INTERNATIONAL CHAMBER OF COMMERCE
INTERNATIONAL COURT OF ARBITRATION

EMPLOY MEDIA LLC.	)
	)
Claimant,	)
	)
v.	) **Case No. 17917/VRO**
	)
INTERNET CORPORATION FOR	)
ASSIGNED NAMES AND NUMBERS	)
	)
Respondent.	)

EMPLOY MEDIA LLC'S STATEMENT OF CLAIM

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1.   Claimant Employ Media LLC ("Employ Media") respectfully submits this Statement of Claim, together with the Witness Statements of Thomas J. Embrescia, Ray W. Fassett, and Gary Rubin; Exhibits C 1-146; and Claimant's Legal Authorities CL 1-28.

I.   INTRODUCTION

2.   On the evening of Sunday, 27 February 2011, the Internet Corporation for Assigned Names and Numbers ("ICANN") emailed a "Notice of Breach" to Employ Media, threatening to cancel the .JOBS Registry Agreement ("the Registry Agreement" or "Agreement") – which ICANN and Employ Media (collectively, the "Parties") had executed on 5 May 2005, and subsequently amended in 2010.   This arbitration arises from ICANN's Notice of Breach, which threatens to terminate the Agreement in its entirety, which in turn would put an end to Employ Media's business in its entirety.

3.   .JOBS is a "sponsored Top Level Domain," or "sTLD." An sTLD is designed to serve the needs and interests of a particular "community" – in this case, the "international human resource management community" (the "Community"). With an sTLD, ICANN delegates broad authority to the TLD's Registry Operator (here, Employ Media) and the TLD's "Sponsor" (here, the Society for Human Resource Management ("SHRM")), for the policies, rules, and practices that govern the sTLD. The Registry Operator and Sponsor exercise that authority within the parameters of a Charter (here, the ".JOBS Charter") – a document approved by ICANN and incorporated in the Registry Agreement. The .JOBS Charter has remained in place, unchanged, since 2004.

4.   ICANN's Notice of Breach complains about the expansion of Employ Media's registry service – specifically, the expansion of the types and usages of the domain names available in .JOBS (the "expansion"). The Notice of Breach is remarkable for number of reasons, including the fact that ICANN was fully involved in the expansion and knew about its every detail: ICANN specifically required Employ Media and SHRM to undertake a series of lengthy and elaborate procedures to achieve the expansion, and ICANN specifically approved every aspect of it.

5.   Prior to the expansion, Employ Media had allowed the registration of sites for job postings only when the site's domain name was that of the company posting the job (e.g., microsoft.jobs or dupont.jobs). The expansion allows the registration of sites where the domain name indicates the region, industry, or occupational category of the posted jobs (e.g., newyork.jobs, healthcare.jobs, or dentist.jobs). Multiple employers can list their job openings in such "non-company name" domains – and can do so for free. Such sites – where multiple employers can post listings for job openings at their companies – are typically referred to as "job boards."

6.   As set forth in this Statement of Claim, prior to undertaking the expansion, Employ Media had provided voluminous information about the expansion to ICANN – and, at ICANN's specific request, had undergone several lengthy and extensive processes in order to achieve it. Employ Media discussed the expansion publicly, and it was widely reported in the media. Indeed, in 2009, Employ Media had worked with a not-for-profit association of employers called DirectEmployers Association ("DirectEmployers") to launch a test of "shared domains" with non-company name domains. When ICANN told Employ Media that it could not undertake even a test of such domains without undergoing a series of specific processes, Employ Media immediately suspended the test. Working closely with ICANN, and at the direction of ICANN at each step, Employ Media undertook the following procedures:

(1)   **Policy Development Process (PDP)** – Employ Media requested SHRM to conduct a PDP to evaluate the expansion. SHRM in fact conducted two iterations of the PDP – which included, among other things, detailed field research – and approved the proposed expansion;

(2)   **Registry Service Evaluation Process (RSEP)** – Employ Media submitted an RSEP request, which is ICANN's process for evaluating a new registry service. ICANN staff examined the request for the purposes of assessing competition, stability, and security concerns, and, in particular, the methodology by which Employ Media intended to allocate the domain names that are the subject of the expansion. Based on these criteria, ICANN staff approved the request pending amendments to the Agreement;

