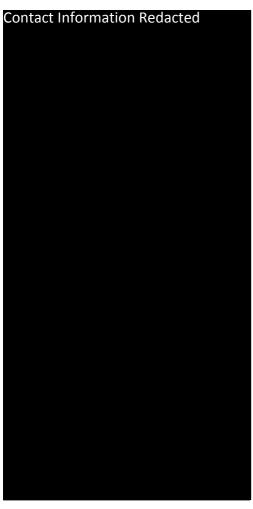1300 Eye Street NW, Suite 900
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<u>VIA EMAIL</u>

March 30, 2012

Contact Information Redacted

Re: 17917/VRO – *Employ Media LLC v. Internet Corporation for Assigned Names and Numbers*

Dear Members of the Tribunal:

Claimant Employ Media LLC ("Employ Media") writes in response to the Chairman's letter of 19 March 2012 and provides the following requested information.

<u>Summary of Employ Media's Claims</u>

This dispute arises out of the Internet Corporation for Assigned Names and Numbers' ("ICANN's") unfounded allegations that Employ Media has breached its registry agreement (the

"Registry Agreement" or "Agreement") and ICANN's unwarranted threats to terminate that Agreement, in violation of both the plain terms of the Registry Agreement and ICANN's Bylaws and Articles of Incorporation.

In 2005, ICANN and Employ Media executed the Registry Agreement appointing Employ Media as the registry operator for the .JOBS sponsored TLD or "sTLD" and delegating to Employ Media the policy-making authority for the domain. The .JOBS top-level domain was established to serve the needs of the international human resource management community (the ".JOBS community"). As a sponsored TLD, .JOBS operates in accordance with policies and practices approved by its sponsoring organization, the Society for Human Resource Management ("SHRM"), which ensures that the .JOBS sTLD serves the needs of the .JOBS community.

The Registry Agreement describes the broad policy-making authority delegated to Employ Media, including Employ Media's authority to establish the naming conventions, registration requirements, and policies within .JOBS.[1] Additionally, a portion of the Agreement called the "Charter" defines the purpose of .JOBS and provides that, in exercising its delegated authority, Employ Media must act:

> [I]n accordance with (i) the provisions of this charter (the "Charter"); (ii) the interests of the [.JOBS] Community; and (iii) policy directives from the Society for Human Resource Management ("SHRM"), as "Sponsor."[2]

Additionally, the Charter addresses who may request registrations in the .JOBS sTLD.

After the execution of the .JOBS Registry Agreement in May 2005, Employ Media officially launched the .JOBS sTLD and began accepting registrations for <companyname> domain names. For the first several years of its operation – although nothing in the Charter required it – the .JOBS sTLD allowed registrations of only <companyname.jobs> domain names (for example, "icc.jobs"). This was a logical starting point for the sTLD, primarily for business reasons. Employ Media always anticipated that the .JOBS sTLD would evolve to include other categories of names (if such names served the needs of the .JOBS community). The .JOBS Registry Agreement reflects this. First, the delegated authority to determine naming conventions, by its very nature, includes the authority to expand the categories of names available. Second, the Registry Agreement specifically recognizes that "[t]he Registry Operator may from time to time introduce new categories of domain registrations, consistent with the Charter and in compliance with the provisions of this Sponsored TLD Registry Agreement."[3] From the very outset

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[1] .JOBS Registry Agreement at Art. 3.1(d)(i)(A).

[2] *Id.* at Appendix S, Part I (.JOBS Charter).

[3] *Id.* at Appendix S, Part IV (Start-Up Plan).

of the contractual relationship, ICANN was aware that the .JOBS sTLD would likely expand beyond the <companyname.jobs> class of names.

As anticipated, as time went on, Employ Media evaluated other ways in which the .JOBS sTLD could further serve the .JOBS community. In particular, a 2007 study by SHRM on trends in the human resource industry noted increased reliance on specialized or niche job boards to reach job seekers. After reviewing this study, Employ Media approached SHRM to discuss how the .JOBS sTLD could expand to provide employers a better platform for targeting job seekers. Then, in late 2008, Employ Media stated publicly that it was considering expanding the .JOBS sTLD to include <non-companyname> domain names, and that it would be interested in receiving proposals for expansion plans to serve the needs of the .JOBS community.

