

specialized in career fair events throughout the United States. I joined this division as a relatively junior accountant, as a way to get my foot in the door in a business that I found interesting, but my responsibilities soon expanded as the business grew and as I proved that I had valuable and innovative ideas and insights. Over time, as I grew more familiar with the human resource world and in particular recruiting, it became clear to me that online recruiting was becoming increasingly important to the human resource community. Recruiters (both internal and external) were trying to figure out how to use the Internet to do their jobs better by more efficiently reaching a wider pool of potential employees. Given First Communications' experience in the world of career fairs, our focus was in bringing career fairs into the online world. In particular, I was instrumental in launching a successful online career portal that was eventually sold to a joint venture owned by the Washington Post and Chicago Tribune. Following that sale, I joined the executive management team of a company called OverDrive, an Internet start-up that was partially owned by Microsoft, where I remained until taking on my current duties with Employ Media in June 2005.

4. In 2000 and 2001, as described below, I began discussions with Tom Embrescia, a respected investor, entrepreneur, and owner of a number of media companies, regarding a TLD that would serve the needs of recruiters and job-seekers. To apply for the TLD, Tom and I decided to form a new company, Employ Media, and I eventually joined Employ Media as Vice President.

5. Employ Media is the registry operator for the .JOBS sponsored Top-Level Domain, or sTLD. As registry operator of the .JOBS sTLD, Employ Media manages the .JOBS sTLD. As Vice President of Employ Media, my responsibilities include

overseeing the day-to-day operation of the TLD, including managing our relationship with our technical provider, VeriSign; reviewing and verifying applications for domain names in the TLD; and overseeing the implementation of the rules and policies for the sTLD and helping to ensure that the rules and policies are enforced.

II. The Initial Idea For A Jobs-Related TLD

A. I First Consider the Idea for a Jobs-Related TLD

6. I first started developing the idea that ultimately became the .JOBS TLD sometime in 1999, when I was working at First Communications. As part of First Communications' attempts to bring career fairs into the digital era, as we had done with our online job search platform, the CEO decided to register thousands of websites containing occupational, geographic, or other keywords and ending in "jobs.com" or "jobs.net" or "jobs.org"—for example, "engineeringjobs.com," "engineeringjobs.net," and "engineeringjobs.org." Internet users who searched for certain keywords and "jobs" would find the sites and be re-directed to First Communications' main website.

7. I was put in charge of registering and establishing all of these domain names. As I continued working on the project, I started thinking about why all of the addresses ended in ".com," ".net," or ".org." The one thing that all of these names had in common was the inclusion of the keyword "jobs," and I began wondering what it would take to move "jobs" to the right of the dot. It seemed to me that such an idea would be good for those who wanted to advertise jobs and those who were looking for jobs—it would help organize and centralize online job listings. I knew that recruiters still were looking for better, cheaper, and more efficient ways to recruit online.

8. At that time, I knew very little about ICANN or its administration of the Domain Name System ("DNS"). As I researched how to implement my idea, learned

more about ICANN and read its foundational documents, including the Green Paper¹ and the White Paper,² I learned that ICANN was created to privatize the DNS³ and also to expand it by creating new TLDs, thereby facilitating competition and giving opportunities to new registries.⁴ In accordance with this second goal, as of early 2000, ICANN was planning to start with a limited first round of additional TLDs that would serve as a trial for future expansions. Additional rounds of applications would be initiated as soon as the first round was completed successfully. I also learned that one private entity (Network Solutions, which was acquired by VeriSign in 2000) had the exclusive contract for the delegation of domain names in .COM.

9. As a result of all this research, I began to think that I had identified an idea that was not only useful to human resource personnel, such as recruiters, and to job-seekers, but also something that could be a good business opportunity for me. A company that created a jobs-related TLD could have a contract for that TLD similar to

¹ National Telecommunications Information Administration, Proposed Rule, Improvement of Technical Management of Internet Names and Addresses, 30 July 1998, C-2 (“Green Paper”).

² National Telecommunications Information Administration, Management of Internet Names and Addresses, 5 June 1998, C-1 (“White Paper”).

³ The DNS is the database of Internet names and addresses that coordinates the easier-to-remember, “human-readable” domain names for computers and websites with the complicated and less user-friendly numerical strings, known as “IP addresses,” that are actually processed by computers. Because of the organization of the DNS, an Internet user can type a domain name, such as “www.amazon.com,” into a web browser and the computer will locate the correct website. ICANN is responsible for coordinating the technical standards to ensure the stable and secure operation of the DNS. Bylaws for Internet Corporation for Assigned Names and Numbers, Art. I § 1, 16 Mar. 2012, *available at* <http://www.icann.org/en/general/bylaws.htm>, C-129 (“Bylaws”).

⁴ Registrars are retail sellers that handle the sale of domain names within the various TLDs—for example, selling “adr.org” to the American Arbitration Association.

the contract for .COM. And the timing seemed fortuitous, as ICANN was about to begin accepting applications for new TLDs. In the meantime, however, First Communications was sold to new owners, and I left the company.

B. I Begin Working With Tom Embrescia to Develop My Idea

10. I knew that, on my own, I would not have the resources to apply for or operate a TLD. Therefore, I began to approach potential business partners who could provide capital and media experience and expertise. I first learned of Tom Embrescia and his company, Second Generation, through a colleague at First Communications. My colleague told me that Tom had owned and managed a number of radio and television stations and was looking for new opportunities related to the Internet. After learning a little bit more about Second Generation, I decided to approach Tom to see if he would be interested in partnering with me.

11. I called Tom, expecting to speak with a secretary or receptionist, so I was surprised when he answered the phone. I could tell that he was not entirely convinced by our first conversation, but he was interested enough to agree to meet with me. At our first in-person meeting, I was able to explain my idea and all of my research in more detail. I explained that the TLD could serve as an online platform for those who are responsible for the recruiting function of human resources, allowing recruiters and employers to post job openings and connect with job searchers electronically. I told him that I thought employers would welcome the idea as a way to improve their online recruiting efforts. One difficulty that employers were facing in developing online recruiting strategies was that links to job listings had to share space on a company's home page with links and information designed for customers, investors, and other users. As a result, job-seekers frequently had to click through several pages to find the relevant

information. One possible way to overcome this would be for employers to create sites specific to their company, using the company's own name, which would allow job-seekers to find all the relevant information on one main site. Another problem was that many of the most desirable generic website names were unavailable in .COM. Those names—including names using occupational keywords and other useful descriptors—had been bought and used to establish niche job boards. Our .JOBS proposal would open up a new TLD where all of those names would once again be available for employers and their recruiters to use to post jobs listings and directly connect with job-seekers. And even beyond these initial ideas, with a new TLD, we could be creative, and allow employers and their recruiters to come up with new ideas that would help them do their jobs more efficiently.

12. After the first in-person meeting where I explained all this to Tom, he was convinced that my idea had merit, and he wanted to invest. At that time, however, we decided it would be best to sit out the first round of applications, which took place in 2000. ICANN intended for the 2000 round to be very limited, resulting in only a few new TLDs, but also planned that there would be another round shortly thereafter. Tom and I agreed that it would be better to observe and learn from the first round so that we would be better prepared to participate in the second. Tom also agreed to provide funding. Additionally, he introduced me to Brian Johnson, a lawyer who was outside counsel for Second Generation at the time.

13. I spent the next several years monitoring and learning about ICANN, and I continued to make plans to apply during the expected later round. Over time, my idea continued to evolve. Initially, I envisioned that registrations could take a variety of

forms. In one early outline of a potential business plan, I described examples of registration types, including for occupational names, such as Accounting.JOBS and Autosales.JOBS; regional names, such as Cleveland.JOBS and London.JOBS; company-specific names, such as Toyota.JOBS and Alcoa.JOBS; general names, such as Search.JOBS and Part-time.JOBS; and industry-specific names, such as Electronics.JOBS and Newspaper.JOBS.

14. Based on that idea, I began gathering data to make projections describing the volume of registrations that could be expected in .JOBS, broken down according to categories such as company-specific registrations, regional location registrations, industry and profession registrations, and general registrations. I believed, with regard to regional location registrations, that the ability to navigate the Internet by region was a capability that would work well in the .JOBS TLD and that the industry and profession category would best fit the description of the .JOBS TLD. The regional, industry, and general names would serve as job boards, allowing job-seekers to visit such a site and view listings of jobs that were relevant to the site name (i.e., a site such as Cleveland.JOBS would list job openings in Cleveland, Ohio, or a site such as Newspaper.JOBS would list job openings at newspapers).

15. As my plans developed, and as I continued discussing those plans with Tom Embrescia, Brian Johnson, and later our sponsoring organization, it began to make sense to us to do a gradual roll-out of the .JOBS TLD, starting with <companyname>.JOBS. After two or three years, when the TLD was more established and we had a critical mass, we could expand the domain to include regional, occupational, and other classes of names, if it made sense to do so.

16. As a logistical matter, in order to achieve a gradual roll-out, we decided that any domain that was not a <companyname> would not be available upon launch. Thus, although we always planned to expand the TLD beyond <companyname>.JOBS, by the time we were actually able to file an application, we had decided that we would launch the TLD with <companyname>.JOBS domain names and would expand after the TLD was more established.

17. As it turned out, however, approximately three years elapsed between the first round of TLD applications and the next application window, which opened in December 2003.

C. ICANN Signals That It Will Accept Applications for Sponsored TLDs

18. One of the first important steps toward the second application process came in October 2002, when ICANN publicly posted a document called “A Plan for Action Regarding New gTLDs.”⁵ That plan, created by ICANN’s then-president, Stuart Lynn, contained a “limited proposal for moving forward with another round of new sponsored TLDs,” also known as sTLDs.⁶

19. sTLDs are a special category of TLD. It is my understanding that, while a generic TLD operates under policies established through the ICANN process, a sponsored TLD serves a specialized community, with the community sponsor carrying out delegated policy-formulation responsibilities over many matters concerning the TLD.

20. I believed that our idea for a jobs-related TLD was a good fit as a sponsored TLD. After all, the goal was to create a name space that was beneficial for

⁵ Stuart Lynn, A Plan for Action Regarding New gTLDs, 18 Oct. 2002, *available at* <http://www.icann.org/en/committees/ntepptf/new-gtld-action-plan-18oct02.htm>, C-6.

⁶ *Id.*

employers, recruiters, and others engaged in human resources, so there was a natural community for our TLD. Moreover, the best way to ensure that the TLD was beneficial to the community was by operating as an sTLD; gTLDs generally do not have the flexibility to control who registers in their domain or what names are registered (beyond some names that are off-limits to all registrants) and traditionally have accepted any and all applications from all comers. For these reasons, I felt that our idea would be a perfect fit in the sTLD application round.

21. Even before I saw Stuart Lynn’s plan about launching sponsored TLDs, I had mentioned to Tom the possibility of partnering with various human-resource-related organizations. But after I saw Stuart Lynn’s plan, Tom and I began to seriously discuss potential sponsoring organizations.

D. SHRM Agrees To Serve as Sponsoring Organization For Our TLD

22. One of the organizations I approached was the Society for Human Resource Management (“SHRM”). Founded in 1948, SHRM is a not-for-profit entity whose mission is to advance the human resource profession and serve the needs of human resource professionals. In 2003, SHRM was the world’s largest organization representing the interests of human resource professionals, and it remains so today. At the time, it had more than 175,000 individual members in more than 120 countries; today, it has more than 250,000 individual members. In my interactions with SHRM, they emphasized the diversity of their membership and their strong belief in the importance of fostering a sense of community among human resource professionals and developing the human resource profession globally. I believed that this focus made SHRM a good fit as a potential sponsoring organization. And SHRM’s broad, international membership

and long-term connection to the community of human resource practitioners made them more than qualified to represent the interests of the .JOBS community.

23. I had several conversations with SHRM, and in particular Gary Rubin (SHRM's Chief Publishing, E-Media and Business Development Officer), about my idea and my plans to work with Tom to apply for an sTLD. SHRM was interested in the idea from the start but wanted to do more research before committing. After several conversations, SHRM was fully on board, and we began more in-depth discussions of how to operate the TLD. With Brian Johnson's help, I coordinated with SHRM to draft the Charter for .JOBS.