(3)   **Amendments to the Registry Agreement** – ICANN and Employ Media negotiated and drafted amendments to the Registry Agreement, specifically to allow the expansion. The ICANN Board of Directors ultimately voted to approve the amendments to the Agreement (which were also included in the RSEP) in a vote on 5 August 2010;

(4)   **Employ Media's Request for Proposals (RFP)** – As provided for in the amended Registry Agreement, Employ Media publicly issued an RFP for proposals concerning the expansion. Employ Media selected several proposals, including DirectEmployer's "universe.jobs" proposal – an improved and expanded version of the program carried out in the "shared domain" test – and specifically informed ICANN of its selections (including the selection of DirectEmployers).

7.   In addition to all of these procedures, following the ICANN Board vote on 5 August 2010, which approved the expansion, a well-funded group of companies and industries representing the fee-based job board industry (the so-called "Coalition for .JOBS Charter Compliance," or the "Coalition") – which sees the .JOBS expansion as a significant competitive threat – filed a **Request for Reconsideration of Board Action.** Specifically, the Coalition asked the ICANN Board to reverse its approval of the .JOBS expansion. At ICANN's request, Employ Media voluntarily suspended the implementation of the expansion, so that the ICANN Board could fully consider the Coalition's

Request. After another lengthy process, the ICANN Board finally rejected the Request on 10 December 2010.

8. Lest there be any doubt that ICANN knew exactly what Employ Media was proposing – and exactly what ICANN was approving – the briefing materials provided to the ICANN Board of Directors prior to the 5 August 2010 vote stated: "*.jobs is requesting that registration restrictions be relaxed to allow for the creation of job boards such as: engineering.jobs and ohio.jobs.*"[1] Following the ICANN Board's December 2010 rejection of the Coalition's Reconsideration Request, that is precisely the expansion launched by Employ Media.

9. It was therefore a surprise, to say the least, when slightly more than two months after the Board rejected the Coalition's Reconsideration Request, ICANN issued without warning its 27 February 2011 Notice of Breach. Not only was the Notice of Breach emailed to Employ Media – it was (in violation of ICANN policy) immediately posted on ICANN's website that same Sunday night. ICANN had apparently provided the Notice of Breach to the Coalition even before it provided it to Employ Media. On the morning of Monday, 28 February, the Coalition issued a polished news release, hailing the Notice of Breach.

10. As discussed *infra* in Section II.E, ICANN's Notice of Breach is a vague and confusing document. Indeed, it is so lacking in factual and legal foundation that it is impossible to believe ICANN issued it in good faith. ICANN's main complaint seems to be that Employ Media is now permitting "job boards" through non-company name domains within .JOBS, in violation of the alleged "spirit and intent" behind the original Registry Agreement, and that Employ Media is doing so primarily with DirectEmployers. But that is precisely what ICANN authorized Employ Media to do.

11. As we explain below, the amended Registry Agreement unambiguously allows Employ Media to permit job boards, and to do so (following the RFP) with DirectEmployers, or any other person who meets the applicable requirements and successfully applies for available domain names through the allocation process set forth in the amended Agreement. That is not surprising, given that the Parties drafted the amendments to achieve exactly that result. Because of the plain and unambiguous language of the amended Registry Agreement, the Tribunal does not need to resort to extrinsic evidence concerning the Parties' intent. However, to the extent that the Tribunal decides to examine such

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[1]   Board Briefing Materials, 5 Aug. 2010, *available at* http://www.ICANN.org/en/minutes/board-briefing-materials-2-05aug10-en.pdf (last visited 5 Aug. 2012) C-95.

evidence, the Tribunal will find that it overwhelmingly supports Employ Media's position. The Tribunal will also find that ICANN's vague and irresponsible allegation that there "appears" to have been a "backroom deal" with DirectEmployers to be without any support whatsoever.

