

THE .JOBS CHARTER COMPLIANCE COALITION

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

May 11, 2011

VIA EMAIL

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 John:

The .JOBS Charter Compliance Coalition (the "Coalition") has reviewed the Request for Arbitration ("Request") filed by Employ Media LLC ("Employ Media"), which seeks to commence arbitration against the Internet Corporation for Assigned Names and Numbers ("ICANN") arising from the clear and detailed [breach notice](#) issued by ICANN on February 27, 2011. The Coalition submits this open letter to you to address the Request's numerous inconsistencies, omissions and mischaracterizations. Accordingly, the Coalition requests that ICANN post this letter on the Correspondence page of its website.

As you know, the Coalition has consistently maintained since our filing of the [Reconsideration Request](#) in August 2010 that Employ Media's Phased Allocation Program could not be implemented in compliance with the [.JOBS Charter](#). Unfortunately, subsequent events have borne out these facts, although the Coalition was initially encouraged when ICANN issued the breach notice with its strong condemnation of Employ Media for its non-compliant operation and management of the .JOBS Top-Level Domain ("TLD"). The Coalition believes that Employ Media simply cannot provide any reasonable response that would explain away the indisputable fact that the Charter does not permit the operation of job boards that advertise job openings for multiple employers. The Charter clearly envisions internal human resource management personnel utilizing .JOBS domains exclusively for their own companies and organizations. The .JOBS domain was not meant as a forum for Employ Media and its conspiring alliance partner DirectEmployers Association ("DirectEmployers") to operate a massive job board – which is exactly what the Dot Jobs Universe represents. The registration of tens of thousands of second-level domain names by one bulk registrant for this improper purpose is entirely inconsistent with both the intent of the .JOBS TLD and ICANN's policies, and represents a terrible precedent for the anticipated launch of the new gTLD initiative.

We understand that ICANN will eventually provide an answering brief in response to the allegations asserted in the Request. The Coalition, however, feels compelled to issue an intervening response to refute Employ Media's claims and to inform the global Internet community of Employ Media's demonstrable non-compliance. It is also noteworthy that since the issuance of the breach notice, Employ

Media and DirectEmployers have maintained – and expanded – their joint operation of the Charter-violating Dot Jobs Universe. ICANN’s own breach notice documents the harm this non-compliant website inflicts on members of the human resource community while serving the financial interests of Employ Media and DirectEmployers.

I. THE .JOBS CHARTER LANGUAGE REPUDIATES EMPLOY MEDIA’S POSITIONS

A. Employ Media Ascribes No Meaning To The Charter’s Registration Restrictions

In Employ Media’s view, essentially any person or entity can register second-level domains in the .JOBS TLD, a position which completely disregards the language in Paragraph IV of the Charter relating to registration restrictions. Recognizing that this stance violates fundamental principles of sponsored Top-Level Domains (“sTLDs”)¹, Employ Media purposely buries its brief mention of the critical Charter language at the end of the Request. Employ Media also diverts attention from this subject by falsely claiming that the [breach notice](#) is based on its use of <noncompanyname> domain names, when it is evident that ICANN’s breach determination is premised on Employ Media’s violations of the registration restrictions of the Charter. These maneuvers underscore Employ Media’s discomfort with the mandate of the Charter language.

[Paragraph IV of the Charter](#) clearly defines the universe of eligible registrants, limiting the class of persons eligible to register a .JOBS domain name to: (1) members of the Society of Human Resource Management (“SHRM”) or (2) persons who work in the human resource function within their respective companies or organizations. This language demonstrates that the class of persons eligible to register a second-level domain name in the .JOBS TLD is limited to those individuals who work in the human resource function within their respective companies and organizations. This registrant eligibility restriction is further supported by Paragraph I of the Charter, which defines “human resource management” as “*the organizational function* that focuses on the management and direction of people” and defines the human resource management community as “those persons who deal with the human element *in an organization . . .*” This limitation is also reinforced by the Internet Assigned Number Authority (“IANA”), the ICANN entity responsible for the management of the domain name system (“DNS”) root, which states in its [database](#) that the .JOBS TLD is “*[r]eserved for human resource managers.*” This specific issue was also addressed by the ICANN Board prior to its vote on Employ Media’s proposed <noncompanyname> amendment when, in response to a Board member’s question regarding Charter compliance, ICANN Staff Member Kurt Pritz stated that “*the universe of registrants is unchanged; it’s still the hiring managers and the entities that employ people.*”