24. For an sTLD, the Charter is the document which defines the community, establishes what the TLD is for and who can register, and provides guidelines regarding how the sTLD will operate. In working on the Charter with SHRM, one issue that we discussed in some detail was the scope of the TLD. As I explained above, our plan was to start the TLD with <companyname> registrations. But I explained to SHRM that we envisioned that the domain would evolve and expand to allow for registration of occupational and geographic names. SHRM understandably wanted to retain the ability to veto anything that would not address the needs and interests of the .JOBS community. We agreed to launch with <companynames>; any expansion beyond that would require the approval of SHRM, acting as the sponsoring organization.⁷ However, we also agreed that the <companyname> restriction should not be included in the Charter because the Charter was intended to and does serve as the permanent policy underpinning for the TLD.

⁷ JOBS Registry Agreement, Appendix S, Part I, 5 May 2005, C-19 ("Charter").

25. Another significant area of discussion revolved around whether or not the Charter should include any rules regarding how registrants could use their domains. I had reviewed the Charters for the sTLDs that existed at that time—.MUSEUM, .AERO, and .COOP—and none of them contained any usage restrictions. That, in combination with ICANN’s very strong policy against content regulation, indicated to me that ICANN would be less inclined to approve an sTLD proposal if it included content restrictions. Moreover, I had reviewed ICANN’s statements regarding certain unsuccessful applications from the 2000 round and noted ICANN’s statements that “[t]he concept of a content-restricted TLD presents difficult definitional issues.”⁸ I concluded, therefore, and SHRM agreed, that the better approach for the Charter would be to define the community and then require that the registered names serve the needs of the community. Thus, we agreed that no restriction on name type or usage would appear in the Charter other than to serve the needs of the community.

III. ICANN Approves the .JOBS TLD

A. Employ Media Applies for the .JOBS TLD

26. On December 15, 2003, ICANN published the final RFP soliciting applications for new sTLDs. I had committed to Tom that I would complete the application, but when I saw the final criteria, I knew that I couldn’t do it without help. I recommended that Brian, who was still acting as Tom’s outside counsel, take charge of it. Tom agreed, and Brian was put in charge of managing the application, working closely with me.

⁸ See ICANN, Report on New TLD Applications §§ III.B.1.c, III.B.2, 9 Nov. 2000, available at <http://www.icann.org/en/tlds/report>, C-4.

27. Because we had decided on a phased roll-out, our application focused on <companyname>.JOBS. But we never intended this to be the only type of name that would be registered. As discussed above, we drafted the Charter so that the TLD could evolve, and our intention was that the TLD would evolve. This was reflected in our application. For example, one portion stated:

SHRM and Employ Media have already agreed upon certain policies The Charter is an example. In an additional example, .jobs registrations will only be allowed for domain names which (i) are for the legal name (s) under which a proposed registrant does business (e.g. a trade name such as EIduPontdeNemours.jobs), for a name under which the proposed registrant is commonly known (e.g., dupont.jobs) or which includes such a legal or commonly-known name (e.g., dupontcanada.jobs).

Acting always in the interests of the Community (as assured by SHRM's position in policy creation and modification) and responding to the desires of the Community, additional policies and/or services may be offered under the .jobs sTLD. . . . [I]t is possible that the Community may desire, e.g., the ability to register generic .jobs domains which describe certain occupations (e.g., accounting.jobs).⁹

28. Additionally, because we were not exactly certain how expansion might work and what ideas might prove to address the needs and interests of the community in later years, we tried to leave ourselves as much flexibility as possible. We did not include any restrictions on use or content for names in .JOBS, meaning that later expansion would not be limited by any such restrictions.

29. We submitted our application in March 2004, along with ten other applicants. After the applications were submitted, the non-confidential portions of each

⁹ Employ Media, New sTLD RFP Application at 15, 38, 14 Mar. 2004, *redacted version available at* <http://www.icann.org/en/tlds/stld-apps-19mar04/jobs.htm>, C-9 (“ .JOBS Application”).

application (the parts that described the TLD but not the parts that described financial information) were posted online for public comment.¹⁰ ICANN received only seven comments about the .JOBS application. The seven commenters did not particularly understand the value of the TLD but did not have strong objections either.¹¹

B. ICANN Approves The .JOBS Application and We Negotiate the Registry Agreement

30. After we submitted our application, ICANN spent several months evaluating it. During that time, although we were in frequent contact with ICANN, ICANN never asked us to change our Charter or our definition of the community, nor did they ask us to include any restrictions on how domain names in the TLD could be used or what content could be on the websites.

31. Following the evaluation, on December 13, 2004, the ICANN Board unanimously approved our application:

Resolved (04.__) the board authorizes the President and General Counsel to enter into negotiations relating to proposed commercial and technical terms for the .JOBS sponsored top-level domain (sTLD) with the applicant. During these negotiations, the board requests that special consideration be taken as to how broad-based policy-making would be created for the sponsored community, and how this sTLD would be differentiated in the name space.

Resolved (04.__) if after entering into negotiations with the .JOBS sTLD applicant the President and General Counsel are able to negotiate a set of proposed commercial and technical terms for a contractual arrangement, the

¹⁰ See ICANN: Progress in Process for Introducing New Sponsored Top-Level Domains, 19 Mar. 2004, *available at* <http://www.icann.org/en/announcements/announcement-19mar04.htm>, C-10.

¹¹ See ICANN Archive of Public Comments, 18 May 2004, *available at* <http://forum.icann.org/lists/stld-rfp-jobs>, C-11.

President shall present such proposed terms to this board, for approval and authorization to enter into an agreement relating to the delegation of the .JOBS sTLD.¹²

32. Approximately two months later, Brian Johnson and I began negotiating the details of our Registry Agreement with ICANN. Our primary contacts during that process were Kurt Pritz, a Senior Vice President with ICANN; John Jeffrey, ICANN’s General Counsel; and Dan Halloran, ICANN’s Deputy General Counsel.

33. Negotiations started with a template agreement provided by ICANN staff and containing ICANN’s standard boilerplate.¹³ After reviewing the template agreement, we drafted various provisions related to our sTLD, at ICANN’s request. There were very few, if any, changes to the body of the agreement, which was drafted by ICANN.

34. The .JOBS Registry Agreement reaffirmed that the .JOBS sTLD is to “serve the needs of the international human resource management community,”¹⁴ describing that community as follows, exactly as it had been described in the application (notably, this description has never changed):

‘Human resource management’ is the organizational function that focuses on the management and direction of people. The Community consists of those persons who deal with the human element in an organization—people as individuals and groups, their recruitment, selection, assignment, motivation, compensation, utilization, services,

¹² ICANN Special Meeting of the Board, Board Resolutions on .JOBS sTLD Approval to Enter Negotiations, 13 Dec. 2004, *available at* <http://www.icann.org/en/minutes/resolutions-13dec04.htm>, C- 12 (“ICANN Board Resolutions on .JOBS sTLD Negotiation”).

¹³ *See* Email and Attachment from Kurt Pritz to Tom Embrescia, 8 Feb. 2005, C- 13.

¹⁴ Charter, C-19.

training, development, promotion, termination and retirement.¹⁵

35. Consistent with the Board resolution requiring that special consideration be taken as to broad-based policy-making, we included policy-making procedures—including a Policy Development Council—that was patterned after ICANN’s own Policy Development Process at the time.

36. In addition to the authority to initiate the PDP (the process by which TLD policy could be implemented or changed), the Registry Agreement provides that Employ Media would have the authority to develop policy related to the:

1. Establishment of naming conventions to be used in the Sponsored TLD.
2. Restrictions on what types of people or entities may register Registered Names (which need not be uniform for all names within the Sponsored TLD), provided that the scope of the Charter . . . is not exceeded.
3. Restrictions on how Registered Names may be used (which need not be uniform for all names within the Sponsored TLD) provided the scope of the Charter . . . is not exceeded.¹⁶

37. The only restrictions on these delegated authorities are in the Charter.

Broadly speaking, the Charter requires that Employ Media act:

in 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.”¹⁷

¹⁵ *Id.*

¹⁶ JOBS Registry Agreement, Appendix S, Part II, 5 May 2005, C-19.

¹⁷ Charter, C-19.

38. Likewise, registration requirements approved by SHRM must be “consistent with th[e] Charter and in the interests of the [.JOBS] Community.”¹⁸

39. Aside from the requirement that .JOBS be operated to serve the needs of the .JOBS community, the only other restriction we included in the Charter is the limitation on who may request registrations in the .JOBS sTLD. Registration may be requested by either:

- members of SHRM; or
- persons engaged in human resource management practices that meet any of the following criteria: (i) possess salaried-level human resource management experience; (ii) are certified by the Human Resource Certification Institute; (iii) are supportive of the SHRM Code of Ethical and Professional Standards in Human Resource Management, as amended from time to time, a copy of which is attached hereto.¹⁹

40. As already noted, SHRM and we intentionally drafted the Charter so that it didn’t limit domain names or how they could be used, so long as it served our community. At no point during the negotiations did ICANN request, or even suggest, that we alter the definition of our community in any way, or make any changes or add any restrictions to our Charter. We were relying on the fact that the Registry Agreement provided that the authority delegated to Employ Media and SHRM included the authority to establish restrictions on how domain names could be used—but it would be up to Employ Media and SHRM, not ICANN, to determine if such restrictions should be added.

¹⁸ *Id.*

¹⁹ *Id.*

41. We finalized the draft Registry Agreement with ICANN in March 2005, and ICANN subsequently posted that draft to its website.²⁰ The ICANN Board unanimously approved the final agreement in April 2005. The resolution is attached to my statement.²¹ As the resolution demonstrates, the Board's only concern with the draft Registry Agreement was that we ensure that the names of countries and distinct economies were reserved from registration. In consultation with ICANN's outside counsel, Esme Smith, we proposed incorporating a list of countries published by the International Organization for Standardization, and agreed to reserve additional entities in the future if ICANN so directed. This proved satisfactory, and we executed the final .JOBS Registry Agreement on May 5, 2005, with no changes in the definition of the .JOBS community or the Charter.

IV. Initial Operations

42. Following the execution of the Registry Agreement, .JOBS launched in June 2005. We timed the launch so that we could publicize the new TLD and begin accepting applications at SHRM's annual meeting. The technical work to add .JOBS to the root was completed in the next few months, and domain names in .JOBS began resolving sometime around the end of August or early September 2005. Just prior to launch, we registered over a thousand names to Employ Media that we might later

²⁰ See Press Release, ICANN, ICANN Completes Negotiations with Applications for .JOBS and .TRAVEL, 2 Apr. 2005, *available at* <http://www.icann.org/announcements/announcement-24mar05.htm>, C-15.

²¹ ICANN Board Meeting Minutes, 8 Apr. 2005, C-18.

include in our TLD. These were names such as accounting.jobs, California.jobs, workathome.jobs, and the like.²²

43. Shortly after launch, Employ Media also established a website where community members or others could post comments or suggestions about the sTLD. For the most part, very few comments or complaints were received. Notably, in April 2009, we received a comment asking that owners of .JOBS domains be allowed to post job placement information for third parties on the basis that such usage was clearly in line with the sTLDs purpose of providing job placement information.

44. Aside from receiving very few complaints about our operation, our registration policies were proving in practice not to be causing any trademark or copyright infringement claims. Moreover, a 2007 ICANN audit of “Employ Media’s business and internal operations as they relate to the shared registration system available to all ICANN-Accredited Registrars” confirmed that Employ Media was “compliant in all areas tested.”²³

A. Employ Media and SHRM Begin Discussing Possible Expansion

45. Of course, we had not forgotten our expansion plans. From the time we had launched, we had received a steady stream of requests for non-company names to be used for multiple-employer job listings. Shortly after .JOBS launched in the summer of 2005, Tom held a series of meetings with various fee-based online job boards, including Monster.com, HotJobs.com, and CareerBuilder.com.²⁴ Around the same time, I made a

²² Employ Media paid ICANN a \$2.00 annual fee for each of these registrations.

²³ Emails between Stacy Burnette and Ray Fassett, 10 Sept. 2007-3 Oct. 2007, C-25.

