After Employ Media subsequently posted its Request for Arbitration on its website on May 3, 2011, ICANN’s outside counsel submitted a letter dated May 6, 2011 to Employ Media’s outside counsel (Exhibit D) which noted that any potential confidentiality claims relating to the arbitration had been effectively released:

As a procedural matter, we are pleased to see that Employ Media has posted a copy of the Request on its website, and we assume that in doing so *Employ Media has waived any confidentiality claims regarding the information contained in the Request or the proceedings before the ICC.*

ICANN’s counsel represented that ICANN would continue to post non-confidential information relating to the timing of the parties’ discussions. Accordingly, based on the public posting of Employ Media’s Request for Arbitration, ICANN’s public posting of the Arbitration Answer, and ICANN’s representation that it would post information regarding the timing of the parties’ discussions in this dispute, there can be no reasonable basis for ICANN (or Employ Media) to assert a claim of confidentiality for arbitration-related materials, correspondence, schedules or any other information.



Finally, none of the DIDP Requests enumerated below fall within the parameters set forth in the “Defined Conditions for Nondisclosure” in ICANN’s DIDP Policy. More specifically, the Coalition’s DIDP Requests do *not* (1) compromise the integrity of ICANN’s deliberative and decision-making process; (2) materially prejudice the commercial interests, financial interests, and/or competitive position of any party; (3) seek confidential business information and/or internal policies and procedures; (4) seek privileged information; or (5) seek information that is unreasonable, excessive or overly burdensome. In addition, given that both ICANN and Employ Media have previously posted publicly their respective legal briefings and evidence in this matter (*i.e.*, the Arbitration Request and Answer with exhibits) along with certain arbitration-related correspondence already selectively posted by ICANN on its website, there simply is no rational basis to withhold full disclosure of the materials and information sought by the DIDP Requests.

Accordingly, pursuant to ICANN’s DIDP Policy, the Coalition requests the following documents and information:

- (1) The identity of the third arbitrator appointed by the ICC on March 13, 2012 as referenced in the “status note” on ICANN’s website;
- (2) Any and all prior and future non-privileged documents, materials or communications relating to the arbitration, including but not limited to the following:
  - correspondence, including but not limited to (1) the “prior letter” from ICANN’s outside counsel referenced in his February 3, 2012 letter to the ICC; (2) correspondence relating to the appointment of the third arbitrator; and (3) correspondence relating to the “parties’ requests to that effect” as referenced in the ICC letter dated February 10, 2012;
  - emails exchanged among the parties, the ICC and any third parties relating to the arbitration; and
  - supplemental briefings, exhibits, motions and any other submissions provided by the parties.
- (3) The schedule (or “timetable” as referenced in the “status note” on ICANN’s website) for the arbitration proceedings;
- (4) Please disclose whether the arbitration hearing will take place in a public venue and, if so, the date(s), times and location of the hearing;
- (5) Please disclose whether there will be live testimony during the course of the arbitration hearing and, if so, the list of all witnesses identified by the parties.

The Coalition requests that ICANN post this letter on the "Correspondence" page of its website. Thank you in advance for your response.

Sincerely,

A handwritten signature in black ink, appearing to read "John Bell". The signature is fluid and cursive, with the first name "John" and the last name "Bell" clearly distinguishable.

John Bell  
Chairman, .JOBS Charter Compliance Coalition

cc: Maguy Serad  
didp@icann.org

# **EXHIBIT A**

# JONES DAY

555 SOUTH FLOWER STREET • FIFTIETH FLOOR • LOS ANGELES, CALIFORNIA 90071-2300  
TELEPHONE: 213-489-3939 • FACSIMILE: 213-243-2539

Direct Number: (213) 243-2304  
epenson@JonesDay.com

3 February 2012

## VIA E-MAIL

Mr. José R. Pereyó Deputy Counsel  
Secretariat of the ICC International Court of Arbitration  
38 Cours Albert 1er  
75008 Paris, France

**Re: Employ Media LLC v. Internet Corporation for Assigned Names and Numbers,  
ICC Case No. 17917/VRO**

Dear Mr. Pereyó:

On behalf of the Internet Corporation for Assigned Names and Numbers ("ICANN"), I am writing to respectfully request that, to the extent possible, the ICC International Court of Arbitration expedite the recommendation of a Chairperson of the Arbitral Tribunal in the above-referenced matter. **As noted in my previous letter to you**, ICANN is extremely interested in proceeding with this matter and reaching a final resolution.

