

**INTERNATIONAL CHAMBER OF COMMERCE  
INTERNATIONAL COURT OF ARBITRATION**

EMPLOY MEDIA, LLC,

Claimant,

v.

INTERNET CORPORATION FOR ASSIGNED  
NAMES AND NUMBERS (“ICANN”),

Respondent.

ICC Case No. 17917/VRO

**RESPONDENT’S ANSWER TO CLAIMANT’S  
REQUEST FOR ARBITRATION**

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Pursuant to the 5 May 2005 Registry Agreement between Claimant Employ Media, LLC (“Employ Media”) and the Internet Corporation for Assigned Names and Numbers (“ICANN”), and the Rules of the International Court of Arbitration of the International Chamber of Commerce, ICANN hereby submits this Answer to Claimant’s Request for Arbitration.

**I. INTRODUCTION.**

Despite the grand claims presented in Employ Media’s Request for Arbitration, this is a straight-forward breach of contract action. As set forth in the operative contract between the parties, the *sole* question for this Panel is whether a “Notice of Breach” letter served by ICANN on Employ Media was “appropriate.” This question is not complex, but it can only be answered through the well-established canons of contract interpretation. When this is done – and the terms of the operative contract are interpreted consistent with the mutual intent of the parties at the time of contracting – this Panel should arrive at the conclusion that ICANN’s Notice of Breach letter was “appropriate” in every sense.

As explained further below, when an Internet user logs on to a computer to print a boarding pass at United.com, check the news at NPR.org or download a course syllabus at Stanford.edu, the user relies on the Internet’s Domain Name System (“DNS”). The DNS translates unique sets of numbers that computers associate with websites into commonly known domain names, allowing users to easily find specific locations on the Internet. Pursuant to a series of agreements with the United States government, ICANN – a California not-for-profit public benefit corporation – is the entity responsible for managing the DNS.

Being at forefront of Internet expansion, the space that ICANN is tasked with coordinating is constantly changing and evolving. Thus, in order to maintain a consistent, stable and secure environment in the Internet’s DNS, ICANN enters into contracts, referred to as “Registry Agreements,” with each “Registry Operator,” who are the companies permitted by ICANN to manage the Internet’s top level domains (“TLDs”), such as .COM, .NET and .ORG.

This matter involves ICANN's 2005 Registry Agreement with Employ Media, the Registry Operator of the .JOBS TLD, which is a specialized TLD set up for human resource managers. 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*. But Employ Media has violated these contractual terms by permitting the creation of job "bulletin boards" within .JOBS, thereby allowing entities to promote employment opportunities *outside of their own organization*. Accordingly, in February 2011, ICANN served Employ Media with a "Notice of Breach" letter informing Employ Media that it must cure its contractual violations or face termination.

Rather than complying with its contractual duties, Employ Media filed this action. But the positions Employ Media advances in its Request for Arbitration are as misplaced as those espoused by Employ Media in allowing job "bulletin boards" within .JOBS in the first place.

## **II. SUMMARY OF ICANN'S POSITION.**

.JOBS is a "sponsored" TLD. Sponsored TLDs, unlike unsponsored TLDs, such as .COM and .NET, are specialized TLDs designed to serve specific communities of Internet users. The communities served by the current set of sponsored TLDs are based on geographical, ethnic or professional concepts. Each of the sponsored TLDs that ICANN has approved – including, for example, .MUSEUM (for museum operators) and .AERO (for members of the global aviation community) – is guided by a Registry Agreement, which contains a Charter defining the sponsored community and contractually limiting registrations within the TLD to members of the sponsored community.

.JOBS was approved by ICANN in 2005 based on Employ Media's stated desire to serve the needs of the "international human resource management community." The .JOBS Charter narrowly defines "human resource management" as "*the organizational function* that focuses on the management and direction of people." Likewise, the .JOBS Charter identifies the

Community to be served by the TLD as “those people who deal with the human element *in an organization.*”

Thus, to ensure that the .JOBS would serve this identified Community, the Registry Agreement that Employ Media and ICANN signed – which was based on Employ Media’s application to run the TLD – contained three important restrictions on .JOBS registrations.

- First, only human resource management professionals were eligible to register domain names within .JOBS.
- Second, domain name registrations within .JOBS could only be used by these human resource professionals in connection with their “human resources management practices;” that is, for the promotion of employment opportunities within their own organization or company.
- Third, .JOBS registrations were limited to a particular naming convention. Specifically, all domain names within .JOBS were required to follow the “companyname.jobs” format, such as Chevron.jobs, Microsoft.jobs or ICANN.jobs.

In the summer of 2010, Employ Media sought to alter *one* of these restrictions – the companyname.jobs naming format. Employ Media requested a proposed amendment to its Registry Agreement that would allow Employ Media to accept registrations in .JOBS using a “non-companyname.jobs” convention. Employ Media’s submissions were ambiguous as to the purpose behind the proposed amendment and the manner in which non-companyname.jobs domain names would be allocated. But Employ Media did make clear – in numerous statements to ICANN – that it was *not* seeking to amend the .JOBS Charter, it was *not* seeking to change the Community served by .JOBS and it was *not* seeking to alter the registration restrictions contained in the .JOBS Registry Agreement. In fact, Employ Media stated in its proposed amendment that “*Plans will be evaluated by Employ Media for compliance with the .JOBS Charter.*”

In August 2010, the ICANN Board considered Employ Media’s proposed amendment. Based on public comments, there was some concern that the proposed amendment might allow

entities to offer job bulletin boards within the .JOBS TLD. Up to this point, and pursuant to the .JOBS Registry Agreement, job boards were not allowed in .JOBS because job board operators were not “engaged in human resource management practices” to the extent they were promoting employment opportunities outside of their own organization. But based on assurances from Employ Media, ICANN Staff informed the ICANN Board that neither the .JOBS Charter, the .JOBS Community, nor the restrictions on .JOBS registrations would be altered by the proposed amendment. In the words of one ICANN Staff member, “the universe of registrants is unchanged; it’s still the hiring managers and the entities that employ people. It’s the name registration policy that’s changed.” Pursuant to Employ Media’s representations, the ICANN Board approved the amendment, thereby allowing Employ Media to offer the new domain names, as long as such offerings complied with the terms of the existing .JOBS Charter and Registry Agreement.

Not long thereafter, however, it became evident that the “.JOBS expansion” – as Employ Media now touts it – went well beyond allowing human resource managers to register non-companyname.jobs domains. In fact, it soon came to light that Employ Media allowed one company to register **40,000 domain names** within the .JOBS TLD, such as SanFrancisco.jobs, MilitaryFamily.jobs, Accounting.jobs and CaliforniaMarketing.jobs. These domain names were then deployed to launch the “.JOBS Universe,” which is a massive job board offering links to third-party employment opportunities in various states, cities and industries. Moreover, it appears that these 40,000 domain names were registered in a behind-the-scenes transaction, rather than through an open and fair allocation program allowing other entities to register and use these domain names.

Permitting the .JOBS Universe to exist in the .JOBS TLD, was – and remains – a material breach of the .JOBS Registry Agreement in at least three respects:

- First, by allowing third-party job boards in .JOBS, Employ Media has transcended the very intent behind creation of the TLD and thus the terms of the .JOBS Registry Agreement, which was specifically drafted to reflect this intent. Employ Media’s

application for the .JOBS TLD – and ICANN’s approval of that application – were explicitly intended to provide human resource professionals with a TLD in which they could promote employment opportunities *within their own organizations*. The .JOBS Registry Agreement contractually memorializes this intent and limits .JOBS registrations to human resource professionals seeking to promote their own employer. To read the .JOBS Registry Agreement in any other way, renders its language a nullity and removes the very characteristic that defines the .JOBS Community and differentiates .JOBS from all other TLDs.