In spring 2009, DirectEmployers submitted a proposal for a network of several hundred <non-companyname> domain names, in formats like <location.jobs> and <occupation.jobs>. This network would serve as a platform to organize job postings by geographic area or industry—a goal clearly in line with the .JOBS sTLD's purpose of providing the .JOBS community with "a reasonable and consistent method for promotion and location" of job-related material online.[4] Employ Media, following consultation with SHRM, saw the potential benefits of the proposal; it therefore allowed DirectEmployers to launch a beta test—*i.e.*, a "dry run"—of the proposed platform in August 2009.

When ICANN learned of the beta test, it asked Employ Media first to go through a formal "PDP" (Policy Development Process) to get SHRM's approval and then to submit a request, called an "RSEP" (Registry Services Evaluation Process), for ICANN's approval of a new registry service.[5] Although Employ Media disagreed that an RSEP was required and already had SHRM's approval, it complied with ICANN's request. After completing a PDP with SHRM and gaining its approval, Employ Media submitted an RSEP requesting approval to allow registration of <non-companyname> domain names in accordance with a "Phased Allocation Program." The RSEP explained that SHRM had approved the following:

> To the extent that any policies, practices or business rules in .JOBS govern Employ Media's ability to provision, allocate, register (to third parties or itself), allow use of in the DNS (by third parties or itself), reserve or remove from reserve, any non-"companyname" domain names, including industry and occupational domains, geographic domains, dictionary term domains and two-character domains, all such polices, practices or business

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[4] .JOBS Application at p. 5, Conf. C-Exh. 1.

[5] Employ Media, Request for Registry Service Evaluation (submitted 9 June 2010) *available at* http://www.icann.org/en/registries/rsep/jobs-proposal-09jun10-en.pdf (last visited 22 March 2012).

> rules are amended to allow Employ Media, at Employ Media's discretion (provided that Employ Media maintains adherence to the .JOBS Charter), to provision, allocate, register (to third parties or itself), allow use of in the DNS (by third parties or itself), reserve and remove from reserve, all such non-"companyname" domain names. [6] (emphasis added)

The request also described the Phased Allocation Program as having three main components: (1) a Request for Proposals ("RFP") process inviting interested persons to propose specific plans for <non-companyname> domain names; (2) an auction for domain names not allocated through the RFP; and (3) a first-come, first-served release of domain names not registered through the first two processes. Notably, nothing in the proposal involved altering the Charter policies regarding who may request registrations or the requirement that the policies established, including naming policies, be in the interests of the .JOBS community. The ICANN Board approved the expansion by approving the necessary amendments to the Registry Agreement on 5 August 2010.[7]

In reliance on the ICANN Board's approval, Employ Media implemented the Phased Allocation Program exactly as it had been earlier described to ICANN. In late August 2010, Employ Media posted the RFP, seeking proposals for <non-companyname.jobs> domain names, and began reviewing the proposals it received. Employ Media hoped to receive multiple proposals, fostering competition among applicants to create even more options for the .JOBS community.

Meanwhile, however, pre-existing for-profit job boards, worried about the competitive threat from the expansion of the .JOBS domain, banded together and created "The .JOBS Charter Compliance Coalition" ("the Coalition") in an attempt to stop the expansion into, potentially, free job listings. In August 2010, just as Employ Media released its RFP, the Coalition filed a Request for Reconsideration of the Board's Action (*i.e.*, the Board's approval of the amendments to the Registry Agreement that allowed the .JOBS expansion). The Reconsideration Request wrongly asserted that the Phased Allocation Program violated the .JOBS Charter, and the Coalition further complained that the creation of new domain names through the Phased Allocation Program would adversely affect various Coalition members that offered online employment services, *i.e.* Internet job boards that charge employers for posting job openings.

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[6] Employ Media, Request for Registry Service Evaluation (submitted 9 June 2010) *available at* http://www.icann.org/en/registries/rsep/jobs-proposal-09jun10-en.pdf (last visited 22 March 2012).

[7] ICANN Board Resolution, Approval of RSEP Request for Phased Allocation Program in .JOBS, Special Meeting of the Board (5 Aug. 2010), *available at* http://www.icann.org/en/minutes/resolutions-05aug10-en.htm (last visited 22 March 2012).