Should the Secretariat have any questions or require a further information from ICANN, please do let me know. Thank you.

Sincerely,



Eric P. Enson

cc: Arif H. Ali, Esq.  
Counsel for Employ Media LLC

LAI-3159303v1

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# **EXHIBIT B**



International Chamber of Commerce

*The world business organization*

**International Court of Arbitration • Cour internationale d'arbitrage**

10 February 2012

**17917/VRO**

**EMPLOY MEDIA LLC (U.S.A.) vs/ INTERNET CORPORATION FOR ASSIGNED NAMES AND NUMBERS (U.S.A.)**

**Counsel: Ms Victoria Orlowski**

(Tel: + 33 1 49 53 28 32)

**Deputy Counsel: Mr José R. Perevó**

(Tel: + 33 1 49 53 28 61)

(Fax: + 33 1 49 53 57 80)

(Email: [ica5@iccwbo.org](mailto:ica5@iccwbo.org))

Arif H. Ali, Esq.  
John L. Murino, Esq.  
Emily M. Alban, Esq.  
CROWELL & MORING LLP  
1001 Pennsylvania Avenue, N.W.  
Washington D.C., 20004  
U.S.A.

*By email: [aali@crowell.com](mailto:aali@crowell.com), [jmurino@crowell.com](mailto:jmurino@crowell.com), [ealban@crowell.com](mailto:ealban@crowell.com)*

Michael N. Ungar, Esq.  
Gregory J. Phillips, Esq.  
Kari C. Samuels, Esq.  
ULMER & BERNE LLP  
Skylight Office Tower  
1660 W. 2<sup>nd</sup> Street, Suite 1100  
Cleveland, OH 44113  
U.S.A.

*By email: [mungar@ulmer.com](mailto:mungar@ulmer.com), [gphillips@ulmer.com](mailto:gphillips@ulmer.com), [ksamuels@ulmer.com](mailto:ksamuels@ulmer.com)*

Jeffrey A. LeVee, Esq.  
Eric P. Enson, Esq.  
Cindy Reichline, Esq.  
JONES DAY  
555 South Flower Street, 50<sup>th</sup> floor  
Los Angeles, CA 90071  
U.S.A.

*By email: [jlevee@jonesday.com](mailto:jlevee@jonesday.com), [epenson@jonesday.com](mailto:epenson@jonesday.com), [creichline@jonesday.com](mailto:creichline@jonesday.com).*

Dear Mesdames and Sirs,

The Secretariat acknowledges receipt of Respondent's letter dated 3 February 2012, copied directly to Claimant.

We take note of Respondent's comments concerning the appointment of the Chairman of the Arbitral Tribunal.

We have taken the necessary steps for the appointment of the Chairman, taking into account the particular characteristics of this file and the parties' requests to that effect.

.../...

**ICC International Court of Arbitration • Cour internationale d'arbitrage de la CCI**

38 Cours Albert 1er, 75008 Paris, France

Tel +33 (0)1 49 53 28 28 Faxes +33 (0)1 49 53 29 29 / +33 (0)1 49 53 29 33

E-mail [arb@iccwbo.org](mailto:arb@iccwbo.org) Website [www.iccarbitration.org](http://www.iccarbitration.org)



We shall inform the parties of the Court's decision in due course.

Yours faithfully,

A handwritten signature in black ink, appearing to read 'JP2', is written over the typed name.

José R. Pereyó  
Deputy Counsel  
Secretariat of the ICC International Court of Arbitration

Contact Information Redacted

# **EXHIBIT C**

# JONES DAY

555 SOUTH FLOWER STREET • FIFTIETH FLOOR • LOS ANGELES, CALIFORNIA 90071-2300

TELEPHONE: 213-489-3939 • FACSIMILE: 213-243-2539

Direct Number: (213) 243-2304  
epenson@jonesday.com

April 26, 2011

## VIA E-MAIL

Arif H. Ali  
Crowell & Mooring  
1001 Pennsylvania Ave., N.W.  
Washington, D.C. 20004-2595

### Re: Notice of Breach of .JOBS Registry Agreement

Dear Arif:

I write in response to your 22 April 2011 letter objecting to ICANN's public posting of certain communications between ICANN and Employ Media regarding ICANN's 27 February 2011 Notice of Breach letter. Herein, ICANN addresses the points you raise with respect to ICANN's 19 April 2011 posting in the hope that we can return to focusing on the resolution of the issues detailed in ICANN's Notice of Breach letter in a manner that serves all interested parties and stakeholders.