- Second, with its lax interpretations of the .JOBS Registry Agreement, Employ Media has espoused policies that allow a .JOBS domain name (or thousands of them) to be used for virtually any purpose as long as a human resource manager is propped up to “request” the domain. In doing so, Employ Media has failed to enforce meaningful restrictions on .JOBS registrations, as required by the Registry Agreement.
- Third, by permitting one entity to register thousands of .JOBS domain names in what appears to be a self-serving transaction, rather than through an open, fair and transparent allocation process, Employ Media has violated the terms of the allocation program approved by the ICANN Board and made part of the Registry Agreement.

ICANN was forced to serve Employ Media with a Notice of Breach Letter attempting to bring Employ Media into compliance with the Registry Agreement. But Employ Media refused to delay in bringing the .JOBS Universe to market, and instead chose to institute this arbitration. In doing so, Employ Media has taken on the burden of establishing that ICANN’s Notice of Breach Letter was not “appropriate.” This, Employ Media cannot do given the parties’ mutual intent in creating the TLD, the terms of the .JOBS Registry Agreement and the manner in which these terms must be interpreted. With nothing more than a review of the publicly available documents relating to this matter and a visit to the Universe.jobs webpage, this Panel can – and should – determine that ICANN’s Notice of Breach Letter was “appropriate.”

### **III. SUMMARY OF RELEVANT FACTS.**

#### **A. ICANN – A Unique Organization With A Complex Mandate.**

1. To access a specific website, Internet users rely on the Internet Domain Name System, or “DNS.” Pursuant to a series of agreements with the United States Department of Commerce, ICANN, a not-for-profit public benefit corporation organized under California law in 1998, is responsible for coordinating the DNS. ICANN’s mission is to protect the stability, integrity and utility of the DNS on behalf of the global Internet community.

2. The main way computers find locations on the Internet is through a series of numbers, called an “IP address,” each of which must be unique, just like a street address or telephone number. But because it is difficult for Internet users to remember long lists of numbers, the DNS uses letters and words, known as a “domain name,” and links that domain name with the precise series of numbers associated with a particular website. The end result is that ICANN’s website can be found at “icann.org” rather than “192.0.34.163” – which is how computers on the network know it.

3. A domain name is generally made up of two elements – before and after “the dot.” The part to the right of the last dot, such as “COM” or “NET,” is known as a “top-level domain” or “TLD.” The part of a domain name just before the last dot is the word or phrase that individuals and entities register, such as Google or Yahoo.

4. As part of its mission, ICANN oversees the companies that run Internet TLDs, known as “Registry Operators.” ICANN enters into contracts, or “Registry Agreements,” with each Registry Operator requiring the Operator to uphold certain standards, follow certain policies, offer certain services and ensure that domain names within a particular TLD are unique.

5. ICANN also accredits companies known as “Registrars,” who market and sell domain name subscriptions within a particular TLD – such as “cnn.com” or “pbs.org” – to consumers or businesses.

6. It is ICANN’s contracts with the Registry Operators and the Registrar accreditation system that provide a consistent and stable environment for the DNS, and hence the Internet.



7. ICANN is a complex organization that facilitates input from a wide variety of stakeholders. ICANN has a Board of Directors, a Staff, an Ombudsman, a Nominating Committee for Directors, three Supporting Organizations, and four Advisory Committees. ICANN's Board of Directors consists of sixteen voting directors – all of whom, with the exception of the CEO and the Chair, are volunteers. In addition, a volunteer, non-voting liaison is appointed by most Advisory Committees to sit on the Board and to take part in Board discussions and deliberations.

8. ICANN operates through open and transparent, bottom-up policy development processes that promote well-informed decisions based on community input, factual analysis and expert advice, when needed. ICANN implements documented policies neutrally and objectively, with integrity and fairness; and ICANN's Bylaws require ICANN to remain accountable to the Internet community through mechanisms that enhance ICANN's effectiveness.

9. In its dynamic, yet relatively short, life, ICANN has had many successes that are consistent with its mission to ensure the security and stability of the Internet and to create competition within the DNS. By encouraging competition within the Registrar market, several hundred companies are now accredited by ICANN to sell domain name registrations in TLDs. The growing number of Registrars has led to nearly an 80 percent reduction in the cost of domain name registrations since ICANN was formed in 1998. Likewise, ICANN helped design and implement a low-cost system for resolving disputes over domain names, particularly domain names with trademark implications. The Uniform Domain Name Dispute Resolution Policy has been used tens of thousands of times to resolve domain name registration disputes, avoiding the need for costly and complex litigation. Further, ICANN has adopted guidelines for the introduction of "internationalized" domain names, opening the way for domain name registrations in hundreds of the world's scripts and languages – something that will expand the use and the influence of the Internet globally. And as discussed below, ICANN has paved the way for the creation of new TLDs, which has stimulated further competition and broadened the Internet's reach by allowing for the creation of millions of new domain names.

#### **B. ICANN's Role In Creating New TLDs.**

10. There are several types of TLDs within the Internet's DNS. The TLDs with three or more characters are often referred to as "generic" TLDs. Generic TLDs can be subdivided

into two types, “unsponsored” TLDs or “sponsored” TLDs. Generally speaking, unsponsored TLDs, such as .COM, .NET and .INFO, operate for the benefit of the global Internet community as a whole – virtually anyone can register a domain name within an unsponsored TLD.

11. On the other hand, sponsored TLDs are specialized TLDs created to serve the defined needs of a specific “community.” Domain name registrations within a sponsored TLD are limited to members of the defined community and the purposes for which the sponsored TLD was created. For example, .MUSEUM – one of the Internet’s first sponsored TLDs – was developed to serve the needs of the international museum community, and only museums, associations of museums and professional museum workers can register domain names within the TLD. Similarly, .AERO was created to serve the needs of the global aviation community, and is restricted to the people, entities and government agencies that operate in that community.

12. Each sponsored TLD has a “Sponsor,” which is supposed to work with the Registry Operator to develop and enforce policies ensuring that the sponsored TLD is operated for the benefit of the defined community. Each sponsored TLD also has a “Charter,” which is a contractual provision contained in the Registry Agreement that defines the purpose for which the sponsored TLD was created and places restrictions on the persons and entities that can register domain names within the TLD.

13. The introduction of new TLDs has been a central focus of ICANN’s operation and policy development work since its founding in 1998. At the time of ICANN’s creation, several TLDs were already in existence – .COM, .EDU, .GOV, .INT, .MIL, .NET and .ORG. Venturing into uncharted territory, in 2001 and 2002, ICANN oversaw the creation of seven new TLDs. Four of the new TLDs (.BIZ, .INFO, .NAME, and .PRO) are unsponsored. The other three new TLDs (.AERO, .COOP, and .MUSEUM) are sponsored TLDs.