²⁴ CareerBuilder.com expressed interest in working with .JOBS initially. For some time, they offered their clients the opportunity to register for a .JOBS domain as part of

presentation to an organization called DirectEmployers Association (“DirectEmployers”), a not-for-profit association of employers who were actively working to “improve labor market efficiency through the sharing of best practices, research and the development of technology.”²⁵ The goal of all of these meetings was to promote our new TLD and to explore potential opportunities to cooperate in offering new and beneficial services to the .JOBS community. During these meetings, several of the fee-based job boards expressed interest in acquiring <non-companynames> domain names. We responded that we were focused on <companynames> domain names for now but would likely expand in the future.

46. At various times between 2005 and 2009, however, we had allowed registration of certain <non-companynames>. For example, following Hurricane Katrina, we coordinated with CareerBuilder.com to create Katrina.JOBS as a means to help those who were out of work and/or displaced because of the hurricane to find employment and get back on their feet.²⁶ Similarly, we allowed the city of Buffalo, New York, to create TakeTheTest.JOBS to help them recruit police officers. My

an overall “Brandbuilder” website design and hosting package that they were selling to corporate clients for \$25,000. Employ Media, however, was selling its <companynames>.jobs domains at significantly lower prices, and so we concluded we could sell more domain names on our own with our lower price point.

²⁵ DirectEmployers, *available at* <http://www.directemployers.org> (last visited 21 June 2012), C-141.

²⁶ John Zappe, *Dot-Jobs Gets First Use as Katrina Job Board*, Workforce, 26 Sept. 2005, *available at* <http://www.workforce.com/apps/pbcs.dll/article?AID=/20050926/NEWS01/309269997&template=printarticle>, C-21. I did receive one communication from someone at ICANN regarding this registration. Mike Palage, who was then a member of the ICANN Board, called to discuss the site—his only concern was how we were going to “pick and choose” what natural disasters or crises to become involved with. He did not express any other concerns with any other aspect of the site.

understanding is that this local recruitment campaign was extremely successful, with over 7,000 job applications downloaded from the site.²⁷ In mid-2007, the discussion about noncompany names was further advanced by a number of current events. One was a SHRM report on trends in the human resource industry that noted increased reliance on specialized or niche job boards to reach job-seekers.²⁸ It struck me that expanding .JOBS was one obvious way to meet this growing need of the community. The second was the announcement that the federal government was going to stop subsidizing America's Job Bank ("AJB"), a long-standing service that allowed employers to list job openings for free. I knew that the human resource community was extremely interested in finding a replacement for AJB. Among other things, AJB had been the only one of the generally-accepted national job boards that was a free service, and using one of the generally-accepted boards was the most reliable way for employers and state work force agencies to demonstrate to the federal government that they were complying with national listing requirements for federal funding eligibility. Third, the extraordinary success of Google influenced how job seekers were using the internet to search for jobs, and employers and their recruiters needed to respond to these developments.

47. During the same time frame, we began to feel that the TLD, and the sites within it, were less valuable because potential users (i.e., job-seekers) would attempt to visit other .JOBS sites (such as nursing.JOBS or seattle.JOBS) and find they didn't exist.

²⁷ David Bertola, Buffalo Police on Recruiting Mission, Business First, 1 Nov. 2006, C-23.

²⁸ Society for Human Resource Management, 2007 Advances in E-Recruiting: Leveraging the .JOBS Domain, June 2007, *available at* http://www.goto.jobs/advances-erecruiting_07.pdf, C-24.

We were pleased that a number of prominent companies had registered <companynames> and that they were marketing their .JOBS domain names as part of their recruiting efforts, but we felt that people who heard about the names from that advertising would be disappointed—and less likely to visit the TLD again—if they tried to visit other, non-existent sites. It seemed reasonable to us that because it would serve our community and would make the existing <companyname>.JOBS domain names even more valuable, the time had come to begin our expansion to allow registration of geographic, occupational, and industry names. So in June 2008, we began publicly discussing the fact that we were considering expansion to allow registration of <non-companynames>, though such plans were still contingent on our on-going discussions with SHRM.²⁹

48. Importantly, along with discussing our potential expansion plans with SHRM, we also informed ICANN of those plans. Craig Schwartz, ICANN’s Chief Registry Liaison, visited our offices in February 2009. According to my contemporaneous notes summarizing that meeting for our records:

We asked if Employ Media was in contractual compliance. Craig stated we were. . . . Craig intimated ICANN’s desire to have contract compliance be attainable for registries to achieve vs. more of a micro managing approach...does not see ICANN’s role to be [] in the middle of a TLD business and noted even further the delegated policy responsibilities that an sTLD inherently has (meaning ICANN is intentionally one step farther removed). **Tom mentioned repeatedly our [intended] delegation of certain names such as newyork.jobs at our discretion. Craig offered no objectionable reason to doing so.** [sic] Ray mentioned on a number occasions [sic] SHRM’s recent

²⁹ For example, Brian Johnson gave a video interview that was later posted on a news site targeted at job board operators where he discussed Employ Media’s potential expansion.

advice for Employ Media to consider an initiative that enables .jobs to be of greater relevance to search engines (including the use of exact match domain names to job seeker search queries i.e. sales.jobs and dallas.jobs). Ray mentioned SHRM's advice to Employ Media to assist employers to make their actual jobs (different than just their jobs web site) more relevant to search engines potentially to reduce employer listing fees. Craig intimated the idea made sense and offered no red flags of objection including for any sort of reason contract related. . . . Craig complimented Tom as a businessman that has "higher bar"—including integrity - for those he has around him in key managerial positions.³⁰

Additionally, the day after the meeting, Craig Schwartz emailed me and Tom, thanking us for the visit and stating that "I feel that we have a very good working relationship and that I can easily approach you with any concerns or issues that might arise."³¹

B. DirectEmployers Association Proposes An Expansion Platform

49. In early 2009, I spoke with Bill Warren and his team at DirectEmployers.³² DirectEmployers is a non-profit association of employers, including more than 500 Fortune 5000 companies, who joined together to share online recruitment strategies and to pool their resources to make online recruiting more efficient and cost effective.³³ Because DirectEmployers' business and affairs are managed by a Board of Directors consisting of member company representatives, it acts in the interests of the member employers, not for any profit motive. Notably, DirectEmployers' interests are

³⁰ Employ Media Meeting Minutes, 23 Feb. 2009, C-26 (emphasis added).

³¹ Email from Craig Schwartz to Ray Fassett and Tom Embrescia, 24 Feb. 2009, C-29.

³² DirectEmployers, *available at* <http://www.directemployers.org/about/member-companies> (last visited 21 June 2012), C-133.

³³ DirectEmployers, About, *available at* <http://www.directemployers.org/about> (last visited 21 June 2012), C-131.

not separate from the interests of the individual members. DirectEmployers was and still is a one-of-a-kind association; since I first heard of DirectEmployers in 2002, I had been interested in hearing their ideas for the .JOBS community. As I mentioned earlier, I had met with DirectEmployers in 2005 regarding their ideas. In early 2009, DirectEmployers ultimately offered a proposal for a series of sites using geographic, occupational, and industrial terms, where any employer could list jobs, for free, on any site with a relevant name. For example, a hospital in Cleveland could list an opening for a nursing job on Nursing.JOBS, Cleveland.JOBS, Hospital.JOBS, and so on.

C. Employ Media Discusses Possible Expansion with Other Parties

50. We certainly were interested in DirectEmployers' proposal, but at the same time, we were exploring other options for expansion. In March 2009, Tom reached out to a number of entities, including Monster.com, CareerBuilder, and Yahoo! (which had acquired HotJobs).³⁴ Tom informed all of them that the expansion plan was "now official" and that:

[a]s web sites, future examples include: www.sales.jobs, www.retail.jobs., www.marketing.jobs, www.dallas.jobs, www.chicago.jobs, www.newyork.jobs, www.nurse.jobs, www.90210.jobs, www.london.iobs, www.india.jobs. When including combinations, and on a global scale, the names we plan to release is nearly endless along with the potential impact upon user search for jobs on the Internet.³⁵

51. Also in March 2009, we posted a link on our website announcing the expansion. It did not take long for our plans to become public knowledge. In April

³⁴ See, e.g., Email from Tom Embrescia to Gary Rubin, 24 Feb. 2009, C-27.

³⁵ See, e.g., Letter from Tom Embrescia to Jeff Kinder, 2 Mar. 2009, C-31. Additionally, in May 2009, Gary Rubin, a SHRM Vice President, put Tom in touch with Job Target, a SHRM vendor, to discuss possible expansion plans.

2009, Ere.net (“ERE”)—a website that reports on online recruiting issues, particularly related to job boards, and is affiliated with an association of fee-based job boards called the International Association of Employment Web Sites (“IAEWS”)—published an article stating that Employ Media was “weighing the possibility of opening up the registry to allow regional and occupational names,” and quoting Tom as saying it was likely that “the addresses would go to job boards, social networks, or other organizations.”³⁶ We were very clear as to our plans.

D. The Shared Domain Beta

52. After continued conversations with DirectEmployers (and after SHRM agreed that it was time to expand), we decided that the best way to evaluate their proposal for expansion was through a beta test. The term “beta test” is borrowed from the world of software development. A beta test is essentially an external pilot program that allows the intended customers to try out and evaluate the product. We referred to the test as a “shared domain beta” because it allowed a single domain to be used for multiple-employer job listings.

53. The beta test had several goals: we wanted to make sure that search engines like Google would recognize the domain names and would include “jobs” as a keyword even though it was the TLD (a theory we had been hoping to test for many years). We also wanted to make sure it was valuable to employers and that employers would actually use it—that is, that it would help human resource personnel perform their recruiting function. For this reason, we formed a “.JOBS Advisory Council,” composed

³⁶ John Zappe, Dot-JOBS Addresses Could Be Opened Up, Ere.net, 29 Apr. 2009, available at <http://www.ere.net/2009/04/29/dot-jobs-addresses-could-be-opened-up>, C-33.

of nearly 50 human resource professionals from Fortune 5000 companies to consult with employers, test their reaction to the beta, and gather suggestions for improvement.³⁷ We were serious about learning from our community and were committed to making the expansion as useful as possible.

54. The beta test launched in mid-August 2009 with a few hundred domain names, and it quickly became obvious that it was a success with our community. In mid-September, after the first 30 days of being live on the Internet, there were over 5,000 unique visitors and more than 18,000 page views. Among the individuals that signed up to post jobs on the beta test were representatives from IBM, Hyatt, General Dynamics, Lockheed Martin, ABB, and Nestle. The sites were being indexed by Google and Bing immediately, and some were even appearing on the first page of Google search results. The usage data also indicated that visitors to the beta were following links to employers' websites, meaning that those websites were attracting more visitors as a result of the beta. We received valuable feedback from the beta test and from the .JOBS Advisory Council. In particular, the Council suggested that the beta could be improved by the implementation of "premium placement"—allowing employers to purchase fixed positions at the top of the lists in certain domains for a set amount of time in order to achieve greater visibility (such as in the case of an urgent hiring need).

55. Not only was the beta used by the .JOBS community, it was also widely publicized by DirectEmployers and attracted a fair amount of public attention.³⁸ This

³⁷ See, e.g., Email from Bill Warren to Ray Fassett, 27 May 2009, C-44; Email from Bill Warren to Ray Fassett, 29 May 2009, C-44; Email from Bill Warren to Ray Fassett, 17 June 2009, C-44.

³⁸ Bill Warren, White Paper: Dot-Jobs (.JOBS) Universe, DirectEmployers, Jan. 2011, available at <http://de.nlx.org/pdfs/white-papers/wp-dotjobs.pdf>, C-117; Christopher S.

also meant that it generated objections from some existing, fee-based job boards that wanted to avoid competition. These fee-based job boards, otherwise natural competitors, banded together to work against us, forming the so-called Coalition for .JOBS Charter Compliance; until then, they acted as the IAEWS Task Force, cooperating to oppose the planned expansion of .JOBS.