First, ICANN cannot assure Employ Media that ICANN will refrain from publicly posting future communications, as you request in your 22 April letter. You and Employ Media know quite well that, pursuant to ICANN's Bylaws and embodied in its Accountability and Transparency Framework and Documentary Information Disclosure Policy ("DIDP"), ICANN endeavors to operate to the maximum extent feasible in an open and transparent manner in accordance with procedures designed to ensure fairness and protect confidential materials. These policies and objectives require that, from time to time, ICANN publicly post relevant materials in order to apprise interested parties of developments and happenings within the Domain Name System. Without this level of transparency, ICANN's multi-stakeholder model does not operate as effectively or efficiently.

Contrary to the claims in your letter, the 19 April posting – which consisted solely of communications regarding extensions to the opportunity-to-cure period set forth in ICANN's Notice of Breach letter – complied with both the letter and spirit of these policies. The three documents publicly posted by ICANN are of the type posted as a matter of due course. In particular, the documents did not contain the proprietary or confidential business information of either ICANN or Employ Media. Furthermore, the cooperative engagement provisions contained in the .JOBS Registry Agreement do not bar the public posting of correspondence created during the process, as Employ Media concedes in its 22 April letter. Finally, the 19 April posting was intended to, and did, inform the .JOBS Community that the opportunity-to-cure period established in the Notice of Breach letter has been extended once again by ICANN.

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Arif H. Ali  
April 26, 2011  
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Perhaps more importantly, ICANN's 19 April posting does not evidence "bad faith" on ICANN's part, as your 22 April letter claims. Quite the opposite, ICANN provided Employ Media with advance notice of the posting and a list of the three documents that would be posted. ICANN restricted the posting to those documents relevant to the matter at hand – ICANN's extensions to the opportunity-to-cure period – and ensured that proprietary and confidential information was not disclosed. And although your 22 April letter fails to mention this point, Employ Media specifically requested that ICANN publicly inform the .JOBS Community that the opportunity-to-cure period had been extended, which is precisely what ICANN set out to achieve through the 19 April posting.

Second, ICANN cannot agree to consult Employ Media on future postings, as you request in your 22 April letter. Indeed, one of the main issues raised in the Notice of Breach letter is the concern that the .JOBS Community was not fully apprised of changes taking place within the .JOBS domain. ICANN will not compound these concerns by negotiating with Employ Media which documents will, or will not, be disclosed to the Community. Rather, ICANN's public posting of materials will be guided by the neutral application of its principles and policies.

Third, ICANN disagrees with your claim that the cooperative engagement process cannot be productive if ICANN publicly posts communications made pursuant to that process. To the contrary, ICANN believes that the cooperative engagement process is fostered by forthcoming disclosures to stakeholders and Community members, as called for by ICANN's Bylaws, Accountability and Transparency Framework and the DIDP.

On the other hand, it is not productive for Employ Media to continually claim that it was surprised by ICANN's public issuance of the Notice of Breach letter. The issue of Employ Media's Charter compliance has been front and center – and public – since, at least, the time ICANN's Board Governance Committee began its analysis of Reconsideration Request 10-2 in late summer of 2010. Nor is it productive for Employ Media to repeatedly claim that it was unaware of ICANN's belief that a Charter amendment was necessary to cure the breaches identified in the Notice of Breach letter. Without risk of overstatement, ICANN has consistently taken this position, and has had specific discussions with Employ Media on this point, from the outset of the cooperative engagement process. Finally, the cooperative engagement process is undercut by correspondence, such as your 22 April letter, seemingly geared solely towards use in future litigation. Cooperative engagement with respect to the issues identified in the Notice of Breach letter is far more likely to succeed if litigation posturing is placed to the side.

It should be clear from our previous communications and discussions, as well as ICANN's willingness to extend Employ Media's opportunity to cure the issues raised in the Notice of Breach letter, that ICANN remains dedicated to the cooperative engagement process and attempting to resolve the issues ICANN sees with Employ Media's Phased Allocation



Arif H. Ali  
April 26, 2011  
Page 3

Program. ICANN looks forward to proceeding in this fashion, and hopes that Employ Media is dedicated to the same end.