14. After much deliberation and consultation with its supporting organizations and advisory committees, ICANN launched the next round of TLD expansion in 2003, but this round was intentionally limited to the creation of new *sponsored* TLDs that would serve specific and defined communities of Internet users. To this end, on December 15, 2003, ICANN publicly

posted an open request for proposals (“RFP”) inviting interested parties to apply for the creation of sponsored TLDs designed to serve defined sponsored communities.<sup>1</sup>

15. The RFP included a full description of the selection criteria and process. In terms of selection criteria, successful candidates had to demonstrate the following four attributes: (i) a sound business plan; (ii) the technical ability to ensure stable operations; (iii) the existence of a clearly defined community whose needs and interests would be served by launching the sponsored TLD; and (iv) the value that would be added to the Internet by launching the sponsored TLD.<sup>2</sup> In terms of selection process, the RFP explained that three independent “Evaluation Teams” – one to assess the business/financial issues, one to assess the technical issues and one to assess the sponsorship/community value issues – would evaluate each of the proposals against the selection criteria.<sup>3</sup>

**C. Employ Media’s .JOBS Application Sought To Serve The Needs Of Human Resource Managers By Providing Them With A TLD Reserved For Promoting Employment Opportunities Within Their Own Organizations.**

16. On 19 March 2004, Employ Media submitted an application for the creation of the .JOBS sponsored TLD (“Application”).<sup>4</sup> Employ Media’s Application expressly stated that, unlike existing TLDs, .JOBS would provide individual human resource managers with a reserved space in which to promote employment within their own companies. With the .JOBS TLD, Employ Media sought “to serve the needs of the international human resource management community (‘the Community’),” which Employ Media defined as “*the organizational function* that focuses on the management and direction of people.”<sup>5</sup> This Community, according to Employ Media, consisted of “those persons who deal with the human element *in an organization* – people as individuals and groups, their recruitment, selection, assignment,

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<sup>1</sup> See New sTLD Application, 15 December 2003, available at <http://www.icann.org/en/tlds/new-stld-rfp/new-stld-application-part-15dec03.htm> (last visited July 20, 2011), attached hereto as ICANN Exhibit A.

<sup>2</sup> *Id.* at 4-8.

<sup>3</sup> *Id.* at 1.

<sup>4</sup> New sTLD RFP Application, .JOBS, available at <http://www.icann.org/en/tlds/stld-apps-19mar04/jobs.htm> (last visited July 20, 2011) [Hereinafter “.JOBS Application”], attached hereto as ICANN Exhibit B.

<sup>5</sup> *Id.* at 3 (“The Community to be Served”) (emphasis added).

motivation, compensation, utilization, services, training, development, promotion, termination and retirement.”<sup>6</sup>

17. Employ Media selected the Society for Human Resource Management (“SHRM”) as the .JOBS Sponsor.<sup>7</sup> SHRM, a not-for-profit entity whose mission is to advance the human resource profession, “is the world’s largest association devoted to human resource management, representing more than 175,000 individual members with more than 500 affiliated chapters in the United States and members in more than 120 countries.”<sup>8</sup> SHRM has no corporate or institutional members – it limits its membership to individuals engaged in human resource management.

18. In an effort to demonstrate that a .JOBS TLD would serve the interests of human resources managers, Employ Media stated in its Application that the .JOBS Community “is a group with clearly defined needs [] which are not efficiently fulfilled by the current DNS hierarchy of Top Level Domains.”<sup>9</sup> Members of the .JOBS Community, according to Employ Media’s Application, “focus on the management and direction of people *on behalf of the organization they represent*” and “it is incumbent upon these members of the Community *to market their employer*, and further to promote access to information regarding the employer to potential employees.”<sup>10</sup>

19. But in Employ Media’s view, inefficiencies within the then-existing DNS restricted the Community’s “ability to communicate and otherwise promote an exact Internet destination to the labor market,” which led employers to create hard to find “sub-web” pages “within the employer’s website to communicate and promote HR (including jobs) information,” such as HomeDepot.com/jobs or fbijobs.com.<sup>11</sup> Thus, through its .JOBS Application, Employ Media sought to “provide this Community efficiencies for identifying the HR element -- an exact destination (i.e., a ‘jobs’ page) consistent with the organizational strategy this Community has historically been charged to carry out, including with other forms of media, in its communication

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<sup>6</sup> *Id.* (emphasis added).

<sup>7</sup> *Id.* at 2 (“The Sponsoring Organization and The Applicant”).

<sup>8</sup> *Id.*

<sup>9</sup> *Id.* at 4 (“Appropriateness of Sponsored TLD Community”).

<sup>10</sup> *Id.* (emphasis added).

<sup>11</sup> *Id.* at 5 (“Appropriateness of Sponsored TLD Community”).

to the labor market.”<sup>12</sup> Summing up its aim, Employ Media stated that “the Community, as represented by SHRM, is requesting that ICANN approve delegation whereby its members can offer a standardized address *on behalf of the organization they represent* for the purpose of communicating such a destination to the labor market.”<sup>13</sup>

20. In an effort to establish that Employ Media would minimize .JOBS registrations that violate the rights of others and would limit registrations to members of the .JOBS Community, Employ Media offered a number of safeguards. First, registrations within the TLD would be “granted only to applications submitted by a qualified applicant – *generally a human resource manager of the employer such manager represents*.”<sup>14</sup> Employ Media went on to define a “Qualified Applicant” as a person who is (a) member of SHRM; or (b) is engaged in human resource management practices that meet certain criteria.<sup>15</sup> Second, “all prospective registrants must submit a Qualification Document (generally speaking, third party written proof of status as an *employer organization*, such as, e.g., in the U.S., a Form 941) which will be reviewed by Employ Media for approval prior to authorizing registration.”<sup>16</sup> Finally, Employ Media proposed that .JOBS domain name registrations would be “limited to the legal name of an employer and/or a name or abbreviation by which the employer is commonly known,” which is referred to as the “companyname.jobs” naming convention.<sup>17</sup>

21. In the Spring and Summer of 2004, the independent Evaluation Teams met formally several times to discuss the sponsored TLD applications. In addition, the Evaluation Teams posed a series of questions to the applicants to obtain additional information regarding the applications. For instance, the Sponsorship Evaluation Team asked Employ Media to elaborate on how .JOBS would satisfy needs that could not be readily met through existing TLDs, such as .COM.<sup>18</sup> In its response, Employ Media made clear that – unlike existing TLDs – .JOBS would

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<sup>12</sup> *Id.*

<sup>13</sup> *Id.* (emphasis added).

<sup>14</sup> *Id.* at 2 (“Executive Summary of This Proposal”) (emphasis added).

<sup>15</sup> *Id.* at 3-4 (“The Community to be Served”).

<sup>16</sup> *Id.* at 18 (“Protect the rights of others”) (emphasis added).

<sup>17</sup> *Id.*; *see also* 1 (“Naming Conventions”).