V. ICANN Eventually Approves the .JOBS Expansion

A. ICANN Staff Initially State Employ Media is in Compliance

56. In October 2009, one of those opponents, ERE, contacted ICANN to ask about the beta test.³⁹ Craig Schwartz showed me an email from ERE while we were both attending the ICANN meetings in Seoul, South Korea.⁴⁰ Craig was aware of the beta. The email described the most pertinent aspects of the domain, which was that geographic and occupational names were being used by DirectEmployers to list job postings collected from multiple employees. I told Craig that ERE was just trying to create trouble because its readership and advertisers—primarily representatives of online job boards—didn't like the idea of increased competition in online recruitment, and I also told him that our community was dynamic and robust, and full of different interests and perspectives. Not everyone in the community would agree on everything, but ICANN

Rugaber, Pioneer of Online Job Search Starts Over Again, U.S. News Today, 26 Feb. 2010, *available at* http://www.usatoday.com/tech/news/2010-02-26-online-jobs_N.htm, C-54; John Zappe, A Universe of .Jobs Job Boards Is Set to Launch, Ere.net, 10 Nov. 2009, *available at* <http://www.ere.net/2009/11/10/a-universe-of-jobs-job-boards-is-set-to-launch>, C-40.

³⁹ Email from John Zappe to Michele Jourdan, 28 Oct. 2009, C-36. A similar email was sent to SHRM. Email from David Manaster to Gary Rubin, 24 Oct. 2009, C-36.

⁴⁰ Email from John Zappe to Michele Jourdan, 28 Oct. 2009, C-36.

has never required that sponsored communities be unanimous—only that they have some broad common interests.

57. Later that day, Craig emailed me and told me that he had responded to ERE, “[s]tat[ing] that Employ Media LLC is operating in compliance with its registry agreement.”⁴¹ When he made that statement, there is no doubt in my mind that Craig knew we had launched the beta test and what the beta test encompassed, i.e., <non-companynames> with listings from multiple employers on any one page.

58. Despite what Craig had told me, a few days later he informed me that ICANN would be conducting a compliance review of .JOBS.

B. ICANN Conducts a Compliance Review

59. We were certainly surprised. Based on my conversations with Craig, including our discussion about Employ Media’s expansion at the meeting in February 2009, we didn’t think ICANN would object to our expansion. We thought that ICANN was just trying to demonstrate that it had covered all of its bases in case there were further questions from a motivated minority, as those complaining appeared to be.

60. We received a list of contract compliance questions from ICANN that same day. The questions focused on (1) whether job boards are in compliance with the .JOBS application and Charter; (2) Employ Media’s registration of certain names, including names using geographic or occupational identifiers; (3) Employ Media’s domain name registration practices (in particular, whether Employ Media intended to reserve certain names by registering certain names); (4) failure of certain domain names to resolve and/or redirection from those names; (5) participation of other registrars and

⁴¹ Email from Craig Schwartz to Ray Fassett, 28 Oct. 2009, C-37.

community interests in the .JOBS domain.⁴² The letter also attached records for the registration of several of the names in the beta.

61. From our perspective, these questions were the result of the fact that many of the new ICANN personnel were not familiar with our TLD and its history, in particular the fact that we had discussed potential expansion with ICANN during the initial negotiations for the Registry Agreement. Thus, we were confident that if we explained the history to them, we would satisfy their concerns. We prepared a draft of our answers to their questions and sent the draft to ICANN in early December 2009.⁴³

62. The next week, on December 9, several ICANN staff met with us at our office to discuss the compliance review. At that meeting were David Giza, ICANN's Senior Director of Contractual Compliance; William McKelligot, an ICANN auditor; and Samantha Eisner, an ICANN attorney. Each of these individuals was new to ICANN in the previous 12 months or so. I recall that during that meeting, Brian, Tom, and I discussed the beta with them, including the use of geographic and occupational names and the fact that the beta was designed to include listings from multiple employers on the same site at no charge to the company, and explained why we had chosen to work with DirectEmployers. David told us that he did not see any serious infractions resulting from the beta, and certainly nothing that would cause a breach letter. He explained that we could fix any problems through an "amicable" remediation plan that would give retroactive approval for the expansion. He assured us that this remediation could be done while the beta stayed live and that this approach would help us to avoid a legal

⁴² Email from David Giza to Ray Fassett, 24 Nov. 2009, C-41.

⁴³ Letter from Brian Johnson to David Giza, 4 Dec. 2009, C-42.

dispute—which we had made clear we wanted to avoid. It seemed to all of us that David’s concern didn’t relate to the substance of our expansion plans but rather to making sure that all of ICANN’s procedures were followed.

63. The next week, on December 14, 2009, we sent David Giza a revised version of our draft response to ICANN’s compliance questions, based on our conversations during their visit. In particular, we noted that our Charter did not make any distinction between different types of entities or organizations, including job boards or similar sites. We told him that:

for every .jobs domain name registration, the .jobs Charter requires that the person applying be a member of the global HR management Community. In this light, a “job board or similar site” can qualify if the domain name is submitted by a member of the global HR management Community (the same qualification criteria as for any other type of entity or organization).⁴⁴

64. We sent these responses to ICANN, again in draft form in an effort to cooperate and work constructively with ICANN. We asked David to let us know if he had any questions about our responses. We were extremely surprised when, on January 20, 2010, ICANN sent us an email notifying us that we were in violation of our Registry Agreement.

65. According to the letter, there were three categories of names in the beta that were of particular concern to ICANN:

- Two character registrations entered against the terms set forth by ICANN in response to Employ Media’s 2008 request, including a press release and notice to the ccNSO and the GAC;
- Geographic names; and

⁴⁴ Letter from Ray Fassett to David Giza, 14 Dec. 2009, C-43.

- Industry and occupational identifiers.⁴⁵

66. The letter also asserted that we had failed to comply with the policy development process. According to ICANN, the restriction to <companyname>.JOBS names was a community policy that could not be changed without a PDP.

67. Notably, however, the letter concluded that “ICANN does not suggest that policies allowing the use of the shared domains set forth in the beta could not be reached; however, EmployMedia has not yet deployed nor followed the proper processes.”⁴⁶

68. This letter was not made public, and in fact, we were told that ICANN’s practice was to allow remediation attempts before making any potential breaches public and that ICANN’s breach notice would only become public if remediation did not succeed. Based on the letter’s conclusion and ICANN’s statements about what we had been doing and what remediation steps would be required, we still believed that we could resolve ICANN’s newly-developed concerns. Thus, we immediately proposed a remediation plan, including a PDP, where the .JOBS community would have the opportunity to weigh in to evaluate our expansion proposal.

C. Employ Media Goes Through the Remediation Process

1. ICANN Instructs Employ Media Regarding Remediation Steps Based on Knowledge of the Beta and Employ Media’s Expansion Plans

69. On January 21, 2010, we discussed with ICANN, specifically David Giza and William McKelligot in Contract Compliance, what they generally expected to see in a remediation plan. Several days later, on January 25, 2010, we provided ICANN with

⁴⁵ Email from David Giza to Tom Embrescia and Ray Fassett, 20 Jan. 2010, C-45.

⁴⁶ *Id.* at 6.

a proposed remediation plan. The remediation plan provided that Employ Media would invoke the PDP to evaluate the benefits of two-character names, geographic names, and industry/occupational identifiers.⁴⁷

70. About two weeks later, ICANN responded that the proposed remediation steps were not sufficient. ICANN staff apparently had decided, despite what had been said before, that we would have to take down the shared domain beta before doing anything else. On that same day, we had a phone conversation with David Giza, ICANN's Director of Contract Compliance. He told us that it wouldn't be possible to obtain retroactive approval, which was precisely the opposite of his earlier position that we could get retroactive approval. He also said that we should take down the sites in the beta if we wanted to avoid a legal dispute. Tom always prefers to avoid legal disputes and would much rather work cooperatively wherever possible, so we agreed to take down the names from the beta, even though this was an extraordinarily difficult step for us to take.

71. A letter from David on February 5, 2010, also stated that "ICANN is not a proper overseer of a sponsoring organization's policy development and will not approve any interim parts of SHRM's process."⁴⁸ ICANN noted that there had been substantial communication between ICANN and Employ Media about the beta, and that ICANN had learned of DirectEmployers' plan to launch 25,000 domain names. ICANN urged Employ Media not to move forward with the registration of those 25,000 domain names

⁴⁷ .JOBS Remediation Plan, 25 Jan. 2010, C-46.

⁴⁸ Letter from David Giza to Ray Fassett, 5 Feb. 2010, C-49.

until “the proper processes have occurred.”⁴⁹ In fact, I believe it was DirectEmployers’ announcement that it was planning to launch so many new names, and the resulting pressure from our opponents,⁵⁰ that led ICANN to force the take-down of the beta.⁵¹ ICANN did not request that we unregister the names, only that we stop them from functioning, which we did.

72. Based on this letter and my conversation with David Giza, we shut down the beta test. ICANN very clearly informed us what steps would be required next: first a PDP, then a Registry Services Evaluation Request (“RSEP”), and finally an amendment to the .JOBS Registry Agreement.⁵² We agreed to go through these steps based on the understanding that the remediation steps would allow us to re-institute and expand the platform that we had tested in the beta, so long as that program was properly approved by a PDP. ICANN’s official communications (not to mention our frequent contact with ICANN staff) were very clear on this point. The authority to make policy for the sTLD resided with us (SHRM and Employ Media), not ICANN. ICANN’s position was that we needed to undertake these steps to demonstrate that our

⁴⁹ *Id.*

⁵⁰ John Zappe, .Jobs Universe Project Explained In Meetings, Ere.net, 29 Jan. 2010, available at <http://www.ere.net/2010/01/29/jobs-universe-project-explained-in-meetings/>, C-48; Peter M. Zollman, 25,000 New Dot-Jobs Sites Launch Next Week, 29 Jan. 2010, AIM Group, available at <http://aimgroup.com/2010/01/29/25000-new-dot-jobs-sites-launch-next-week/>, C-47. See also Letter from David Giza to Ray Fassett, 5 Feb. 2010, C-49.

⁵¹ Letter from John Jeffrey to Brian Johnson, 27 Feb. 2011, C-125.

⁵² .JOBS Remediation Plan, 25 Jan. 2010, C-46; Letter from David Giza to Ray Fassett, 5 Feb. 2010, C-49; Letter from Kurt Pritz to Tom Embrescia, 2 Mar. 2010, C-56.

policy-making authority had been exercised in accordance with the requisite procedures. ICANN made it clear to us that from its perspective, this was a matter of procedure.

73. For instance, in the February 5, 2010 letter that resulted in the take-down of the beta, ICANN wrote:

While the action items identified in Employ Media's proposed remediation plan may ultimately be the steps required to operate the shared domain beta in compliance with the Registry Agreement, they are not the proper steps to remediate the current violations of the Registry Agreement. The proper action at this time is for Employ Media to make all registrations in the shared domain beta stop resolving in the DNS. Employ Media can then work to initiate the proper processes, applications and approvals, as necessary, to craft the proper scope of allowable registrations in the .JOBS sTLD.

Employ Media's contractual obligation to ICANN is to confirm that SHRM independently operates a Policy Development Council (including the selection of the membership) as well as the policy development process, and to make sure that any proposed policy changes arising out of the policy development process and presented to Employ Media for implementation are properly documented.

Once Employ Media is in compliance with the Registry Agreement, ICANN will be in a position to evaluate any properly initiated requests for new registry services or amendments to the Registry Agreement.⁵³

74. For the reasons that I've explained above, we did not believe that the beta test put us out of compliance. Nonetheless, for the sake of moving the process forward, we decided not to fight this particular battle and to state that by taking down the beta, the allegation that we were out of compliance would be put to rest. In a letter dated February 23, 2010, ICANN confirmed that we had "returned to compliance" by taking

⁵³ Letter from David Giza to Ray Fassett, 5 Feb. 2010, C-49.

down the beta.⁵⁴ A week later, ICANN wrote that: “From the information currently available to ICANN, the proposed implementation of the entire shared domain system would require a submission of a Registry Services Evaluation Request (“RSEP”) and would require an amendment to the Registry Agreement.”⁵⁵

75. In late March, after we had taken down the beta and ICANN had confirmed that we were once again “in compliance,” Tom and I had a telephone conversation with Kurt Pritz, Craig Schwartz, and Patrick Jones to discuss these steps.

76. We agreed on this call that a PDP conducted by SHRM would address whether and how non-company names could be used to serve the needs of the community. The RSEP would address only phased allocation of those names.