Should you have any questions, please do not hesitate to call me. Thank you.

Sincerely,

A handwritten signature in black ink, appearing to be "Eric P. Enson", with a long horizontal flourish extending to the right.

Eric P. Enson

cc: John O. Jeffery  
Amy A. Stathos  
Samantha Eisner  
Jeffrey A. LeVee  
Brian Johnson  
John Murino

# **EXHIBIT D**

# JONES DAY

555 SOUTH FLOWER STREET • FIFTIETH FLOOR • LOS ANGELES, CALIFORNIA 90071-2300  
TELEPHONE: 213-489-3939 • FACSIMILE: 213-243-2539

Direct Number: (213) 243-2304  
epenson@jonesday.com

6 May 2011

## VIA E-MAIL

Arif H. Ali  
Crowell & Moring  
1001 Pennsylvania Ave., N.W.  
Washington, D.C. 20004-2595

### **Re: Notice of Breach of .JOBS Registry Agreement**

Dear Arif:

I write regarding Employ Media's 3 May 2011 Request for Arbitration ("Request") regarding ICANN's 27 February 2011 Notice of Breach letter.

As an initial matter, it is disappointing, and a clear sign of bad faith, that Employ Media utilized its latest extension to the opportunity-to-cure period to draft its Request, rather than working to resolve this matter. What is more, Employ Media is in breach of the parties' agreement to extend the opportunity-to-cure period by failing to provide ICANN with a proposed Charter amendment by 2 May 2011 and discuss that proposal with ICANN before 6 May 2011. These terms were the basis for ICANN agreeing to extend the opportunity-to-cure period; they were explicitly set forth in my 14 April 2011 letter to Brian Johnson; and they were explicitly accepted in your 18 April 2011 email to me. The filing of the Request did not relieve Employ Media of its duty to comply with these terms. It therefore appears that Employ Media has no intention of working cooperatively with ICANN to resolve this dispute. Presuming this is true, ICANN will continue, as appropriate, to pursue its rights under the termination procedures set forth in Article VI of the .JOBS Registry Agreement.

As a procedural matter, we are pleased to see that Employ Media has posted a copy of the Request on its website, and we assume that in doing so Employ Media has waived any confidentiality claims regarding the information contained in the Request or the proceedings before the ICC. It is, however, surprising that Employ Media chose to publicly post the Request after complaining that ICANN's posting of communications between the parties was inappropriate. As we have discussed before, ICANN's posting contained non-confidential information relating to the timing of the parties' discussions; Employ Media's public posting of the Request contained the very information Employ Media has claimed as proprietary and confidential.

It is telling that Employ Media refused to speak directly with ICANN before filing the Request, as I proposed on the morning of 3 May, but then turned around and transmitted a copy

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Arif H. Ali  
6 May 2011  
Page 2

of the Request directly to ICANN's Board Members along with a recitation of Employ Media's alleged grievances. The cooperative engagement process set forth in the dispute resolution provisions of the .JOBS Registry Agreement is aimed at encouraging good faith discussions in order to avoid litigation. Although Employ Media has claimed to be engaged in this process, the actions of Employ Media, or at least the actions of its attorneys, belie these claims. In any event, given the fact that ICANN is represented by counsel and we are now involved in a formal dispute resolution process, I ask that you, and anyone acting under your direction, including Employ Media, communicate with ICANN's counsel, rather than directly to ICANN's Staff or Board Members.

In closing, and as you and I have discussed previously, the terms on which ICANN based the latest extension were geared towards reaching an amicable resolution of this matter and avoiding costly legal fees associated with arbitration or litigation. All previous efforts have sought an open dialogue with Employ Media in the hope of bringing its actions in line with its representations, and ICANN still believes that this is possible without spending extraordinary legal fees. As such, I again request a meeting among the business persons involved in this matter to discuss potential resolutions before spending more of ICANN's funding on unnecessary litigation. If Employ Media is willing to engage in such discussions, please let me know when your client is available on Thursday of next week.

Should you have any questions, please do not hesitate to call me. Thank you.

Sincerely,

A handwritten signature in black ink, appearing to be "Eric P. Enson", with a long horizontal flourish extending to the right.

Eric P. Enson

cc: John O. Jeffrey  
Amy A. Stathos  
Samantha Eisner  
Jeffrey A. LeVee  
Brian Johnson  
John Murino