<sup>18</sup> JOBS Response to Sponsorship Questions Promulgated on June 17, 2004 at 1, *available at* <http://www.icann.org/en/tlds/stld-apps-19mar04/PostAppC.pdf> (last visited July 20, 2011), attached hereto as ICANN Exhibit C.

be a TLD reserved for human resource managers seeking to promote job opportunities within their own company: “The .jobs TLD is to connote jobs. ***It is to be a name space for employers.*** Or more specifically, the Community of members tasked to carry out the very distinct organizational mission of communicating ***employment opportunities and benefits of the organization . . . Jobs are the product that the Community needs to market on behalf of its employer . . .*** The focus is to bring jobs to the market place and the .jobs TLD provides an exact navigational identifier to provide employment related purposes not fulfilled by the intended mission or purpose of any other TLD. ***This message makes .jobs distinct and differentiated.***”<sup>19</sup>

22. On 31 July 2004, ICANN informed Employ Media that the independent Evaluation Teams concluded that the .JOBS application satisfied the RFP with respect to the business/financial issues, but that questions remained with respect to technical and sponsorship/community value issues.<sup>20</sup> Specifically, the technical Evaluation Team found that the .JOBS TLD “could complicate, rather than simplify, use of the Internet.”<sup>21</sup> And the sponsorship/community value Evaluation Team found that “the global jobs and careers market was well served by existing search capabilities and the application as presented would not add significant new value to the name space.”<sup>22</sup> Nevertheless, ICANN invited Employ Media to continue working with the Evaluation Teams until the technical and sponsorship issues could be resolved.<sup>23</sup>

23. Based on additional information provided by Employ Media and further discussions with the Evaluation Teams, it was eventually determined that the .JOBS Application met the baseline criteria in the RFP. On 13 December 2004, after review of the above-mentioned information and materials, ICANN’s Board of Directors authorized ICANN Staff to begin negotiating a Registry Agreement with Employ Media. Once these negotiations were completed,

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<sup>19</sup> *Id.* at 2 (emphasis added).

<sup>20</sup> 31 July 2004 Letter from Kurt Pritz to Brian Johnson at 2, *available at* <http://www.icann.org/en/tlds/stld-apps-19mar04/AppE-30nov05.pdf> (last visited July 20, 2011), attached hereto as ICANN Exhibit D.

<sup>21</sup> New sTLD Applications, Evaluation Report, Section I: Report of the Technical Team at 8, *available at* <http://www.icann.org/en/tlds/stld-apps-19mar04/PostAppD.pdf> (last visited July 20, 2011), relevant excerpts attached hereto as ICANN Exhibit E.

<sup>22</sup> New sTLD Applications, Evaluation Report, Section III: Report of the Sponsorship and Other Issues Team at 90, *available at* <http://www.icann.org/en/tlds/stld-apps-19mar04/PostAppD.pdf> (last visited July 20, 2011), relevant excerpts attached hereto as ICANN Exhibit F.

<sup>23</sup> 31 July 2004 Letter from Kurt Pritz to Brian Johnson, *supra* note 20 at 2.

the proposed Registry Agreement was submitted to the ICANN Board for review. On 8 April 2005, ICANN's Board noted that Employ Media had demonstrated "how this sTLD would be differentiated in the name space," and that "delegation of a .JOBS sponsored top-level domain to Employ Media would be beneficial for ICANN and the Internet community." Thereafter, Employ Media executed the Registry Agreement on 5 May 2005 and .JOBS became operational on 9 September 2005.

**D. Consistent With Employ Media's Application, The .JOBS Registry Agreement Limits Registrations In .JOBS To Human Resource Managers Seeking To Promote Employment Within Their Own Organizations.**

24. The terms of the .JOBS Registry Agreement were specifically based on the representations made by Employ Media in its Application and the intent behind creation of the TLD – that is, providing human resource managers with a reserved TLD for promoting employment within their own companies.<sup>24</sup> The .JOBS Charter, for example, which is contained in Appendix S of the Registry Agreement, states that the .JOBS TLD "will be established to serve the needs of the international human resource management community," which is defined as "*the organizational function* that focuses on the management and direction of people."<sup>25</sup> Like Employ Media's Application, the Charter also defines the Community to be served by the .JOBS TLD as "those persons who deal with the human element *in an organization* . . . ."<sup>26</sup>

25. And the .JOBS Charter contractually requires Employ Media to limit registrations within .JOBS to the following *persons*: (1) Members of SHRM (who must be individuals "engaged in human resource management");<sup>27</sup> or (2) Persons "engaged in human resource management practices" that possess salaried-level human resource management experience, are certified by the Human Resource Certification Institute or are supportive of the SHRM Code of Ethical and Professional Standards.<sup>28</sup>

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<sup>24</sup> .JOBS Registry Agreement (5 May 2005), Article II, § 2.1(b) (certifying that statements made by Employ Media in the application process were true and accurate and remained true and accurate at the time of the Registry Agreement's execution) (hereinafter "Registry Agreement"), *available at* <http://www.icann.org/en/tlds/agreements/jobs/> (last visited July 20, 2011), attached hereto as ICANN Exhibit G.

<sup>25</sup> Registry Agreement, Appendix S, Part I (emphasis added).

<sup>26</sup> *Id.* (emphasis added).

<sup>27</sup> *Id.* at 2; *see also* SHRM Membership Application, *available at* <http://www.shrm.org/Communities/MemberDirectory/Documents/memapp0094.pdf> (last visited July 20, 2011), attached hereto as ICANN Exhibit H.

<sup>28</sup> Registry Agreement, Appendix S, Part 1, at 2.

26. And like Employ Media’s Application, the original Registry Agreement limited domain name registrations to the companyname.jobs format, such as Exxon.jobs and Dupont.jobs.

27. As with every Sponsored TLD, Appendix S of the .JOBS Registry Agreement notes, in multiple places, that the .JOBS Charter is a contractual provision defining the scope of all future activities within .JOBS. For example, recognizing that neither ICANN nor Employ Media could predict future developments in the DNS, Appendix S states that Employ Media may introduce new categories of domain name registrations, but any new categories must be **“consistent with the Charter and in compliance with the provisions of this Sponsored TLD Registry Agreement.”**<sup>29</sup> Likewise, the Registry Agreement delegates to Employ Media the authority to impose restrictions on registrations and domain name use, but such authority was delegated to Employ Media **“provided the scope of the Charter is not exceeded.”**<sup>30</sup>

28. One of the chief aims of the Registry Agreement was to ensure that Employ Media committed to instituting policies that would minimize .JOBS registrations that did not comport with the .JOBS Charter. Thus, the Registry Agreement states that registrations in .JOBS must be limited to human resource managers seeking to promote their own employer. For instance, each registration application must be submitted by a “Qualified Applicant,” which is defined as the “persons identified in the .JOBS Charter;” that is, members of SHRM or other persons engaged in human resource management practices.<sup>31</sup> In addition, each Qualified Applicant must submit a “Qualification Document,” which ensures that a registration is associated with “an employer organization.”<sup>32</sup> Similarly, Appendix S goes on to recognize that “the major concern of other TLDs, namely, trademark infringement, is of lesser concern as it relates to the .JOBS TLD” because **“a registration in the .jobs sTLD will be associated with an employer, and more particularly the HR aspects of an employer (and still more likely job postings).”**<sup>33</sup>

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<sup>29</sup> Registry Agreement, Appendix S, Part IV, Phase 7: Normal Operations, at 13 (emphasis added).

<sup>30</sup> Registry Agreement, Appendix S, Part II, §§ 2-3 (emphasis added).

<sup>31</sup> Registry Agreement, Appendix S, Part VII, § 2: Community Value Criteria (noting Qualified Applicant requirement), Part IV, Phase 2: Initial Reservations (defining Qualified Applicant).

<sup>32</sup> Registry Agreement, Appendix S, Part VII, § 2: Community Value Criteria.