77. Also during this call, Kurt, Craig, Patrick, and I together came to the conclusion that the RSEP request should be structured like previous RSEPs. Accordingly, the RSEP would address the class of names that we wanted to begin allocating (<non-companynames>) and the methods of allocation. This would preserve the proper roles of the parties: the PDP Council and the SHRM Executive Committee would review and decide upon new policy for the sTLD—that is, determining if and how the availability of additional names and the use of the names in the sTLD might be beneficial to the community. Employ Media would then coordinate with ICANN through the RSEP so that ICANN could determine whether the implementation of the new registry service would pose any security, stability, or significant competition issues,

⁵⁴ Letter from David Giza to Brian Johnson, 23 Feb. 2010, C-52.

⁵⁵ Letter from Kurt Pritz to Tom Embrescia, 2 Mar. 2010, C-56.

per the terms of the Registry Agreement. We agreed to work cooperatively on any contract amendments necessary to allow the registration of the new types of names.

78. Additionally, this approach would allow us greater flexibility than simply having ICANN approve the shared domain beta alone. We were still interested in hearing other proposals from the community about how we could expand, and not necessarily just from DirectEmployers. As I told Craig several times in various conversations in this time period, we anticipated that we would select and implement DirectEmployers' proposal once expansion was approved, but our RFP truly would be open and it was certainly possible that we'd select multiple proposals, or even select another proposal instead of DirectEmployers'. For instance, in April 2010, I sent Craig a link to the White Paper prepared by DirectEmployers that described their plans for the .JOBS expansion, noting that "this is just one example of a Charter eligible party standing by to submit its proposal (that, as we've said, also happens to be one we think is sound)."⁵⁶

79. The White Paper also described DirectEmployers' proposal:

All employers worldwide, regardless of size or industry, can post jobs at no cost. Since this is not a million job boards but rather one dynamic jobs platform, it will provide a single interface for posting jobs to niche, targeted locations. Automated job feeds and single postings will only be accepted from vetted employers and, when the .jobs TLD build-out is complete, all jobs will automatically appear in the appropriate city, state, country, and occupational .jobs URLs. Job seekers will be able to enter a desired city, state, geographic region, country, or occupation plus .jobs (Atlanta.jobs, Georgia.jobs, etc.) in their browser for immediate access to relevant jobs.

⁵⁶ Emails between Ray Fassett and Craig Schwartz, 27-28 Apr. 2010, C-74A.

The .jobs platform offers distinct advantages for both employers and job seekers. It provides the only search engine on the Internet where job seekers can search all jobs across employer career sites with results that are guaranteed to be real jobs from real employers and free of scams, duplicate job listings, and old or expired jobs.⁵⁷

I later noted to Craig that this actually put DirectEmployers at something of a disadvantage in our planned RFP—everyone knew what their plan was, and could try to come up with more attractive proposals that would beat it. Employ Media, of course, would have loved that. As I told Craig, we wanted lots of applicants to submit proposals. The more proposals we got, the more likely we were to get lots of good ideas that would serve the community.

80. All of this was fully discussed and understood by me, Tom, Kurt, Craig, and Patrick: we would follow ICANN’s latest instructions to conduct a PDP, submit an RSEP request if the PDP were successful, and seek contract amendments if needed. If we successfully completed that process, we would have the certainty to allocate and use <non-companynames> as we had proposed, including for the purpose of re-starting the original beta test in some form.

2. SHRM Conducts A PDP Per ICANN’s Instructions

81. Per ICANN’s instructions, SHRM prepared to conduct a PDP by appointing a PDP Council to evaluate our proposal, after which, if the PDP Council voted to approve it, the SHRM Executive Committee would have the opportunity to approve or reject the proposal. Initially, both SHRM and Employ Media thought that the most efficient way to conduct a PDP would be to draw PDP members from the .JOBS

⁵⁷ Bill Warren, White Paper: Dot-Jobs (.JOBS) Universe, DirectEmployers, Jan. 2011, available at <http://de.nlx.org/pdfs/white-papers/wp-dotjobs.pdf>, C-117.

Advisory Council, because they were both representative of the community and already familiar with the plan so they could quickly evaluate it. However, SHRM became worried that the PDP council, as originally constituted, might give the appearance of lacking adequate balance and impartiality. Thus, even though the originally-appointed members of the PDP approved the expansion, SHRM insisted that we discard that result. SHRM then constituted a new PDP council.

82. In mid-February, SHRM began appointing members to the new PDP Council, taking care to ensure that the membership was representative of major constituencies of the community, including small employers, large employers, government, private industry, an IAEWS representative, and so on. By March 30, the full PDP Council had been appointed. The PDP Council met five times between April and June 2010.⁵⁸

83. SHRM and Employ Media had already publicly posted our proposed amendment to the policy.jobs website. The proposed amendment was to eliminate any “policies, practices or business rules” that prevented Employ Media from “provision[ing], allocate[ing], register[ing] (to third parties or itself), allow[ing] use of in the DNS (by third parties or itself), reserve[ing] or remov[ing] from reserve, any <non-companyname> domain names, including industry and occupational domains, geographic domains, dictionary term domains and two-character domains.”⁵⁹ Before the Council’s first

⁵⁸ .JOBS PDP Council Conference Call Meeting Minutes, 9 Apr. 2010, C-70; .JOBS PDP Council Conference Call Meeting Minutes, 15 Apr. 2010, C-73; .JOBS PDP Council Conference Call Meeting Minutes, 28 Apr. 2010, C-75; .JOBS PDP Council Conference Call Meeting Minutes, 30 Apr. 2010, C-76; .JOBS PDP Council Conference Call Meeting Minutes, 3 June 2010, C-81.

⁵⁹ Notice of Decision on Employ Media Proposed Amendment Concerning .JOBS TLD at 2, 3 June 2010, *available at* <http://www.policy.jobs/>, C-116 (“Notice of Decision”).

meetings, we provided SHRM with materials to present to the Council for their deliberations. These materials stated that if the Council approved the proposal:

Employ Media’s provisioning, allocation, registration, use in the DNS (and allowance of third party use in the DNS), reservation or removal from registration of any non-“companyname” domain would still be governed by the terms of the .jobs Charter. In the immediate sense, it appears that Employ Media would potentially accept (but would not be required to accept) requests for proposals for allocating/using non-companyname” domains, and **would likely continue a previously launched, and recently ceased, shared domain beta test in some form or fashion consistent with the terms of this proposed amendment and the .jobs Charter.**⁶⁰

The materials presented to the Council also described the beta test as it had operated:

Called the shared domain beta test, many non-“companyname” .jobs domains were (and in many cases still are) registered to Employ Media. Employ Media “used” these domains in the DNS by redirecting them to a third party (the Direct Employers Association), who themselves “used” the domains by providing uniform, consistent content to all the domains in the shared beta test.

In the shared domain beta, if a user accessed “marketing.jobs” in their browser, they would have gone to an Employ Media-registered domain with content provided by the Direct Employers Association. **This content included job listings from employers at no charge to the employers; it was an automated free job listing service available to all employers worldwide to allow candidates to apply directly to the employer.** Employ Media received no domain name registration fees for the domains it selected and registered for the shared domain beta test. All employers were allowed to list jobs at no cost. Job seekers were allowed to apply directly to the employer at no cost. Any employer could, however, purchase from Employ Media one or more of a limited number of “premium placement” positions at each domain, a fixed position for a fixed duration of time to achieve

⁶⁰ Society for Human Resource Management, .JOBS Issue Report, 30 Mar. 2010, C-61 (emphasis added). See also Notice of Decision, C-116.

greater visibility (such as in the case of an urgent hiring need). Premium placement served the purpose of funding the beta test in lieu of Employ Media's receipt of domain name registration fees, job posting fees or job applicant submission fees.⁶¹

84. The PDP was conducted by SHRM, totally independently from Employ Media. As the party submitting the proposal to the Council, Employ Media was invited to participate in part of one of the Council's telephonic meetings in order to present Employ Media's proposal and answer questions. Tom and I represented Employ Media in this meeting, in which we participated by telephone. We provided the Council with additional materials and answered questions the Council posed. But we were not included in any of the deliberations, and we didn't have any idea what decision the Council would make until it was announced.

85. After the Council's third meeting, SHRM informed us that the Council had decided to solicit formal research, using SHRM's Research Group, to address the advantages and disadvantages of the release of non-company .JOBS domain names.⁶² I did not believe that a survey was required, and I was concerned that it would further prolong the process. I expressed my view to SHRM. However, since SHRM was independent, and they felt that a survey would aid them in the PDP Council's evaluation of our proposal, they proceeded with the survey. When it was completed, the results were very clear: an expansion to geographic, occupational, and industry names would be of value and interest to the community.

⁶¹ Brian Johnson, Employ Media Proposed Amendment at 1-2, 16 Mar. 2010, C-59.

⁶² .JOBS PDP Council Conference Call Meeting Minutes, 15 Apr. 2010, C-73.

86. According to the survey materials released following the conclusion of the PDP, SHRM’s researchers surveyed a sample of members of SHRM who were human resource Generalists or Employment/Recruitment professionals—the members of the community that SHRM’s researchers deemed most likely to use job boards or similar tools, like .JOBS—to determine the usefulness and impact of the proposed .JOBS changes.⁶³ The survey concluded that “[t]he new .jobs seems quite useful for recruitment needs, with 67% rating either 4 or 5 (with an average rating of 3.72),” and only 7% rating “it either ‘less useful’ [or] ‘significantly less useful.’”⁶⁴ Additionally, 77% of respondents rated the proposal as “useful,” “very useful,” or “extremely useful” compared to other available tools, and SHRM’s researchers concluded that those who rated the proposal less highly indicated not weakness in the .JOBS proposal, but rather “plenty of competition for the new .jobs.”⁶⁵

87. The survey’s ultimate conclusion was basically a slam dunk:

Response to the new .jobs classifications proposed by .JOBS was mostly positive, and with little indication of negative impact on the HR community.

- The new .jobs classifications are generally viewed as positive additions to the toolset for HR Generalists and Employment/Recruitment professionals and healthy competition exists, e.g., Google, Indeed, etc.

⁶³ JOBS – SHRM/PDP Council Survey, Final Report, 3 June 2010, *available at* [http://www.shrm.org/about/news/Documents/Dot%20Jobs%20Survey%20Report%20t%205_28_10%20\(2\).pdf](http://www.shrm.org/about/news/Documents/Dot%20Jobs%20Survey%20Report%20t%205_28_10%20(2).pdf), C-80.

⁶⁴ *Id.*

⁶⁵ *Id.*

- The new .jobs classifications are seen as most helpful to those posting jobs in various niche job areas as well as state and regional jobs.
- Respondents felt that the idea of providing free job postings with the option of paying for premium placement was of value both as a source for free job postings and as a way to gain preferred placement for job postings. Concerns about being priced out or buried in searches were not major concerns.
- Geography.Profession.jobs and Professsion.jobs were seen as the most useful new classifications for .jobs to focus their efforts on.⁶⁶

88. In addition to the survey, SHRM publicly posted two questions on the SHRM website and solicited responses from anyone who wished to participate. Those questions were: “How might this [Employ Media proposal to release non-company names] serve the needs of the Human Resource Profession?” and “How might this not serve the needs of the Human Resource Profession?”⁶⁷ I understand that the response SHRM received to these questions was overwhelmingly positive.

89. After SHRM posted the meeting minutes, I came to learn that the PDP Council discussed these results at its final meeting on June 3, 2010, before voting on whether Employ Media’s proposed amendment would “serve the needs of the international human resource community.”⁶⁸ The Council approved the amendment by a vote of seven to one. As required by the PDP rules, Employ Media and the SHRM Executive Committee reviewed the amendment again after it was passed, and approved

⁶⁶ *Id.*

⁶⁷ See Email from Ray Fassett to Tom Embrescia, 11 May 2010, C-77A; Email from Bill Warren to Ray Fassett, 10 May 2010, C-44.

⁶⁸ .JOBS PDP Council Conference Call Meeting Minutes at 4, 3 June 2010, *available at* <http://policy.jobs/files/06032010.pdf>, C-81.

it.⁶⁹ This meant that our sponsoring organization, after reviewing the beta and consulting with the .JOBS community, had formally, officially, and in writing, approved our expansion to allow registration of <non-companynames> to be used in the manner tested in the beta and in other ways that would serve the community.⁷⁰

3. Employ Media Submits an RSEP Request

90. In the same time frame, Employ Media was working with ICANN to submit its proposal to ICANN's Registry Services Evaluation Process ("RSEP"), as ICANN had requested.⁷¹ As before, I worked collaboratively with ICANN, submitting drafts of our proposal for ICANN's review to make sure that it addressed ICANN's concerns.⁷² We structured the RSEP to allow new classes of names and new allocation methods, as we had discussed with Craig, Kurt, and Patrick in late March and many times since.