Indeed, Employ Media’s [2004 application for registry operator of the .JOBS TLD](#) provides further support for the Coalition’s position. At that time, Employ Media’s *own* interpretation of the Charter restriction was that domains could only be registered by human resource managers of employer organizations for use by their own organization to seek employees: “Registrations are granted only to applications submitted by a qualified applicant - *generally a human resource manager of the employer such manager represents.*” Nowhere in the Charter language or in the supporting authority cited above

¹ The [sTLD RFP](#) issued by ICANN in 2003 to prospective registry operators (including Employ Media) provides that such operators must, among other things, (1) “[e]nsure that *only charter-compliant persons or entities* (that is, members of the Sponsored TLD Community) *are able to register domain names* in the proposed new sTLD;” (2) “implement safeguards to ensure that non-compliant applicants cannot register domain names;” and (3) “ensure compliance with other ICANN policies designed to protect the rights of others.” These representations are also set forth in Part VII of [Appendix S](#) to the Registry Agreement.

is there any room for a contract construction that supports the aggregation of over forty thousand domain names to be used to operate a massive job board for multiple employers.

In the Request, Employ Media turns the limitation governing .JOBS registrants on its head and in the process eviscerates the fundamental intent of the .JOBS TLD. Employ Media's argument in support of its position is both unconvincing and unenthusiastic, with a few sentences devoted to its analysis of the Charter language hidden deep in the Request. Employ Media reads the Charter as differentiating between persons *requesting* registration of .JOBS domain names and the "*actual registrant of record.*" Under this implausible concept, however, a single human resource manager could act as a "dummy" applicant and "request" tens of thousands of .JOBS domain names on behalf of an unaffiliated owner/registrator. In effect, Employ Media's position is that "*any company*"² that is otherwise disqualified from requesting the registration of a .JOBS domain name can still nonetheless circumvent the Charter and acquire the name as long as any random human resource professional initiates the registration request on the company's behalf. It is under this misguided theory that Employ Media and DirectEmployers set the stage for the launch of the non-compliant Dot Jobs Universe.

Employ Media's plan to bypass the parameters of the Charter was evident in [their responses to various questions posed to them by ICANN](#) during the course of the Reconsideration process. A representative example of this evasiveness was its response to ICANN's request that Employ Media confirm that it would only allow persons identified in the Charter to register names in the .JOBS TLD. Employ Media superficially answered that it would only allow persons identified in the Charter to request registration of .JOBS domain. Employ Media withheld a complete and candid answer to this query, clearly aware that disclosing its ill-advised interpretation that the Charter merely contains restrictions on the persons that may *request* registration of names in the .JOBS sTLD on behalf of *any* person or entity would necessarily doom its plan for the pending launch of the Dot Jobs Universe. This subterfuge by Employ Media continues in the Request, which glosses over the meaning of the Charter restrictions.

B. The Charter Prohibits DirectEmployers From Registering .JOBS Domain Names

In the Request, Employ Media does not contest the fact that its alliance partner DirectEmployers registered *over forty thousand* <noncompanyname> domain names. Employ Media's acknowledgement, however, disproves its own position because DirectEmployers is ineligible to register a .JOBS domain name under the language of the Charter.

As previously stated, the Charter limits the universe of eligible registrants to (1) members of SHRM or (2) persons who work in the human resource function within their respective companies or organizations. Since the second category is clearly inapplicable to DirectEmployers, the only path to eligibility is if the organization is a member of SHRM. Indeed, this was the path selected by DirectEmployers, as evidenced by a statement from Bill Warren, the Executive Director of DirectEmployers. This statement, however, presents compelling evidence of Employ Media's breach.

² Employ Media [previously asserted](#) during the <noncompanyname> amendment process that "*any company*" could acquire a domain name in the .JOBS TLD and that the .JOBS Charter is meant for "*any business*" to acquire a domain name. Given this all-inclusive interpretation, no reason exists for the language in Paragraph IV, and the .JOBS TLD is wide open to any and all potential registrants. Such an interpretation clearly violates the fundamental principles of sTLDs as set forth in [ICANN's 2003 sTLD RFP](#).

Mr. Warren erroneously informed ICANN in a [July 15, 2010 public comment](#) that “[t]o be clear, *DirectEmployers is a member of SHRM . . .*” Mr. Warren, however, either failed to understand or simply chose to ignore the fact that DirectEmployers cannot qualify for SHRM membership since it is restricted to individuals and SHRM [has no corporate or institutional membership](#). Accordingly, given Employ Media’s concession that it permitted its alliance partner DirectEmployers to register – despite its ineligibility to do so – a multitude of .JOBS <noncompanyname> domain names, this acknowledgement alone necessarily puts Employ Media in fundamental and material breach of [the .JOBS Registry Agreement](#).