ICANN's Board Governance Committee ("BGC"), the committee responsible for reviewing such requests, agreed to consider the Reconsideration Request. During its review of the Request, the BGC reviewed materials submitted by a number of interested parties, as well as additional information provided by Employ Media and SHRM. Having reviewed all of the information submitted—and thus having the full picture of Employ Media's plans—the BGC recommended that the ICANN Board reject the Reconsideration Request, concluding that the Board had considered all of the material information when it initially approved Employ Media's proposal. In a December 2010 decision, the ICANN Board followed the BGC recommendation, and declined to reverse its prior approval of the .JOBS expansion.

After the ICANN Board had declined to review its previous approval of the expansion, Employ Media proceeded to allocate various names applied for through the RFP. Employ Media accepted the proposal from Direct Employers, and in January 2011, Direct Employers launched the .JOBS Universe. The .JOBS Universe allows employers from all over the world *to list jobs for free*. The listings are vetted to keep the domain free of scams, duplicate job listings, and old or expired jobs, and all postings automatically appear in the appropriate city, state, country, and occupational website within .JOBS. Clicking on the job posting takes a job seeker directly to the information about that job on the employer's website. Within just a few months, over 90,000 employers, including some of the largest companies in the world (such as IBM, AT&T, Hyatt, Deloitte, and many more), listed jobs on the .JOBS Universe.

Undaunted, the Coalition persisted with its campaign, claiming that the .JOBS community would not benefit from the .JOBS expansion and demanding that ICANN staff investigate Employ Media's compliance with the .JOBS Registry Agreement. Despite ICANN's mission and requirement to promote competition, ICANN staff acquiesced to the Coalition's pressure and demanded that Employ Media provide answers to a litany of questions. Employ Media again cooperated with staff's requests and demonstrated its full compliance with the amended .JOBS Registry Agreement.

Nonetheless, on 27 February 2011, as external threats mounted, ICANN staff issued a Notice of Breach, alleging that Employ Media had breached the .JOBS Registry Agreement by allowing registration of the <non-companyname> class of names. ICANN's Notice of Breach identifies two ways in which Employ Media's allocation of <non-companyname> domain names allegedly does not serve the needs of the .JOBS community: (1) the new names are used to advertise job openings for multiple employers; and (2) a large number of names are registered to one entity (DirectEmployers). Notably, ICANN staff fails to specify how or why the staff believes these practices do not serve the needs of the .JOBS community, or why ICANN should be making that determination, instead of Employ Media and SHRM, to whom that authority had been delegated. Nothing in the .JOBS Registry Agreement prevents posting of job openings for multiple employers, and nothing in the .JOBS Registry Agreement—or any agreement for any TLD—limits the number of domain names an entity may register. Indeed, ICANN staff's Notice of Breach is unjustifiable given that the ICANN Board approved the new <non-companyname> domain names knowing exactly how they would be allocated and used. Moreover, it is clear that ICANN, which has a limited, technical mission, should not decide what is or is not in the

interest of a particular sponsored community—especially as the purpose of sTLDs is to allow the Registry Operators and Sponsoring Organizations to be the entities that have the policy making authority.

Issues Which Need to Be Determined

Employ Media sets out below, for purposes of the Terms of Reference, the issues that would need to be addressed by the Tribunal based on the written submissions made by the parties to date. Employ Media reserves the right to amend and/or supplement the issues identified below.

1. Whether the ICANN Notice of Breach is invalid and/or inappropriate because Employ Media has not materially breached the .JOBS Registry Agreement in any way, either as alleged in the Notice or in any other respect;

2. Whether the ICANN Notice of Breach is impermissibly vague because, *inter alia*, it fails to identify any domain names violating either the .JOBS Charter or any other existing .JOBS community policies;

3. Whether the ICANN Notice of Breach is procedurally deficient because, *inter alia*, it unilaterally reverses a previous Board resolution or because it was issued without providing a public notice and comment period;

4. Whether ICANN is estopped from taking the positions it takes in the Notice of Breach (as well as in this arbitration generally) because of the contrary positions it previously has taken;

5. Whether by issuing such a deficient Notice of Breach, ICANN itself breached the Registry Agreement;

6. Whether ICANN breached Article VI, Section 1 of the .JOBS Registry Agreement, which provides that ICANN may only terminate the agreement for "fundamental and material breach;"

7. Whether ICANN breached Article III, Section 1(d)(i) and Appendix S, Part II, which delegated to Employ Media the responsibility to develop policies for the .JOBS sTLD;