91. We submitted our final RSEP request on June 9, 2010.⁷³ As ICANN had instructed, the request specifically stated that Employ Media sought approval to allow

⁶⁹ Society for Human Resource Management, .JOBS Issue Report, 30 Mar. 2010, C-61. See also Notice of Decision, C-116.

⁷⁰ Press Release, Society for Human Resource Management, Expansion of 'Dot-Jobs' Approved, 10 June 2010, available at <http://www.shrm.org/about/news/Pages/ExpansionDotJobs.aspx>., C-86.

⁷¹ Letter from Kurt Pritz to Tom Embrescia, 2 Mar. 2010, C-56. Another concern of ICANN's was our allocation of two-character names. We had earlier completed an RSEP for such names, and ICANN had granted us permission to allocate those names provided we took steps to inform the GAC. Instead of informing the GAC at that point, we decided to drop the use of two-character names for the time being.

⁷² See Email from Ray Fassett to Craig Schwartz and Patrick Jones, 26 March 2010, C-60; Emails between Craig Schwartz and Ray Fassett, 31 March 2010, C-62; Email from Craig Schwartz to Ray Fassett, 6 Apr. 2010, C-67.

⁷³ RSEP of Employ Media, 9 June 2010, C-84.

registration of <non-companyname> domain names in accordance with a “Phased Allocation Program” for the distribution of this new category of domain names. The final RSEP request described the three potential phases of the Phased Allocation Program: (1) an 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.⁷⁴

92. The RSEP request also carefully mirrored what had been approved by the PDP Council to ensure that we would be in full compliance. The request stated that both the PDP and the SHRM Executive Committee had approved the registration of <non-companynames> as long as Employ Media adhered to the .JOBS Charter and provided ICANN with a copy of the amendment approved by the PDP Council. Employ Media also provided ICANN with a copy of SHRM’s survey, which, as I already noted, was a slam dunk in terms of concluding that geographic, occupational, and industry names would be of value and interest to the .JOBS community.⁷⁵ Additionally, the RSEP request clearly acknowledged that there could be some objection to the proposal, mostly from those operating existing fee-based job boards that would be affected by new competition from non-company names being used as job boards.

93. After reviewing Employ Media’s final RSEP request, ICANN staff stated that it did not “identif[y] any significant competition or security and stability issues” with

⁷⁴ *Id.*

⁷⁵ In addition to SHRM’s survey, ICANN was provided information including but not limited to: all of the PDP Council’s minutes, the composition of the Council, the Issues Report, and key areas of interest and concern of the Council.

Employ Media’s proposal but informed Employ Media that ICANN and Employ Media would still need to amend the Registry Agreement.⁷⁶ Nevertheless, Employ Media was “free to deploy” the new registry service, pursuant to the terms of the Registry Agreement, based on ICANN’s determination that the service did not raise any significant security or stability concerns.⁷⁷ Revisions to the Registry Agreement were required simply to reflect the change.

D. ICANN Decides the Registry Agreement Amendments Are Material

94. In addition to working with Craig to prepare the RSEP request, I was also coordinating with him and ICANN staff to prepare the amendments to the .JOBS Registry Agreement. The amendments, like the RSEP request, were designed to leave us with flexibility—rather than describing a particular expansion plan, the amendments eliminated any restrictions preventing the use of <non-companynames> provided they serve the needs of the community. Nothing in the amendments placed any restrictions on the use of domain names or limited the content that could be posted on any .JOBS sites. Indeed, the amendments specifically removed any language that could be construed as imposing such restrictions. The full text of the proposed amendments is reproduced here:

ICANN and EmployMedia LLC agree that the following modification is made to the 5 May 2005 dot-JOBS Registry Agreement:

Appendix S, Part VII.2

⁷⁶ Email from Patrick Jones to Ray Fassett, 15 June 2010, C-88; *see also* Summary & Analysis of Comments for: Phased Allocation Program in dot-jobs, 15 June 2010-15 July 2010, *available at* <http://forum.icann.org/lists/jobs-phased-allocation/pdfvZhVQaTGGo.pdf>, C-91.

⁷⁷ .JOBS Registry Agreement § 3.1(d)(iv)(D), 5 May 2005, C-20.

[Old Text]

.jobs domain registrations are limited to the legal name of an employer and/or a name or abbreviation by which the employer is commonly known.

[New Text]

.jobs "company name" domain registrations are limited to the legal name of an employer and/or a name or abbreviation by which the employer is commonly known. Domain registrations are permitted for other types of names (e.g., occupational and certain geographic identifiers) in addition to the "company name" designation.

[Delete]

A reserved list of names will be employed to prevent inappropriate name registrations. Certain groups of domains will be reserved, such as, e.g., a list of occupational identifiers (e.g., the U.S. Bureau of Labor Statistics list of SOC occupations), industry identifiers (e.g., healthcare.jobs) and certain geographic identifiers (e.g., northeasternohio.jobs). These restricted lists are in addition to the restriction that .jobs domains comprise only trade names or commonly-known names (reserved list domains will be registered to the Registry Operator in the registry database to reflect their status as reserved names). In the event other domains are made available for registration (which would require approval as set forth in this Agreement), such domains will be specifically enumerated (i.e., not creatable by an applicant) and will be pre-screened to remove any inappropriate names.

Appendix S, Part VII.3

[Old Text]

SHRM and Employ Media have already agreed upon certain policies (available upon request in the Employ Media/SHRM agreement). The Charter is an example. In an additional example, .jobs registrations will only be allowed for domain names which (i) are for the legal name(s) under which a proposed registrant does business (e.g., a trade name such as EIduPontdeNemours.jobs), for a name under which the proposed registrant is commonly known (e.g., dupont.jobs) or which includes such a legal or commonly-known name (e.g., dupontcanada.jobs); (ii) are based upon an application for registration which is

submitted by a Qualified Applicant; and (iii) names as the registrant of the domain name the entity which is identified by the trade name or commonly known name. These current policies are only revisable/amendable via the policy making process described herein.

[New Text]

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Appendix S, Part VII.4

[New Text]

4. .JOBS non-companyname Phased Allocation Program ("Phased Allocation Program") The domain names included within the scope, referred to by Employ Media in its Registry Services Evaluation Process (RSEP) as the Phased Allocation Program, shall be limited to non-companyname .jobs domain names, not including all second-level country names set forth on the ISO-3166 list as referenced in Appendix 6 to this Agreement.

Pursuant to the Phased Allocation Program, Registry Operator may elect to allocate the domain names via the following processes: 1) Request for Proposals (RFP) to invite interested parties to propose specific plans for registration, use and promotion of domains that are not their company name; 2) By auction that offers domains not

allocated through the RFP process; and 3) A first-come, first-served real-time release of any domains not registered through the RFP or auction processes. Registry Operator reserves the right to not allocate any of such names.

95. In short, the amendments clarified that <non-companyname> registrations were permitted, added certain protections to avoid inappropriate registrations of <non-companyname> domain names, and described the Phased Allocation Program as explained in the final RSEP request. Importantly, nothing in these amendments changed the Charter.

96. Throughout March and April 2010, Craig and I discussed the process for approving these amendments. I was hoping that we could get the amendments approved without the need for public comment and an ICANN Board vote (since such processes could take months or even years), and Craig and I discussed these issues several times. My position was that there was no need for Board approval because there was no change to our Charter or to our community. The authority to make policy was delegated to SHRM and us. Craig informed me, however, that he would have to consult with ICANN staff to determine if the amendments to the Registry Agreement were “material” such that they required Board approval to be enacted.

97. After conferring with other ICANN staff, Craig informed me sometime in April 2010 that we would nonetheless be required to submit the amendments to public comment and Board review. He said that in ICANN staff’s view, even though neither the Charter nor the community was changing, the amendments were still a “material” change to the Registry Agreement because they would allow for the creation of job boards in the .JOBS domain. According to Craig, the key factor in staff’s decision to submit the amendments to the Board was staff’s awareness of the fact that the

implementation of the amended agreement was likely to cause a significant change to the functionality of the websites in .JOBS. Craig said that the language preventing non-company names in Appendix S had to be changed and that this was a material change.

98. Thus, amending the Registry Agreement to include <non-companynames> would allow any of those new types of names to be registered and used as job boards. And, of course, ICANN staff had seen the beta, which was composed of hundreds of such sites, and we had told them it was likely that we would re-implement the beta after the Registry Agreement was amended. Practically speaking, this was a change in the functionality of the .JOBS TLD. Even though the Registry Agreement had never included any restrictions on job boards before, so long as only <companynames> could be registered, job boards would not generally be a popular use of such names: a website like IBM.JOBS or Nissan.JOBS does not suggest a job board to most Internet users or job-seekers, so most registrants are unlikely to register such names with the intent to use them as job boards. As a result, job boards had not been a significant presence in the .JOBS TLD before the beta. But use as job boards was the most natural fit for names like accounting.JOBS and engineering.JOBS, so allowing allocation of such names meant that job boards would likely be a much more significant presence in the TLD. Because ICANN staff was aware of this reality and considered it significant enough to require Board attention, they required that we submit our Registry Agreement amendments to a Board vote.

99. Based on my discussions with ICANN's staff, I understood that had the issue simply been approving a new class of names, without any change in the way the

names were likely to be used, ICANN would not have considered this a material change.⁷⁸ For instance, had the issue been allowing registration of Seattle.JOBS with the expectation that only Starbucks would be using it to list jobs openings for Starbucks employees, ICANN would not have considered such a change material. It was the expectation of how the new <non-companynames> would be used—to list jobs from multiple employers on one site—that led ICANN staff to decide that the Board’s approval of the contract amendments was required before staff could execute.

E. The ICANN Board Approves the Registry Agreement Amendments After Public Comment and Debate

100. Accordingly, on June 15, 2010, ICANN posted the amendments for public comment. During the public comment period, ICANN received numerous comments opposing the amendments. Although some opponents, including Monster.com, expressly disavowed concern for competitive pressure from an expanded .JOBS sTLD, I had no doubt that most of the objections were from existing fee-based job board operators who feared competition. For example, the International Association of Employment Websites (“IAEWS”) formed the IAEWS Task Force and retained outside counsel to fight the change.⁷⁹ Additionally, some commenters tried to argue that we were somehow changing our sponsored community. On July 15, 2010, we submitted a response, noting that “[t]he definition and scope of the .JOBS community is not changed

⁷⁸ For instance, ICANN approved an RSEP and related Registry Agreement amendments for .ASIA without any Board review. See RSEP of DotAsia Organisation Ltd., available at <http://www.icann.org/en/resources/registries/rsep>, C-136.

⁷⁹ Peter Weddle, IAEWS Newsletter: A Critical Situation that Needs Your Attention, 2010 July 13, available at <http://www.employmentwebsites.org/iaews-newsletter-critical-situation-needs-your-attention>, C-90.

in any way by the RSEP request—it is neither being broadened or restricted, and remains unchanged since the inception of .JOBS.” We were not attempting to change our community and certainly not our Charter but only to offer a new service to the .JOBS community, consistent with the Charter. We also noted that there had been no change to the Charter. And we noted that numerous other registry operators had, like Employ Media, used the RSEP to get ICANN’s approval to allocate previously reserved names.⁸⁰

101. Before the Board's vote, Ram Mohan (a non-voting Board member) asked me to call him to discuss the RSEP and the amendments to the Registry Agreement. I called him, and we spoke for about 45 minutes. I informed him of everything that had preceded the submission of the amendments to the Board's vote: the beta, ICANN’s review of the beta, the PDP, and the RSEP. He was surprised to find out how involved ICANN staff had been, particularly in telling us and SHRM what to do in terms of conducting a PDP, submitting an RSEP request, and amending the Registry Agreement, and also in terms of helping us draft the RSEP request and the Registry Amendment. In turn, I was surprised that he was not aware of this background, since I assumed that staff would have informed the Board about all of that history so that Board members were informed before the vote.