<sup>33</sup> *Id.* (emphasis added). Appendix S’s discussion of how .JOBS would be different from other TLDs also makes clear that .JOBS registrations would be limited to human resource managers’ promotion of jobs within their



29. The manner in which Employ Media operated the .JOBS TLD further confirms that Employ Media understood the restrictions contained in the .JOBS Charter and Registry Agreement. For almost five years, Employ Media advised all .JOBS Registrants that: “You may not: Use your .jobs domain to post third-party information such as jobs listings for other companies. *This means that you cannot have a job board at your .jobs domain which contains listings for jobs outside of your Company.*”<sup>34</sup>

30. Finally, because .JOBS was set up to serve a specific Community, the Registry Agreement requires a detailed Policy Development Process (“PDP”) for changing or amending .JOBS policies. Under the PDP, any change or amendment must first be reviewed by a Policy Development Council, which the .JOBS sponsor, SHRM, oversees. The Council is required to appoint a Staff Manager to create an issues report detailing the proposed amendment and the policies affected by the amendment. The Council is required to then review the issues report and eventually vote on whether to approve the proposed amendment. Importantly, the Registry Agreement explicitly states that certain .JOBS policies, such as the Charter and the companyname.jobs naming convention, “are only revisable/amendable” via the PDP set forth in the Registry Agreement.<sup>35</sup>

**E. Employ Media’s So-Called “Beta Test” Was A Material Breach Of The Registry Agreement Requiring ICANN Intervention.**

31. In its Arbitration Request, Employ Media refers to its 2009 “Beta Test” as a resounding success, but the program was in fact a material breach of the .JOBS Registry Agreement. As a result, and contrary to Employ Media’s claims of a pristine compliance record, ICANN was forced to intervene and insist that Employ Media comply with its Registry Agreement.

32. In late 2009, ICANN learned that Employ Media was registering certain domain names to itself in a “non-companyname.jobs” format, which was contrary to the

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own companies. For example, under the Differentiation section of Appendix S, the parties state that “Community needs regarding marketing and other uses regarding ‘jobs’ are not being met by current TLDs at the second level. Either multiple levels of domains are required . . . . Such inconsistency and convoluted nature current URL fixes (e.g., domain.com/xxxxx/jobs, etc) complicates the Community’s task of marketing their product (jobs).” *See* Registry Agreement, Appendix S, Part VII, § 3: Policy-Making and Differentiation.

<sup>34</sup> Original .JOBS Registration Agreement at App. D – Usage Policy, attached hereto as ICANN Exhibit I (emphasis added).

<sup>35</sup> Registry Agreement, Appendix S, Part VII, § 3: Policy-Making and Differentiation.

companyname.jobs naming convention mandated in the .JOBS Registry Agreement. Employ Media referred to these domain names as a “self-managed” class of domains because they were registered to Employ Media. On 24 November 2009, ICANN’s contractual compliance department – the department tasked with ensuring that Registry Operators comply with their Registry Agreements – informed Employ Media that ICANN was conducting a compliance review of the self-managed class of domains. In discussions with ICANN, Employ Media vaguely stated that it was “beta testing certain product categories of .jobs domain names, such as geographic.jobs, occupation.jobs, etc.” But as it has done so many times throughout this dispute, Employ Media assured ICANN that its “Beta Test” would comply with the .JOBS Registry Agreement and Charter: “Creation of these names is in full compliance with the Policy which governs .jobs domain registrations; namely, the Policy which is contained in the .jobs Charter. The Charter sets rules regarding who may qualify to request a .jobs domain registration. Employ Media complies with such rules. ***This Policy (as contained in the Charter) is not being changed in any way, and we have no current intent to make any changes to such.***”<sup>36</sup>

33. On 20 January 2010, ICANN informed Employ Media that its registration of the self-managed domains outside of the companyname.jobs format was a violation of the Registry Agreement. Moreover, ICANN reminded Employ Media that – as the Registry Operator of a sponsored TLD – Employ Media must comply with the PDP provisions set forth in the Registry Agreement and seek ICANN approval ***before*** introducing new categories of domain names.<sup>37</sup>

34. Despite this, Employ Media pushed ahead. On 3 February 2010, ICANN learned through a news article that Employ Media had announced its intention to go live with 25,000 of the self-managed domain names in the non-companyname.jobs format in direct violation of the .JOBS Registry Agreement. In what now is telling, the news article indicated that Employ Media would be launching the non-companyname.jobs domains in some sort of “collaboration” with DirectEmployers Association, a business run by Bill Warren.<sup>38</sup>

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<sup>36</sup> 4 December 2009 Letter from Employ Media to David Giza at 1, attached hereto as ICANN Exhibit J.

<sup>37</sup> 20 January 2010 email from David Giza to Tom Embrescia and Ray Fassett, attached hereto as ICANN Exhibit K.

<sup>38</sup> Peter M. Zollman, 25,000 new Dot-jobs sites launch next week (29 Jan. 1010), <http://aimgroup.com/blog/2010/01/29/25000-new-dot-jobs-sites-launch-next-week/> (last visited July 20, 2011), attached hereto as ICANN Exhibit L

35. ICANN immediately sent a letter to Employ Media reiterating that Employ Media's non-companyname.jobs registrations violated the .JOBS Registry Agreement. ICANN demanded that Employ Media shut down all of the non-companyname.jobs domain names and work to initiate a proper PDP with the .JOBS sponsor, SHRM, and then seek the necessary ICANN approvals before going any further, as required in the Registry Agreement.<sup>39</sup> After much wrangling, Employ Media finally took its non-companyname.jobs registrations offline and assured ICANN that it would undertake the PDP required by the Registry Agreement.

36. Because Employ Media and SHRM were solely responsible for conducting the PDP required in the Registry Agreement, ICANN knows very little about these proceedings. But in a June 2010 SHRM press release, SHRM explicitly noted that it approved the proposed amendments "recognizing that it is the sole obligation and responsibility of Employ Media to implement the Proposed Amendment *in a manner that complies with the .jobs Charter*, with all ICANN rules and regulations, and with all applicable laws and regulations."<sup>40</sup> Since this time, ICANN has learned, and is informed and believes, that Bill Warren – the executive director of Employ Media's Beta Test business partner, DirectEmployers – actually served as the PDP Staff Manager reviewing and analyzing the proposed amendments that served as the basis for the eventual launch of the .JOBS Universe.

**F. Employ Media's Amendment To The Registry Agreement Changed The .JOBS Naming Format, But Did Not Alter The .JOBS Charter, Community Or Registration Restrictions.**

37. Because the companyname.jobs requirement was specifically mandated in the .JOBS Registry Agreement, Employ Media had to seek an amendment of the Registry Agreement from ICANN before offering non-companyname.jobs registrations. Changes such as this are evaluated by ICANN under the Registry Services Evaluation Process, or "RSEP." Under the RSEP, ICANN first undertakes a limited review of the proposal to determine whether it raises significant security, stability, or competition issues within the DNS. If the proposal passes this preliminary review, but requires amendment of a Registry Agreement, ICANN posts the

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<sup>39</sup> 5 February 2010 Letter from David Giza to Ray Fassett, attached hereto as ICANN Exhibit M.

<sup>40</sup> SHRM, Notice of Decision on Employ Media Proposed Amendment Concerning .JOBS TLD, *available at* <http://policy.jobs/> (last visited July 20, 2011), attached hereto as ICANN Exhibit N (emphasis added).

proposal for public comment and then the proposed amendment is considered by the ICANN Board.