12. As the Tribunal considers the facts set out in the Statement of Claim and the supporting evidence, Employ Media asks the Tribunal remain mindful of the following:

- This arbitration is not, as ICANN argues, about the Parties' original intentions when they entered the Registry Agreement. It is about their common intentions and the understanding they reached in executing the 2010 amendments to the Registry Agreement, as reflected in the plain language of the amendments. Even so, the Tribunal will also find that from the outset, the Parties' understanding was that the .JOBS sTLD would likely grow and expand over time, and that ICANN's selective quotations from, for example, Employ Media's 2004 Application for the TLD, are grossly misleading.

- ICANN exercises plenary control over the Internet's Domain Name System ("DNS") on an international basis, pursuant to a series of agreements with the U.S. Government. In overseeing and managing the DNS, ICANN is responsible for the introduction of new TLDs. To circumscribe ICANN's potentially extraordinary regulatory authority over the Internet, ICANN's founders (led by the U.S. Government) established ICANN with a limited, technical mission, focused on the "operational stability of the Internet."[2] ICANN is prohibited from regulating Internet content. And of particular importance for this case, it is required – both by its constitutive documents as well as the Registry Agreement at issue in this case – to act openly and transparently, and according to well-documented procedures and practices that "shall not" be applied "arbitrarily, unjustifiably, or inequitably," and that "shall not single out [a] Registry Operator for disparate treatment . . . ."[3] The balance of power lies with ICANN. Accordingly, ICANN bears a heavy burden in justifying the termination of a registry agreement. It cannot do so on the basis of speculation and innuendo, but only on the

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[2] Articles of Incorporation of Internet Corporation for Assigned Names and Numberts, Art. 4 (21 Nov. 1998), *available at* http://www.icann.org/general/articles.htm (last visited 11 July 2011), C-3.

[3] *See* Registry Agreement, sec. 3.2, 5 May 2005, C-11 (Registry Agreement"). The Registry Agreement as amended in 2010 contains the same provisions. C-19.

basis of hard facts and evidence. In this case it has presented much of the former and none of the latter.

- As it has done on prior occasions, ICANN has in this case once again shown its willingness to abandon its core principles – along with its contractual obligations – when faced with pressure from a well-funded or otherwise powerful or influential group.[4] The evidence of the omnipresence in this case of the Coalition – and its increasingly intensive lobbying efforts in the months leading up to the Notice of Breach – gives rise to serious questions regarding the motivations underlying ICANN's Notice.

13.   As demonstrated below, following the Tribunal's examination of the plain language of the amended Registry Agreement, and the voluminous factual record in this case, the Tribunal should issue a declaration (more fully described below) that Employ Media's expansion, as represented in the universe.jobs program, does not in any manner constitute a fundamental and material breach (or, for that matter, any sort of breach) of the Registry Agreement. To the contrary, it is ICANN that has breached its obligations under the Agreement and its constitutive documents by issuing a sham Notice of Breach, and attempting improperly to pressure Employ Media – through threats of terminating its entire business – to dismantle the expansion that ICANN knowingly and contractually approved.[5]

II.   STATEMENT OF FACTS

14.   In order for the Tribunal to appreciate fully the vacuity of ICANN's allegations and the motivations underlying its 27 February 2011 Notice of Breach, we set out in the sections that follow the factual context within which this dispute has arisen.

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[4]   *See, e.g., ICM Registry, LLC v. Internet Corporation for Assigned Names and Numbers*, ICDR Case No. 50 117 T 00224 08, Declaration of the Independent Review Panel, 19 Feb. 2010, *("ICM v. ICANN")*, CL – 12.

[5]   In its Request for Arbitration, Employ Media included a claim for "[a]n award of damages to be quantified over the course of the arbitration. . . ." Request for Arbitration, para. 103(b) Employ Media has decided, at present, to drop that request. Employ Media is not interested in obtaining monetary damages in this arbitration. Rather, Employ Media is interested in obtaining declaratory relief that will enable it to conduct its business in the manner in which Employ Media and ICANN contractually agreed. To be clear, Employ Media continue to seek an award of costs and reasonable attorneys' fees, as well as the other forms of relief requested herein.

A.   **Employ Media's Application for the .Jobs sTLD**

1.   **The Idea for .JOBS and the Formation of Employ Media**

15.   Employ Media was founded in 2003 by two entrepreneurs based in Cleveland, Ohio: Thomas Embrescia (the President and CEO of Employ Media) and Ray Fassett (its Senior Vice President).