8. Whether ICANN breached Article III, Section 2(a) of the .JOBS Registry Agreement, which provides that "[c]onsistent with ICANN's expressed mission and core values, ICANN shall operate in an open and transparent manner;"

9.   Whether ICANN breached Article III, Section 2(b) of the .JOBS Registry Agreement, which provides that "ICANN shall not apply standards, policies, procedures or practices arbitrarily, unjustifiably, or inequitably and shall not single out Registry Operator for disparate treatment unless justified by substantial and reasonable cause;"

10.   Whether by issuing such a deficient Notice of Breach, ICANN breached its Articles of Incorporation and Bylaws by, *inter alia*:

    a. Failing to act in an open and transparent manner;

    b. Failing to apply documented policies neutrally and objectively, with integrity and fairness;

    c. Treating Employ Media in a discriminatory manner;

    d. Exceeding its limited technical mission.

Relief Sought

Employ Media seeks the following relief:

1.   A declaration that there is no basis for ICANN to modify or terminate, in whole or in part, the .JOBS Registry Agreement;

2.   A declaration that Employ Media has not breached the .JOBS Registry Agreement, either as alleged in the 27 February 2011 Notice of Breach or in any other material respect;

3.   A declaration that Employ Media is accordingly entitled to continue operating the .JOBS sTLD pursuant to that Agreement, as amended on 15 September 2010;

4.   A declaration that ICANN has breached the .JOBS Registry Agreement by preventing Employ Media from exercising the authority that ICANN delegated to it in the .JOBS Registry Agreement;

5.   A declaration that ICANN has breached the .JOBS Registry Agreement and violated its Articles of Incorporation and Bylaws by, *inter alia*, failing to operate in an open and transparent manner; failing to apply documented policies neutrally and objectively; exceeding its limited technical mission; and failing to treat Employ Media in a non-discriminatory manner;

6. An award for an amount of damages to be quantified over the course of the arbitration based on the above;

7. An award of costs and reasonable attorneys' fees;

8. Such other relief the Tribunal may deem appropriate.

Modification to the Claims or Relief Sought

Employ Media does not currently have any modifications to the claims or to the relief sought, as stated herein and in the Request for Arbitration.

Indication of Amounts in Dispute

Employ Media seeks an award of damages to be quantified over the course of the arbitration.

Modification to Contact Details

Please note that the contact information for Ms. Haridi, a member of the Employ Media counsel team, is:

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Comments Regarding Terms of Reference

Employ Media proposes that Claimant will submit its opening Memorial within 90 days following the approval of the Terms of Reference; Respondent will submit its Countermemorial within 90 days of receipt of Claimant's Memorial; Claimant will submit its Reply Memorial within 60 days of receipt of Respondent's Countermemorial; and Respondent will submit its Rejoinder Memorial within 60 days of receipt of Claimant's Reply Memorial.

As provided by ICC Rules 20.3 and 20.6, Employ Media requests that the Arbitral Tribunal schedule a live hearing at which the parties may present witnesses or experts and cross-examine the Respondent's witnesses or experts, as well as present any legal argument. Employ Media believes that an in-person hearing is the most efficient and effective method for the parties to present their evidence

and argument for the Tribunal's evaluation. Employ Media submits that five days would be sufficient to complete the hearing and requests the Tribunal to schedule the hearing as soon as practicable after the completion of the written procedure.

Employ Media proposes that the Tribunal determine whether post-hearing submissions are required at the conclusion of the hearing.

Employ Media does not believe that discovery will be necessary in this case, or that the Tribunal will need to summon any party to provide any additional evidence beyond the evidence submitted by the parties prior to the hearing. Employ Media proposes that all evidence and submissions in this arbitration be made publicly available, except where the parties specifically agree (or the Tribunal orders) that certain evidence or submissions (or portions thereof) be made confidential.

Employ Media submits that it is premature for the Tribunal to make any choice-of-law determination for the resolution of this matter. The Tribunal will need to determine which body (or bodies) of law govern the issues before it based on the appropriate factors presented by the circumstances of the case.

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Employ Media looks forward to discussing these issues further with the Tribunal and counsel for ICANN.

Weil, Gotshal & Manges LLP

Respectfully submitted,

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w/ Permission of A de G

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