38. Employ Media’s RSEP submission sought to allow non-companyname.jobs registrations through a “Phased Allocation Program.” Under the Phased Allocation Program, non-companyname.jobs domains would be allocated in three phases. First, Employ Media would issue a request for proposals “to invite interested parties to propose specific plans for registration, use and promotion of domains that are not their company name.” Second, Employ Media would offer remaining non-companyname.jobs domains through an “auction round.” Third, Employ Media would release other non-companyname.jobs domains on a “first-come, first-served basis.” In describing the Phased Allocation Program, Employ Media specifically stated that its intent was “to solicit plans consistent with the dictates of our Community, *so long as such plans are consistent with the .JOBS Charter.*”<sup>41</sup> To be clear, the amendments proposed in Employ Media’s RSEP only sought to change the naming format requirements in the .JOBS Registry Agreement – Employ Media did not seek to alter or amend the .JOBS Charter, the .JOBS Community or other registration restrictions placed on .JOBS registrants.

39. In a preliminary review of the Phased Allocation Program, ICANN identified no significant security, stability or competition issues, and then posted the proposed amendments for public comment. Thereafter, on 5 August 2010, the ICANN Board reviewed the proposed amendments.

40. Based on public comments, one ICANN Board member stressed concern that the proposed amendments may be interpreted to allow .JOBS Registrants to go beyond their own recruitment needs by offering job boards promoting employment opportunities with third parties in contravention of the original .JOBS Application and the defined .JOBS Community. ICANN’s Senior Vice President, Stakeholder Relations, Kurt Pritz – who had been involved in discussions with Employ Media from the time of the unauthorized Beta Test – explained that he believed, based on his discussions with Employ Media, that proposed amendments did not represent a change the .JOBS Charter, “but a change to the names that can be registered.” Consistent with this belief, another Board member noted that Employ Media’s intent to retain the

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<sup>41</sup> Employ Media Registry Request Service at 1-2; *see also* 5 (“Plans will be evaluated by Employ Media for compliance with the .JOBS Charter.”), *available at* <http://www.icann.org/en/registries/rsep/jobs-proposal-09jun10-en.pdf>. (last visited on July 20, 2011), attached hereto as ICANN Exhibit O (emphasis added).

requirement that .JOBS Registrants submit a Qualification Document – verifying that a registration is associated with an employer organization – meant that the Charter was not being amended. And yet another Board Member stated that he did not believe a change to the naming format affected a change to the Charter – “only the range of names they allow to be registered.” Mr. Pritz reiterated his belief, based on discussions with Employ Media, that “*the universe of registrants is unchanged; it’s still the hiring managers and the entities that employ people. It’s the name registration policy that’s changed.*”<sup>42</sup>

41. After reviewing all of the information, thoroughly discussing the issues raised, and understanding that there was to be no change to the .JOBS Charter or Community, the Board voted to approve the amendments to the .JOBS Registry Agreement allowing for the registration of non-companyname.jobs registrations in .JOBS.<sup>43</sup>

**G. Thereafter, ICANN Issued A Stern Warning To Employ Media That Charter Compliance Was “Crucial.”**

42. Despite Board approval of the proposed amendments, the Phased Allocation Program was challenged immediately. The .JOBS Charter Compliance Coalition (the “Coalition”), which is a federation of entities that operate job boards in other TLDs, such as Careerbuilder.com and Monster.com, requested that the ICANN Board reconsider its approval of Employ Media’s Phased Allocation Program.

43. Under ICANN’s Bylaws, any person or entity materially affected by a Board action or inaction may request reconsideration of that conduct. Board actions may be reconsidered if they were taken “without consideration of material information.” ICANN’s Board Governance Committee (“BGC”) is tasked with reviewing requests for reconsideration.<sup>44</sup>

44. In its submissions to the BGC, the Coalition argued that the change to the .JOBS naming format would allow companies to operate job boards promoting third-party employment opportunities in violation of the .JOBS Charter and Registry Agreement. Based on these

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<sup>42</sup> Minutes of Board Meeting Item No. 7, 5 August 2010, *available at* <http://www.icann.org/en/minutes/minutes-05aug10-en.htm> (last visited at July 20, 2011), relevant excerpts attached hereto as ICANN Exhibit P (emphasis added).

<sup>43</sup> *Id.*

<sup>44</sup> ICANN Bylaws, Art. IV, § 2.1-2.3 (as amended 24 June 2011), *available at* <http://www.icann.org/en/general/bylaws.htm>. (last visited July 20, 2011), relevant excerpts attached hereto as ICANN Exhibit Q.

arguments, and in order to determine if the Board had all material information when approving the .JOBS amendment, the BGC propounded various questions on Employ Media about the intent behind the amendment. In response, Employ Media confirmed “that the amendments approved by the ICANN Board on 5 August 2010 do not change the Charter of the .JOBS sTLD.” Likewise, Employ Media stated that it “has NO intention to allow registrations in the .JOBS sTLD from persons or entities not meeting the .JOBS Charter registration requirements.” Employ Media also assured the BGC that Employ Media “will only allow persons identified in the Charter to request registration of names in the .JOBS sTLD.” And Employ Media firmly stated that it had no intent to transfer or license the use of any .JOBS domain names to any person or entity “that would not qualify for registration under the .JOBS sTLD Charter.”<sup>45</sup>

45. Applying the reconsideration standards, on 9 December 2010, the BGC found that the grounds for reconsideration were not met by the Coalition because the Board did not fail to consider material information in approving the amendments. In addition, the BGC noted that “concerns regarding potential violations of the [.JOBS] Charter is not a proper ground for reconsidering the Board’s 5 August 2010 action.” Moreover, the BGC noted that there was no support – at that time – for the assertion that job site operators who did not qualify for registration under the .JOBS Charter had been, or would be, allowed to register domain names within .JOBS. In reaching these conclusions, the BGC emphasized that Employ Media had repeatedly assured ICANN that it would adhere to the .JOBS Charter, which had not been affected by the amendment.<sup>46</sup>

46. But the BGC cautioned that if implementation of the amendment or the Phased Allocation Program caused Employ Media to violate its Charter, “that is something that ICANN’s Contractual Compliance Department must address.”<sup>47</sup> Indeed, the BGC noted that “Employ Media’s compliance with its Charter is crucial.”<sup>48</sup> As such, the BGC recommended that “the Board direct the CEO, and General Counsel and Secretary, to ensure that ICANN’s

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<sup>45</sup> Employ Media’s 25 October 2010 Responses to Questions Posed by BGC, *available at* <http://www.icann.org/en/committees/reconsideration/employ-media-answers-to-bgc-25oct10-en.pdf> (last visited July 20, 2011), attached hereto as ICANN Exhibit R.

<sup>46</sup> Recommendation of the Board of Governance Committee, Reconsideration Request No. 10-2, 9 December 2010 at 10-12, *available at* <http://www.icann.org/en/committees/reconsideration/bgc-recommendation-09dec10-en.pdf> (last visited July 20, 2011), attached hereto as ICANN Exhibit S.