102. Ram also wanted to discuss a letter from Monster that expressed objections to our plan. As I recall, my initial response was, “What do you think a protectionist is going to do, send a letter of support?” I also told him, as I had told Craig earlier, that we never claimed unanimity in our community and that some disagreement is

⁸⁰ Employ Media Response to RSEP Comments for the Public Record, 15 July 2010, available at <http://forum.icann.org/lists/jobs-phased-allocation/pdfhLstmngA65L.pdf>, C-92.

to be expected within a community as diverse, robust, and dynamic as the human resource community. So there was a minority which dissented from the conclusion of the PDP and the approval from the SHRM Executive Committee, and that continued to oppose us, but that we had nonetheless done everything we needed to do for approval and had the support of our sponsoring organization and our community on the whole. At the end of the call, Ram noted that he now understood everything much better, especially with regard to staff's close involvement in everything and the PDP. He told me that he would share all of this with the Board during their meeting the next day.⁸¹

103. In August 2010, after considering Employ Media's proposal and the public comments received, the ICANN Board approved the proposed amendments to the Registry Agreement.⁸² The briefing materials submitted to the Board explained that ".jobs is requesting that registration restrictions be relaxed to allow for the creation of job boards such as: engineering.jobs and ohio.jobs . . ." ⁸³ There can thus be no question that the Board's approval was given with the knowledge that allowing registrations of <non-companynames> would allow for those sites to be used to post job listings from multiple employers, and in fact, this was the reason that Craig told me it was a material change and the Board would have to approve it.

104. The Board's review is reflected in the August 5, 2010, resolution approving Employ Media's proposal:

⁸¹ See Email from Ray Fassett to Ram Mohan, 4 Aug. 2010, C-93.

⁸² Although the discussion was in August, these documents and the Board's minutes were not available until months later.

⁸³ Board Briefing Materials Background & Discussion, 5 Aug. 2010, *available at* <http://www.ICANN.org/en/minutes/board-briefing-materials-1-05aug10-en.pdf>, C-95.

Whereas, Employ Media submitted a request pursuant to ICANN’s Registry Services Evaluation Policy to amend Appendix S of the .JOBS Registry Agreement permit the registration and allocation of .jobs domain names through a phased allocation process.

Whereas, the proposal was submitted to ICANN following the policy development process defined in its delegated authority in Appendix S as a sponsored TLD, with the endorsement of the sponsoring organization for .JOBS, the Society for Human Resource Management. The proposal is also consistent with other approvals to permit the registration and allocation of certain types of domain names via phased allocation mechanisms.

Whereas, ICANN has evaluated the proposed amendment to the Appendix S of the .JOBS Registry Agreement as a new registry service pursuant to the Registry Services Evaluation Policy and has posted amendments for public comment and Board approval (<http://www.icann.org/registries/rsep/>).

RESOLVED (2010.08.05.20), the .JOBS amendment is approved, and the President and General Counsel are authorized to take such actions as appropriate to implement the amendments.⁸⁴

105. During the Board’s discussion, Kurt Pritz stated that “the design has been for ICANN to delegate certain policy-making authority to the sponsoring organization and not to get between the sponsoring organization and the sTLD with regard to if the actions of the policy-making body are appropriate or not.” Because Kurt had said this to us before, this has always been Employ Media’s understanding of what it means to be an sTLD, and this is what gave us the authority, in cooperation with SHRM, to enact new policies as to what domain names can be registered in .JOBS.

⁸⁴ ICANN Special Meeting of the Board, Board Resolution on RSEP Request for Phased Allocation Program in .JOBS, 5 Aug. 2010, *available at* <http://www.icann.org/en/minutes/resolutions-05aug10-en.htm>, C-98.

106. Following the Board’s resolution approving the amendments, ICANN and Employ Media executed the amended Registry Agreement.

VI. ICANN’s BGC Affirms the Board’s Approval of the .JOBS Expansion

A. Employ Media Launches an RFP

107. In reliance on the instructions of ICANN staff and the ICANN Board’s approval and after the execution of the amended Registry Agreement, Employ Media began implementing the Phased Allocation Program exactly as we had described it to ICANN. In late August 2010, Employ Media posted the RFP, seeking proposals for <non-companyname>.JOBS domain names.⁸⁵ We were certainly expecting to receive an application from DirectEmployers, but we were also hoping to receive other proposals, fostering competition among applicants to create even more options for the .JOBS community. In total, we received 34 expressions of interest and 16 proposals. DirectEmployers’ proposal for “the .JOBS Universe”—an improved and expanded version of the beta—was the best and most extensive. By the end of September 2010, we had selected 6 proposals from the RFP, including the proposal from DirectEmployers for the .JOBS Universe, and were on the verge of announcing those selections.⁸⁶ However, the process was once again delayed.

⁸⁵ .JOBS RFP Round 1 Application Form, 26 Aug. 2010, *available at* <http://rfp.jobs/JOBS-RFP-Round%201-Application-Form.pdf>, C-10.

⁸⁶ *See* Email from Stacy Saenz to Tom Embrescia, 28 Sept. 2010, C-105; Email from Stacy Saenz to Tom Embrescia, 19 Oct. 2010; Accepted applications were submitted by DirectEmployers, and also by Bavaria Agrimedia GmbH, DisABLEDperson.com, InterActive One, Inc., RecruitMilitary LLC, and Ubilibet, S.L.

B. The ICANN Board Rejects A Request To Reconsider Its Approval of the .JOBS Expansion

108. After the ICANN Board approved the amendment to the Registry Agreement, a number of pre-existing fee-based job boards, many of which had opposed the earlier contract amendments as part of the IAEWS Task Force, formally banded together again to create “The .JOBS Charter Compliance Coalition” (“the Coalition”). In August 2010, just after we launched the RFP, the Coalition filed a Request for Reconsideration of Board Action (“Reconsideration Request”) with ICANN’s Board Governance Committee (“BGC”).⁸⁷ The Reconsideration Request reasserted the argument, already dismissed by the Board, 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—in other words, it would create competition for fee-based job boards that charge employers for posting job openings, often on a per-listing basis.

1. The BGC Reviews the Coalition’s Reconsideration Request

109. On September 20, 2010, the BGC determined to consider the request, which was the next step in recommending to the Board how the Reconsideration Request should be treated. Based on its consideration, the BGC could recommend that the Reconsideration Request be rejected, allowing the Board’s decision to stand, or that it be accepted, leading to a reconsideration, and perhaps reversal, of the Board’s decision. We were disappointed by the BGC’s decision to consider the Reconsideration Request

⁸⁷ .JOBS Charter Compliance Coalition, Petition for Reconsideration of Board Action, 20 Aug. 2010, *available at* <http://www.ICANN.org/en/committees/reconsideration/reconsideration-petition-jobs-20aug10-en.pdf>, C-100 (“Reconsideration Request”).

since the underlying interests and issues were previously considered by the SHRM PDP and again by the ICANN Board. But there was nothing we could do.

110. About a week after that decision, I had a phone call with Craig Schwartz, and I informed him that we had received RFP responses from members of the Coalition. He asked me to “hold off” on announcing this. We agreed to do so, even though I was reluctant, since by that time we had selected our 6 applications and were on the verge of negotiations with the applicants. But then in early October, Tom, Brian, and I had another conversation with Kurt Pritz and John Jeffrey. During that call, Kurt asked us, as a favor, not to proceed with the proposals for the moment. He didn’t ever say that we had an obligation not to proceed or that proceeding would violate our Registry Agreement in any way. Instead, he explained to us that there was some concern among the Board that it would create a problem if the BGC were to recommend reversing the Board’s decision after staff had executed the contract amendments allowing us to launch the new names. As Kurt explained it, that situation would call into question whether the BGC’s review was really meaningful.

111. By this point, I was pretty frustrated with ICANN’s continual changes of position and delays. Because we had no obligation to postpone launching the new proposals, I would have preferred to move forward. Tom was also frustrated. He told Kurt and John that we, and many in the .JOBS community, were feeling “deal fatigue.” But Tom always prefers to work cooperatively, so he once again agreed to ICANN’s request.

112. During the BGC’s review of the Reconsideration Request, a number of interested parties submitted a variety of materials. The BGC also posed a series of

questions to Employ Media and SHRM, and Employ Media met in person with the BGC. In response to those questions, SHRM reaffirmed that the .JOBS Charter was not changed, the community had not changed, that there was no requirement that a registrant list only jobs for its organization, and that SHRM intended that third-party job postings be allowable.⁸⁸ Employ Media did the same.⁸⁹

113. Of note, among the materials submitted by the Coalition was the same DirectEmployers White Paper that I had forwarded to Craig in April 2010, which described the DirectEmployers plan as a “dynamic jobs platform,” that would “provide a single interface for posting jobs to niche, targeted locations” and allow “all employers worldwide, regardless of size or industry, [to] post jobs at no cost.”⁹⁰

114. Additionally, the Coalition complained about the creation of one particular site, NativeAmerican.JOBS, stating that “[a] brief review of the website operating at nativeamerican.jobs demonstrates conclusively that the registrant is not using its .JOBS registration to conduct human resource management activities, as required by the .JOBS charter. Rather, it is using its registration in .JOBS to offer and promote its job board service.”⁹¹ The Coalition argued that “[i]t could not be clearer that Employ Media is

⁸⁸ Email from Gary Rubin to Tom Embrescia, 12 Nov. 2010, C-110.

⁸⁹ Letter from Employ Media LLC to ICANN Board of Governance Committee, 25 Oct. 2010, *available at* <http://www.icann.org/en/committees/reconsideration/employ-media-answers-to-bgc-25oct10-en.pdf>, C-108.

⁹⁰ Bill Warren, White Paper: Dot-Jobs (.JOBS) Universe, DirectEmployers, Jan. 2011, *available at* <http://de.nlx.org/pdfs/white-papers/wp-dotjobs.pdf>, C-117.

⁹¹ Memo from .JOBS Charter Compliance Coalition to ICANN Board of Governance Committee, 21 Oct. 2010, *available at* <http://archive.icann.org/en/committees/reconsideration/coalition-memo-to-bgc-21oct10-en.pdf>, C-107.

using the Board’s approval of the Phased Allocation Program to transform the fundamental nature of the .JOBS sponsored top level domain from a site for employers to link directly with job-seekers to a generic employment services theme park - in clear violation of the .JOBS charter.”⁹² To me, this argument was based on an assumption that those operating job boards do not serve the needs of the .JOBS community—an assumption that is clearly wrong. In fact, SHRM’s report from 2007 and the research conducted by the SHRM PDP Council demonstrate the opposite: job boards are a crucial way for employers to connect to job-seekers and recruit new employees. And there is absolutely nothing in the Charter that prohibits such job boards. Whether the Coalition’s argument was correct or not, however, the BGC was fully informed of that argument, and so their decision on the Coalition’s request was made in light of that knowledge.

2. Employ Media Makes Further Concessions To Expedite The BGC’s Review

115. In late November 2010, during the BGC’s review, Tom, Brian and I spoke with Kurt Pritz and John Jeffrey. During that conversation, John told us that the only thing holding up the BGC was the fact that we would be registering all of the new names to ourselves (as we had done in the beta)—making those names a “self-managed class of names.” John told us that the BGC was hung up on this issue because the Coalition was lobbying the ICANN Board intensely about it. We were perplexed to learn this information from John since it is specifically provided for in the Registry Agreement and specifically requested and approved by the PDP Council and the RSEP contractual amendment. We told John that if this was the only remaining obstacle, we would agree

⁹² *Id.*

not to create a self-managed class of names. We told John that instead, we would allow Direct Employers to register the names. John stated his belief that this approach would lead to a positive BGC result for us, so we agreed.

116. John also tried to persuade us to meet with the Coalition to try to reach a compromise, but Tom said that he had already met with many Coalition members individually and that another meeting with them would not solve anything. Because their goal was to prevent .JOBS from expanding in any way that could compete with them, there was no compromise that we could reach. Instead, it was decided that Tom and I would meet with the BGC at ICANN's next meeting in Cartagena, Colombia, to present our case, and the Coalition could do the same.

