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Mr. Eric P. Enson
Jones Day
555 S. Flower Street
50th Floor
Los Angeles, CA 90071

Re: ICANN's Posting of Cooperative Engagement Communications

Dear Eric,

My client, Employ Media, and I are most disappointed by the fact that your client, ICANN, posted certain communications related to the current Cooperative Engagement process, and that it did so without an opportunity for discussion, despite my request that you not proceed with posting our communications until I had reverted to you. We are equally disappointed by the fact that, during all of the various discussions I had with you, you never once raised with me the prospect that ICANN would be posting any of the communications between the parties. In light of this apparent bad faith action on ICANN's part, Employ Media is questioning whether any hope remains for a full and fair exchange of ideas regarding a resolution of its dispute with ICANN. We fail to see how the Cooperative Engagement process can be productive if ICANN is going to post the communications made pursuant to that process—or, more accurately, if ICANN is going to post selected communications that it unilaterally decides to publish to the community. Accordingly, Employ Media requires assurance from ICANN that no further communications relating to the breach notice and attempts at addressing the breaches alleged therein will be posted.

As you well know, Employ Media has made every endeavor to act in a good faith, productive, and collaborative manner throughout the Cooperative Engagement process. As a result, Employ Media has been entirely frank in its communications, and cooperative in what it has offered to ICANN. This frankness and cooperation were premised, in part, on the understanding that the communications were to be kept confidential, as is the norm for contract and settlement negotiations. While I am aware that the Registry Agreement only addresses the extent to which communications issued in the context of Cooperative Engagement are inadmissible in any arbitration or litigation proceedings, you will no

doubt appreciate that the entire purpose of this limitation is eviscerated by virtue of these communications being made public. Some measure of confidentiality is essential to the negotiation process so that the parties can be open and frank without grandstanding or pandering to a larger audience—especially as that audience includes a number of third parties who have wrongfully attempted to insert themselves into ICANN’s contractual relationship with Employ Media. By publishing our communications, your client has substantially hindered Employ Media’s ability to engage in productive and honest negotiations: all future communications will necessarily be more guarded and less open, given the expectation that they will be published to a larger audience.

Neither my client nor I wish to cause ICANN to violate any of its disclosure policies or its transparency obligations, and we have no objection to the publication of appropriate documents at the appropriate time; however, we fail to see any reason why publishing our communications was necessary to “update the community” on the status of the Notice of Breach, which surely could have been accomplished without divulging communications which Employ Media believed to be confidential. Moreover, Employ Media was offered no opportunity to discuss the contents of the communications being posted, including certain contents that Employ Media believes are proprietary and therefore not subject to posting under ICANN’s Documentary Information Disclosure Policy. In fact, when you notified me that you intended to post various communications, I specifically requested that you allow me an opportunity to discuss with my client and then revert to you; instead, ICANN posted those communications only hours later. At the very least, Employ Media should have been given an adequate opportunity to directly inform other interested parties of the contents of the posted communications before those parties found out through a posting on ICANN’s website.

Additionally, we note that the communications posted represent an incomplete and misleading record of what has transpired during our negotiations. In large part, this is a result of the fact that, believing that all communications were confidential, we did not seek to memorialize a number of things understood by the parties. Had we known that any part of our communication was to be published, we would have certainly memorialized, in writing, your statements to us that ICANN very much wants to avoid an arbitration over this dispute, and that ICANN was therefore willing to agree to a process for approving a Charter amendment in order to do so. We would also have memorialized our positions, including our position that a Charter amendment is neither necessary nor desirable, but that we were considering acceding to ICANN’s request solely in the hopes of avoiding arbitration, and our position that the temporary suspension of the Phased Allocation Program was not made out of any belief that the program was in some way a breach of the Registry Agreement, but only as a concession to ICANN during the Cooperative Engagement period. Again, we feel strongly that our ongoing negotiations will be hampered by the need to fully memorialize every statement in order to ensure that future postings more accurately reflect the state of negotiations, an endeavor which can only increase, rather than reduce, the conflict between the parties.

Although Employ Media is deeply concerned that the good faith channel of communication between us will be significantly less open and productive in light of how you and your client have chosen to proceed, the question now is how to proceed from here. If we are to have the productive and collaborative exchange of ideas over the Charter amendment that the parties have discussed, and which ICANN is pressing for, we will need your client’s assurances that no further communications relating to the breach notice and attempts at addressing the breaches alleged therein will be posted. If such assurance is not forthcoming, Employ Media requires, at the very least, advance guidance as to what communications will and will not be posted, as it is unacceptable for ICANN to unilaterally decide to

keep some statements confidential while publishing others. I look forward to your early response, as that response will unquestionably influence our future communications with ICANN.

Finally, Employ Media is requesting that ICANN post this letter to the Correspondence page of the ICANN website.

Sincerely,

A handwritten signature in black ink, appearing to be 'Arif H. Ali', with a long horizontal stroke extending to the left.

Arif H. Ali

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