II. EMPLOY MEDIA MISCHARACTERIZES AND OMITTS SIGNIFICANT INFORMATION IN THE REQUEST

The recurring theme throughout the Request is that Employ Media withstood the repeated scrutiny of ICANN throughout the .JOBS review process. On closer inspection, however, it becomes apparent that Employ Media has both mischaracterized previous determinations by ICANN and omitted significant factual information because they greatly diminish Employ Media’s arguments.

A. Employ Media Misleads ICANN By Launching The Dot Jobs Universe After The Issuance Of The Reconsideration Recommendation

Employ Media misrepresents the [Reconsideration Recommendation](#) issued by ICANN’s Board Governance Committee (“BGC”) as some form of ratification by ICANN for the subsequent launch of the non-compliant Dot Jobs Universe. Nothing could be further from the truth. When it was issued in December 2010 in response to the Coalition’s Reconsideration Request, the BGC acknowledged that it was “*not at all clear that it ha[d] a full picture of how Employ Media intend[ed] to implement*” its plan under the amendment granting expansion of the .JOBS TLD to <noncompanyname> domain names. As an example of this lack of clarity, the BGC pointed out the concerns raised regarding the “self-managed” implementation plan under which an overwhelming number of <noncompanyname> domain names were bulk-registered to Employ Media. In response, Employ Media *represented to the BGC that it had withdrawn* this implementation method.

As a result of the ambiguity surrounding Employ Media’s implementation plan, the BGC recommended that the ICANN Board direct the ICANN CEO and General Counsel to ensure that ICANN’s Contractual Compliance Department “*closely monitor Employ Media’s compliance with its Charter.*” The BGC further cautioned that if “*implementation of the Amendment causes Employ Media to violate its contractual requirements set out in the .JOBS Charter, that that is something that ICANN’s Contractual Compliance Department must address.*”

This demand for heightened vigilance proved prescient when less than one week later Employ Media and DirectEmployers launched the Charter-violating Dot Jobs Universe. It is clear that Employ Media misled the BGC regarding its withdrawal representation and simply resurrected the self-managed plan in a slightly different form. The trivial change it made to the present iteration of the Dot Jobs Universe was the substitution of alliance partner DirectEmployers as the universal bulk registrant.³

³ A review of [Employ Media’s March 2010 proposal to ICANN](#) is noteworthy in that it describes the self-managed plan in a way that is *nearly identical* to what was launched at [universe.jobs](#) in January 2011 – despite Employ Media’s representation to the BGC that it had withdrawn this implementation method. Moreover, Employ Media itself concedes in Paragraph 85 of the Request that its implementation plan was “*obviously consistent*” with the beta test it launched in early 2009. The problem with this acknowledgement is that Employ Media’s implementation was based on the unauthorized beta test (*see*

B. The Unauthorized Launch Of The “Beta Test” By Employ Media And Its Alliance Partner DirectEmployers

In the Request, Employ Media brazenly refers to the purported benefits of its joint launch with DirectEmployers of the so-called “beta test” in early 2009, yet neglects to mention how this launch was done in complete violation of the .JOBS Registry Agreement. The beta test utilized <noncompanyname> domain name designations when that practice was *clearly prohibited* at the time by the Registry Agreement. Although Employ Media portrays the beta test as an experiment taken in the best interests of the .JOBS community, the more accurate explanation is that both Employ Media and DirectEmployers were conspiring to develop methods to monetize the .JOBS TLD to their own financial advantage.

Employ Media also downplays the fact that ICANN compelled Employ Media to shut down the beta test. Employ Media characterizes this violation as a mere disagreement between the parties, when in fact the beta test operation constituted a clear breach of the Registry Agreement. It was only after this initial breach that Employ Media had to be directed by ICANN to follow the amendment process prescribed under the Registry Agreement. This defiance of the rules foreshadowed future non-compliant conduct by Employ Media, ultimately culminating in the launch of the Charter-violating Dot Jobs Universe.