117. Tom and I spoke to the BGC at their December 9, 2010, meeting, as did a representative of the Coalition. During the BGC's meeting, one of the committee members, Dennis Jennings, asked if it was correct that the .JOBS Charter limited a registrant to listing only jobs within their own organization on their .JOBS site. I responded that there was no such restriction in the Charter, and there never had been. He said that he'd have to "take another read" of the Charter (even though it is only a page long).

118. In reviewing the Reconsideration Request, the BGC had to determine if the ICANN Board had granted its approval "without consideration of material information."⁹³ I don't believe that there was any room to claim that they were unclear as to what they had approved when they voted on our Registry Agreement amendments. Even non-ICANN insiders knew what was on the table, as before the Board vote, ERE

⁹³ Bylaws, Art. IV § 2(2) (Reconsideration), C-129.

had written an article stating Employ Media’s “proposed amendment is asking for permission to do what it already did in their beta.”⁹⁴ There was even less room for confusion after the BGC reviewed the Coalition’s Reconsideration Request. The documents submitted by Employ Media and SHRM during the BGC’s review, not to mention the information in the .JOBS RFP, which had by then been publicly posted, clearly described and demonstrated Employ Media’s plans to expand the .JOBS sTLD, including the fact that we were likely to implement a proposal from DirectEmployers and that names in .JOBS were going to be used—and, in fact, were already in use—as job boards.

3. The BGC’s Recommendation Affirms the Board’s Decision

119. 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 approved Employ Media’s proposal.

120. The BGC’s recommendation stated:

there is no indication that the independent job site operators - such as Jobing - are prohibited from qualification as members of SHRM (or the community) and from participation in the policy development process for the .JOBS sTLD. Instead, the record shows that such operators are able to participate in the process.

...

In sum, the Coalition’s concerns regarding potential violations of the Charter in the implementation of the Phased Allocation Program is not a proper ground for

⁹⁴ David Manaster, Why SHRM Must Reject the .JOBS Amendment, Ere.net, 8 Apr. 2010, *available at* <http://www.ere.net/2010/04/08/why-shrm-must-reject-the-jobs-amendment/>, C-69.

reconsidering the ICANN Board's 5 August 2010 Action. Further, the ICANN Board did not fail to consider material information available at the time of the Action. Nevertheless, the BGC does think that Employ Media's compliance with its Charter is crucial. Given the highly disparate views presented by the parties involved with the Request, the BGC is not at all clear that it has a full picture of how EmployMedia intends to implement the Phased Allocation Process. For example, when concerns were raised about the self-managed class of names referenced in the proposal and Employ Media's responses to the BGC questions, that potential implementation method was withdrawn by Employ Media. Therefore, the BGC recommends that the Board direct the CEO, and General Counsel and Secretary, to ensure that ICANN's Contractual Compliance Department closely monitor Employ Media's compliance with its Charter.

121. The ICANN Board then reviewed and unanimously adopted the BGC's recommendation:

Whereas, the BGC has reviewed and considered Reconsideration Request 10-2 submitted by the .JOBS Charter Compliance Coalition on 20 August 2010 (supplemented as posted at <http://www.ICANN.org/en/committees/board-governance/requests-for-reconsideration-en.htm>) concerning the Board's 5 August 2010 resolution approving Employ Media's .JOBS Phased Allocation Program.

Whereas, the BGC recommended that the Request be denied as unsupported because: (i) the Coalition's concerns regarding potential violations of the Charter in the implementation of the Phased Allocation Program is not a proper ground for reconsidering the Board's 5 August 2010 Action; and (ii) the Board did not fail to consider material information available at the time of the Action.

Whereas, the BGC recommended that the Board direct the President and CEO, and General Counsel and Secretary, to ensure that ICANN's Contractual Compliance Department closely monitor Employ Media's compliance with its Charter.

Whereas, the BGC recommended that the Board direct the CEO to create a briefing paper for the GNSO to consider

on this matter, and for the GNSO to determine whether a policy development process should be commenced.

Whereas, the Reconsideration Request and the BGC's Recommendation has been posted on the ICANN website <http://www.ICANN.org/en/committees/board-governance/requests-for-reconsideration-en.htm>

Resolved (2010.12.10.35), the Board adopts the Recommendation of the BGC on Reconsideration Request 10-2.

122. At this point, we truly believed that there was nothing else ICANN could possibly ask of us that would hold back our expansion. In fact, I felt even more confident based on my conversations with ICANN staff while in Cartagena. Shortly after the ICANN Board vote to accept the BGC's recommendation to dismiss the Reconsideration Request, I approached Amy Stathos, a Deputy General Counsel for ICANN, to thank her for her help during the BGC's review. I told her that, as I first read the BGC's final report, I was nervous that it seemed to be taking a fair amount of time describing, and perhaps given credence to, all of the Coalition's arguments, but I was reassured by the final conclusion, which firmly rejected those arguments. She further reassured me, telling me that it was necessary for the BGC to demonstrate that it had fully entertained the Coalition's arguments—as she said, “you've got to get it all out there”—but in the end, those arguments were “not a big deal,” and just had to be dealt with so that ICANN had fully covered all of its bases. She also added that because “the .JOBS Charter was very broad, you should be fine.”

123. I had a similar conversation that same day with John Jeffrey. I was curious about the language contained in the BGC recommendation regarding monitoring our Charter compliance. I caught John Jeffrey directly after the meeting adjourned and

asked him about that language. His response was almost identical to Ms. Stathos—he assured me that, because our Charter is very broad, we should not have any trouble.

124. I also had a conversation with Craig Schwartz about the same language in the Board’s resolution. I offered to him that, to avoid incurring any further compliance issues or misunderstandings, we would inform ICANN of all RFP proposals we intended to accept before implementing them but that we wouldn’t bother consulting with them on the DirectEmployers proposal because ICANN already knew exactly what DirectEmployers’s proposal involved. Craig did not object or raise any concerns and later told me that ICANN did not want to review any proposals we received. Based on that conversation, I reported to Tom, who was back home in Cleveland, that Craig Schwartz had confirmed that they were fully aware of the DirectEmployers application, and expressed no concerns. I noted that ICANN staff was satisfied that because Bill Warren, the Executive Director of DirectEmployers, was (and is) a member of SHRM, he therefore met the Charter eligibility requirements for requesting registrations in the .JOBS sTLD and could register names in the .JOBS Universe.” In light of these conversations—and given that John Jeffrey and Kurt Pritz knew that we were on the verge of proceeding with the proposals that had been selected as a result of the RFP, the BGC’s suggestion that it could not yet consider how Employ Media was implementing the Phased Allocation Program was surprising, and a bit nonsensical, but I was reassured that ICANN staff, up to and including ICANN’s General Counsel, did not expect that language to create any problems for us.

125. In short, we concluded that we had finally jumped through all of ICANN’s various hoops, did everything ICANN told us we needed to do to be fully in compliance,

and allowed ICANN to address all concerns raised by our opponents. ICANN then repeatedly confirmed our understanding of what those processes had meant. We felt that we finally had the certainty to proceed with the new registry service appraised in the RSEP.

126. Immediately after the meeting in Cartagena in December 2010, after having completed all of the procedures ICANN asked of us, and in reliance on the approvals ICANN had given us, we instructed DirectEmployers that they could launch the expanded version of the model we had tested in the beta. The .JOBS Universe allows employers from all over the world to list jobs for free. Employers can sign up to provide a daily feed listing all job openings or can agree to allow automated programs to pull jobs directly from their website. All listings on the .JOBS Universe are therefore updated every day, ensuring that they stay current. The job listings 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 own website, so a job-seeker who visits Accounting.JOBS and finds a posting for a position with CitiBank can click on the "Apply Now" button and go directly to the application submission page on CitiBank's website.

127. 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. This platform is particularly attractive to employers (large and small) because they are able to directly connect to job-seekers, and each job listing is free—a significant advantage over traditional, fee-based job boards that require additional fees for each listing, creating additional expenses for employers or forcing

them to limit the number of job listings they can distribute widely. The money that they save on fees for job boards like Monster.com or CareerBuilder.com can be redirected towards other priorities as they so choose. The .JOBS Universe was created by human resource professionals who came together to design a system that would serve their needs, allow them to do their jobs better, and benefit employers and job-seekers everywhere.

VII. ICANN Publicly Issues a Notice of Breach

128. On the afternoon of December 24, 2010, Christmas Eve, just a few weeks after the ICANN Board's vote to dismiss the Reconsideration Request, ICANN informed me of yet another Coalition complaint that we were allowing DirectEmployers to run job boards in violation of our Charter. Of course, this issue had already been fully addressed. Given that we had scrupulously followed all of ICANN's instructions to ensure that our expansion was compliant with the Charter, and given the recent assurances I had received that the breadth of the Charter made it clear we could proceed with the expansion, we felt that this complaint could not affect our business. We understood that ICANN would address the complaint but expected that it would be quickly resolved.

129. Instead, on February 1, 2011, we received a formal set of questions from ICANN compliance. This time, the focus of the questions was on our relationship with DirectEmployers, and in particular the difference between the "self-managed" class of names from the beta and the names registered to DirectEmployers in the .JOBS Universe. As I noted, domains in the beta had been "self-managed"—registered directly to Employ Media, as a result of which we collected no registration fees—but we had agreed not to register the names to ourselves going forward because of the BGC's concerns and John Jeffrey's advice to us. Instead, we allowed DirectEmployers to register the names just

as we said we would for all applicants we selected in the RFP. The names still served the community by providing human resource personnel a platform to post jobs and recruit for their employers.⁹⁵

130. We provided our answers to ICANN on February 11, 2011, and just two weeks later, on a Sunday evening, with no further communication and no warning, ICANN publicly issued a notice of breach, in direct contradiction of what they had said in 2009 about not publishing such notices until there was a meaningful opportunity to engage in remediation. Astonishingly, the Coalition had a press release ready to go and released it on Monday morning. I can only conclude that ICANN had informed the Coalition in advance about the breach notice, prior to sending it to us on Sunday night.

131. Not only were we shocked and damaged by the public nature of the breach notice, but we were extremely disappointed, and even angry, at some of the claims ICANN made in that notice. And we feel the same frustration with some of the claims that ICANN has made since. In particular, I was astonished that ICANN claimed that we had acted “inconsistent[ly] with the .JOBS Charter for the naming conventions within the sponsored TLD,”⁹⁶ given that multiple ICANN staff had consistently assured me that our Charter was broad and that therefore our planned expansion shouldn’t present any difficulties—and they had said this to me as far back as our meeting with David Giza in December 2009, and as recently as two months before the breach notice.

132. Before resorting to this arbitration, we invoked the cooperative engagement procedures called for in our Registry Agreement. By that time, however,

⁹⁵ Letter from Brian Johnson to Stacy Burnette, 11 Feb. 2011, C-121.

⁹⁶ Letter from Stacy Burnette to Brian Johnson, 1 Feb. 2011, C-119.

we were no longer optimistic that we could work productively with ICANN. It had become clear that it was no longer a simple matter of addressing legitimate concerns in a reasonable manner—no matter what we said, or how many times we said it, ICANN was going to continue to pretend that it had discovered some new issue, in order to deflect pressure from a well-resourced special interest group.

133. This proved to be the case, and, when cooperative engagement failed, we filed this arbitration, viewing it as the only way to protect our business and vindicate our rights—and, indeed, to ensure our survival.

VIII. Availability and Certification

134. I am available for cross-examination on the following dates: February 4-8, 2013.

135. My identification photo is reproduced below:



136. I certify under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

[Handwritten Signature]

(Signature)

Executive Vice President

(Title and Relationship to the Parties)

3029 Prospect Avenue Cleveland, OH 44115

(Address)

8/3/2012

(Date)

STATE OF Ohio)

) ss.:

COUNTY OF Cuyahoga)

On August 3, 2012, before me, Amy J. Angelo, a Notary Public, personally appeared Ray Fassett, who proved to me on the basis of satisfactory evidence to be the person whose name is subscribed to the within instrument and acknowledged to me that he/she executed the same in his/her authorized capacity, and that by his/her signature on the instrument the person, or the entity upon behalf of which the person(s) acted, executed the instrument.

WITNESS my hand and official seal.

Signature *[Handwritten Signature]*

(Seal)

Amy J. Angelo
NOTARY PUBLIC
State of Ohio
My Commission Expires 10/19/2014