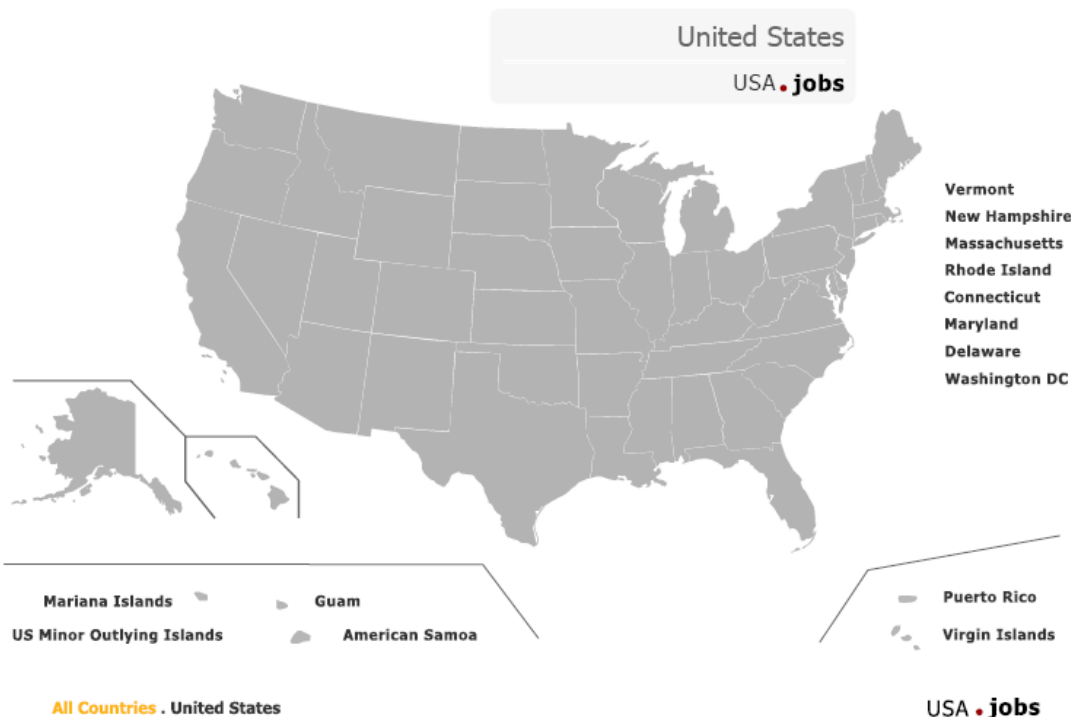
<sup>47</sup> *Id.* at 10.

<sup>48</sup> *Id.* at 11-12

Contractual Compliance Department closely monitor Employ Media’s compliance with its Charter,” which the Board did a day later.<sup>49</sup>

**H. In Violation Of The .JOBS Charter And Registry Agreement Employ Media Allowed DirectEmployers To Register 40,000 .JOBS Domain Names And Launch The “.JOBS Universe.”**

47. Despite the BGC’s strongly-worded admonitions, in early 2011, it became evident that Employ Media’s Phased Allocation Program, in practice, went well beyond allowing human resource professionals to register non-companyname.jobs domains. In fact, it came to ICANN’s attention that Employ Media allowed its business ally, DirectEmployers, to register approximately 40,000 non-companyname.jobs domain names, such as USA.jobs, MilitaryFamily.jobs, Accounting.jobs and FremontCalifornia.jobs, which DirectEmployers deployed to officially launch the “.JOBS Universe.” The .JOBS Universe can only be described as a massive job board offering links to third-party employment opportunities in various states, cities and industries. A recent screen-shot of the Universe.jobs map of the United States is displayed below:



From this map, a user can click on California, for example, to get information on job postings in

<sup>49</sup> *Id.* at 12.

specific California cities and industries:

The screenshot shows the California.jobs website interface. At the top, there are tabs for 'Jobs' and 'Employers'. Below the navigation bar is a search bar and a 'Map' button. A tagline reads 'Real jobs from real companies. Updated daily. A service of DirectEmployers Association'. The main content area is divided into three columns: 'Cities', 'Top Searches', and 'Occupations'. Each column has a list of items with associated counts and a 'View All Jobs' button is visible on the left side of the Cities column.

Cities	Count	Top Searches	Count	Occupations	Count
fremont	470	it manager	20755	Quality Assura...	10343
fresno	468	design	16907	Web Developer	7150
santa maria	466	management	12048	PHP Programmer	6202
santa barbara	437	management trainee	11417	Engineer	5183
pleasanton	431	facilities manager	11061	.net Programmer	4262
azusa	421	warehouse manager	11059	Java Programmer	4225
carlsbad	417	plant manager	11059	Systems Analyst	3998
woodland hills	395	property manager	11059	Registered Nurse	3402
ontario	281	programmer	10994	Supervisor, Fo...	3157
brea	274	fitness	10892	Supervisor, Re...	2966
hayward	255	case manager	10130	Customer Servi...	2931
concord	230	training manager	10039	Sales Manager	2486
huntington beach	228	engineering	9365	IT Manager	2457
rancho cucamonga	199	information te...	7864	Software Engineer	2332

From there, a user can select the city of Fremont, for instance, to see specific jobs being offered by third-party employers in Fremont:

The screenshot shows the fremontcalifornia.jobs website. It features a search bar and a 'Map' button. Below the navigation bar is a tagline 'Real jobs from real companies. Updated daily. A service of DirectEmployers Association'. The main content area displays three job listings, each with a company logo, job title, location, and a 'View' button. There are also advertisements for 'Jobs for MILITARY FAMILIES', 'Every occupation. Every location. One destination.', and 'everything is possible. LOCKHEED MARTIN'.

Company	Job Title	Location	View
HP	Electrical Hdwr Engineer V	Hewlett-Packard Company in Fremont, CA	View
Starbucks	Shift Supervisor Us	Starbucks in Fremont, CA	View
24 Hour Fitness	Membership Counselor Evo	24 Hour Fitness in Fremont, CA	View

48. As directed by the ICANN Board and the BGC, ICANN's contractual compliance department stepped in immediately to get a better understanding of the .JOBS Universe. In



response to questions posed by ICANN, Employ Media began taking the position – for the first time – that .JOBS Registrants need not be “engaged in human resources management practices” to register and use .JOBS domain names. For example, ICANN asked what analysis Employ Media used to determine whether the Registrant of Universe.jobs, DirectEmployers, was engaged in human resource management practices. Employ Media defiantly responded that because DirectEmployer’s Executive Director, Bill Warren, is a member of SHRM and he “requested” registration of Universe.jobs, it was “not necessary” to determine whether the domain was being used in connection with “human resource management practices.”<sup>50</sup> And Employ Media incredibly claimed that the phrase “engaged in human resource management practices” broadly relates to *anyone* dealing “with the human element from outside an organization,” such as “an advertising agency . . . when performing the service of developing a creative for an ad campaign aimed at job seekers on behalf of a hiring entity.”<sup>51</sup>

**I. ICANN Served Employ Media With A Notice Of Breach Letter Due To Employ Media’s Violations Of The .JOBS Charter And Registry Agreement.**

49. In light of Employ Media’s lax interpretations of the .JOBS Charter, on 27 February 2011, ICANN served Employ Media with a “Notice of Breach Letter.” The Notice of Breach Letter – which could not have come as a surprise to Employ Media given the parties’ divergent views – states that Employ Media had failed “to implement restricted registration policies that support the purpose for which the .JOBS top-level domain was established.” ICANN further noted that Employ Media’s failure “to operate and manage the .JOBS TLD in a manner consistent with the spirit and intention of the .JOBS registry and .JOBS Charter has substantially frustrated the primary purpose of the .JOBS Registry Agreement.” This letter also informed Employ Media that ICANN would proceed to terminate the .JOBS Registry Agreement if Employ Media did not cure the identified breaches within 30 days.<sup>52</sup>

50. Pursuant to the .JOBS Registry Agreement, the parties engaged in a cooperative engagement process in which they attempted to resolve the issues identified in ICANN’s Notice of Breach Letter. From the start of this process, ICANN made clear to Employ Media that it was

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<sup>50</sup> 11 Feb. 2011 Letter from Brian Johnson to S. Burnette at 9, attached as Confidential ICANN Exhibit A.