The non-compliant collaboration of Employ Media and DirectEmployers in devising and running the improper beta test underscores the intimate relationship between these two entities and their plans for the .JOBS TLD. In April 2010, Employ Media’s website proclaimed that DirectEmployers was poised to submit its proposal for <noncompanyname> domain names. Likewise, DirectEmployers’ [universe.jobs](#) website contained quotes from the Chairman of Employ Media extolling the “great plan” it had with DirectEmployers to “activate, manage and complete the build-out of all .jobs domains . . . a.k.a. The Dot Jobs Universe.” It is noteworthy that all of these events and statements transpired *prior* to the ICANN Board’s approval of the amendment authorizing expansion of the .JOBS TLD to include <noncompanyname> domain names. It did not appear that Employ Media similarly praised, much less mentioned, the proposals of any other potential RFP applicant during this time. Despite these highly prejudicial statements and the preordained nature of this process, Employ Media incredibly claims that the process that led to its improper takeover of the .JOBS TLD – *i.e.*, the Dot Jobs Universe – was the result of a competitive RFP process. The true nature of this sham RFP process was actually highlighted by the [comments made by DirectEmployers Executive Director Bill Warren](#) to a February 2011 online article in which he both (1) equated the .JOBS TLD to the Dot Jobs Universe and (2) characterized the Dot Jobs Universe as the continuation of the prior, non-compliant beta test (“Our Beta test proved .JOBS will be very successful, it’s real and it’s here to stay!”).

The close relationship between a registry operator and its purported “registrant” is clearly not contemplated by the Registry Agreement, which holds Employ Media responsible as registry operator for establishing procedures for the enforcement of applicable Charter restrictions on registration within the .JOBS TLD. This enforcement role is obviously compromised by Employ Media’s alliance with DirectEmployers and its interest in the Dot Jobs Universe. This conflict of interest is further exacerbated by (1) Employ Media’s marketing efforts on its website on behalf of the Dot Jobs Universe and (2) Employ Media CEO Tom Embrescia’s active participation in recent DirectEmployers’ press conferences – including answering a question regarding the Dot Jobs Universe’s revenue model. In sum, Employ Media’s alliance with DirectEmployers, along with its vested interest in the Dot Jobs Universe, calls into question Employ Media’s qualifications to serve as an impartial registry operator for the .JOBS TLD.

Section II.B herein), which directly incorporated the self-managed plan that Employ Media allegedly withdrew.

The negative consequences resulting from this conflict of interest were noted by ICANN in the breach notice, where it charged Employ Media with serving its own (and DirectEmployers’) interest to the detriment of members of the human resources community.

C. SHRM Disputes Employ Media’s Characterization Of Its Role As Sponsor

Throughout the Request, Employ Media confers vast responsibilities and authority to SHRM based on its role as the sponsoring organization of the .JOBS TLD. Employ Media argues that by issuing the breach notice, “ICANN overreached and overstepped its *limited role*” as it relates to the .JOBS TLD. Instead, Employ Media asserts, it is SHRM that assumes the role of overseeing whether the .JOBS TLD is serving the best interests of the .JOBS community. In effect, Employ Media contends that ICANN has no authority to act in this matter, even in a situation where, as here, the registry operator operates the sTLD in a manner that clearly violates the .JOBS Charter. This assertion, however, disregards the authority specifically delegated to ICANN to terminate the Registry Agreement when Employ Media fails to cure a fundamental and material breach of one or more of its covenants. That authority has been properly exercised here by ICANN.

Moreover, Employ Media’s view of SHRM’s expansive role in the .JOBS TLD is contradicted *by SHRM itself*. In a [letter](#) dated April 1, 2011 issued by SHRM’s outside counsel to a member of ICANN’s legal staff in response to the breach notice, SHRM clearly views itself as having a “*limited role* as the Sponsor and Policy Delegate” of the .JOBS TLD. SHRM evidently disagrees with the considerable oversight role envisioned for it by Employ Media. In addition, this “limited role” of SHRM – the term is utilized three times in the brief letter from its outside counsel – is emphasized by its reluctance to intervene in the breach notice dispute between Employ Media and ICANN. Given Employ Media’s claims that (1) it did not violate the registration restrictions set forth in the Charter; (2) the operation of the Dot Jobs Universe was consistent with the intent of the .JOBS TLD; and (3) ICANN was overstepping its authority in this matter, one would expect that the sponsor would spring to the defense of the aggrieved registry operator if the allegations contained in the breach notice were inaccurate. That clearly has not happened here.

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The Coalition believes this public letter is necessary to advise both ICANN and the global Internet community of the numerous misrepresentations and omissions contained in Employ Media’s Request for Arbitration. Given the Coalition’s familiarity with the complex issues in this dispute, we feel obligated to once again demonstrate to the public how Employ Media’s implementation plan and operation of the Dot Jobs Universe violates the .JOBS Charter and the intent of the .JOBS TLD. I thank you for your time and attention to this serious matter.

Sincerely,



John Bell
Chairman, .JOBS Charter Compliance Coalition

cc: Rod Beckstrom
Eric Enson, Esq.