<sup>51</sup> *Id.* at 8.

<sup>52</sup> 27 Feb. 2011 Letter from John Jeffrey to Brian Johnson and Ray Fassett, *available at* <http://www.icann.org/en/correspondence/jeffrey-to-johnson-fassett-27feb11-en.pdf> (last visited July 20, 2011), attached hereto as ICANN Exhibit T.

not opposed to Employ Media taking the .JOBS TLD in a new direction, but because .JOBS is a sponsored TLD, Employ Media must amend its Charter through a proper PDP and get ICANN approval before allowing third party job boards within .JOBS. Stated differently, ICANN repeatedly explained that Employ Media could not amend its Charter via its own conduct, but must do so through the process contractually required in its Registry Agreement with ICANN.

51. Although Employ Media assured ICANN that it would work with SHRM on proposed Charter amendments, Employ Media instead spent its time drafting its Request for Arbitration, and never submitted any proposed Charter amendments to ICANN.

**IV. EMPLOY MEDIA CANNOT ESTABLISH THAT ICANN’S NOTICE OF BREACH LETTER WAS NOT “APPROPRIATE.”**

52. Article VI of the .JOBS Registry Agreement allows Employ Media to initiate arbitration challenging “the appropriateness of termination by ICANN.”<sup>53</sup> With its Request for Arbitration, Employ Media has taken on this burden. But as established herein, and as set forth specifically below, Employ Media cannot meet this burden – ICANN’s Notice of Breach Letter was appropriate in all respects given the fact that Employ Media materially breached the .JOBS Registry Agreement in several separate and independent ways.

53. First, by allowing third-party job boards within .JOBS, Employ Media has transcended the very purpose behind the creation of the TLD and has exceeded the scope of the .JOBS Charter. As evidenced in Employ Media’s Application for the .JOBS TLD – and ICANN’s approval of that Application – .JOBS was *explicitly* intended to provide human resource professionals with a TLD in which they could promote employment opportunities within their own organizations. It is commonly understood – and a tenet of 2003 sponsored TLD selection process – that registrations within a sponsored TLD must be used to serve the purposes for which the sponsored TLD was created. Otherwise, there would be domains promoting hospitals in .MUSEUM; domains selling bikes in .AERO; and domains advertising trips to the Canadian Provinces in .ASIA. Job boards promoting third-party employment opportunities do not serve the purpose for which .JOBS was created.

54. Moreover, the .JOBS Charter – which limits registrations within .JOBS to members of SHRM, who must be individuals “engaged in human resource management,” or

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<sup>53</sup> Registry Agreement, Art. VI, § 6.3.

other persons “engaged in human resource management practices” – not only memorializes the parties’ intent in creating .JOBS, but it contractually mandates that all registrations within .JOBS be used in connection with the Registrant’s “human resource management practices,” which are the promotion of employment within the Registrant’s own organization. Likewise, the Registry Agreement’s requirements that all .JOBS registrations be submitted by a “Qualified Applicant,” defined as a person “identified in the .JOBS Charter,” along with a “Qualification Document” demonstrating proof that “an employer organization” is associated with the registration, underscore the parties’ intent in creating the TLD and the Charter’s clear requirements. To read the Registry Agreement in any other way renders its language a nullity and removes the very characteristic that defines the .JOBS Community and differentiates .JOBS from all other TLDs. The 2010 amendments to the .JOBS Registry Agreement, which merely allowed for the registration of non-companyname.jobs domains, *did not alter or amend* the .JOBS Charter, the .JOBS Community, the pre-existing registration restrictions in the Registry Agreement or the purposes behind creation of the sponsored TLD.

55. Employ Media’s claim that it is permitted to operate the .JOBS TLD in any fashion as long as the operations “serve the interests” of the .JOBS Community ignores the contractual requirements Employ Media took on in the Registry Agreement. While ICANN certainly delegated authority to Employ Media, the Registry Agreement requires that Employ Media exercise that authority within the scope of .JOBS Charter and the mandates of the Registry Agreement.<sup>54</sup> Simply put, allowing the operation of job boards within .JOBS exceeds the scope of the Charter and is not permitted under the terms of the Registry Agreement.

56. Thus, by permitting job board operators to advertise employment opportunities outside their own companies, Employ Media has breached the spirit, intent and express terms of the .JOBS Registry Agreement and Charter.

57. Second, by espousing a view under which a .JOBS domain name can be issued based on a sole requirement that a human resource professional “request” the domain, Employ Media has failed to enforce meaningful “restrictions on registration within the TLD,” as required by the Registry Agreement.<sup>55</sup> The Charter and Registry Agreement require that a human

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<sup>54</sup> Registry Agreement, Appendix S, Part II, §§ 2-3.

<sup>55</sup> Registry Agreement, Art. III, § 3.1(d)(i)(B).

resource professional request a .JOBS domain *and* that the domain be used in connection with that professional's "human resource management practices." Employ Media's myopic policy opens the door to .JOBS domain names being used for any purposes as long as a human resource manager is propped up to "request" the domain. Under Employ Media's reading of the Charter, Staples, for example, could use a .JOBS domain name to sell its office supply products to the .JOBS Community so long as a Staples human resources employee requests the domain. Likewise, Charles Schwab could use a .JOBS domain to promote its financial services to the .JOBS Community provided that one of its human resource managers makes the official request for the name. Such a scenario is inconsistent with the intent behind the .JOBS TLD, the purpose of a sponsored TLD and it is precisely what the Registry Agreement seeks to avoid by requiring Employ Media to enforce meaningful restrictions on .JOBS registrations.

58. Third, by allowing DirectEmployers to register scores of the most valuable non-companyname.jobs domains through what appears to be a backroom deal, rather than through an open, fair and transparent allocation process, Employ Media has violated the terms of the Phased Allocation Program approved by the ICANN Board and made part of the Registry Agreement.

59. Accordingly, ICANN's Notice of Breach Letter detailing each of these breaches and violations was "appropriate" under the terms of the .JOBS Registry Agreement. The appropriateness of ICANN's Notice of Breach Letter can be determined simply by reviewing the materials submitted by ICANN and Employ Media, and this proceeding can be resolved without any further evidentiary submissions.

**V. RELIEF REQUESTED BY ICANN.**

60. Given the fundamental and material breaches identified herein, ICANN respectfully requests a finding from the Panel that:

- (a) ICANN's Notice of Breach letter was appropriate;
- (b) ICANN may, but is not required to, terminate the Registry Agreement with Employ Media;
- (c) All relief sought by Employ Media is denied; and
- (d) ICANN shall recover all costs and reasonable attorneys' expended in defending this matter, as provided in Section 5.1(b) of the Registry Agreement.

**VI. ARBITRATOR SELECTION BY ICANN.**

61. As stated in ICANN's 10 June 2011 letter to the Secretariat, ICANN has nominated Susan H. Nycum to serve as ICANN's party-appointed arbitrator.

**VII. CONCLUSION.**

Employ Media has transcended the purposes behind the creation of the .JOBS sponsored TLD and has violated the promises it made to ICANN and the .JOBS Community in its Application for the TLD and the Registry Agreement it executed. Accordingly, ICANN respectfully requests that the Panel deny the relief sought in Employ Media's Request for Arbitration and award ICANN the relief it seeks herein.

Dated: 22 July 2011

Respectfully submitted,

By: \_\_\_\_\_



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