16.   As Mr. Embrescia and Mr. Fassett explain in their Witness Statements, it was Mr. Fassett who conceived the idea for the .JOBS TLD in the late 1990s.[6] As Mr. Fassett researched how to implement his idea, he learned that ICANN had been created to manage the DNS, and that ICANN intended to expand the DNS by creating new TLDs. He also learned that ICANN intended to start that expansion with a limited first round of additional TLDs in 2000 (the "2000 Round") that would serve as a trial for future expansions.[7]

17.   Mr. Fassett did not have the resources to apply for or operate a TLD on his own. He therefore began to approach potential business partners who could provide capital, as well as media experience and expertise. Mr. Fassett had heard of Mr. Embrescia and his businesses. He knew that Mr. Embrescia had successfully owned and managed numerous radio and television stations around the country, and that he was looking for new business opportunities, including opportunities related to the Internet.[8] Following meetings in April 2000, Mr. Embrescia decided to invest in Mr. Fassett's idea.[9]

18.   Based on their understanding that ICANN's 2000 TLD round would be a limited, trial round, that ICANN would select only a few applicants, and that ICANN would hold the second round shortly after the first, Mr. Embrescia and Mr. Fassett decided to "sit out" the 2000 Round.[10] As it turned out, it took several years before ICANN got the next round underway. In the meantime, Mr.

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[6]   Witness Statement of Ray W. Fassett ("Fassett Statement"), para. 6; Witness Statement of Thomas J. Embrescia ("Embrescia Statement"), para. 7.

[7]   Fassett Statement, para. at 9.

[8]   *Id.* at 10-11.

[9]   *Id.*

[10]   Embrescia Statement, para. 10; Fassett Statement, para. 12

Fassett monitored and learned more about ICANN, and continued to make plans to submit an application in the second round.[11]

19.   In an early business plan, Mr. Fassett described examples of the types of names that would ultimately be available for registration in the .JOBS domain, including 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.[12] As early as 2002, Mr. Fassett envisioned that the different types of domain names would be "rolled out" in phases, beginning with <companyname>.jobs domains.[13]

20.   Thus, Mr. Fassett specifically envisioned from the outset that the TLD would commence with <companyname>.JOBS domains, and later expand to geographic, occupational, and other types of domain names. It is these latter categories of domain names that have drawn ICANN's ire, even though they were specifically approved by ICANN in 2010.

2.   Employ Media Selects SHRM as the Sponsoring Organization for the .JOBS TLD

21.   ICANN took an important step toward the second round application process in October 2002, when it posted a document called "A Plan for Action Regarding New gTLDs." Created by ICANN's then-president, Stuart Lynn, the plan contained a "limited proposal for moving forward with another round of new sponsored TLDs."[14] The plan made clear that applicants in the new round would need to identify a sponsoring organization for their proposed TLDs.

22.   Following ICANN's October 2002 posting of the plan, Mr. Embrescia and Mr. Fassett began to consider in earnest the best choice for the sponsoring organization for the .JOBS TLD.[15] One

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[11]   Fassett Statement, paras. 12-17.

[12]   *Id*, para. 13.

[13]   *Id*, para. 46.

[14]   *See* Fassett Statement, para. 18; 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.

[15]   Fassett Statement, para. 21.

of the first organizations they considered was SHRM, which, for the reasons discussed below, seemed like an obvious choice given its membership and organizational purpose.

23.   SHRM is a not-for-profit Ohio corporation founded in 1948. It is the largest organization representing the interests of human resources professionals in the world, with nearly 600 chapters internationally, and more than 250,000 individual members in over 120 countries. SHRM is headquartered in Alexandria, Virginia, but has offices (through subsidiaries) in India (Mumbai, Bangalore, and Delhi) and Beijing, China.[16] SHRM's mission includes, for example:

- Build[ing] and sustain[ing] partnerships with human resource professionals, media, governments, non-governmental organizations, businesses and academic institutions to address people management challenges; and

- [P]roviding a community for human resource professionals . . . to share expertise and create innovative solutions on people management issues.[17]

24.   Starting in late 2002, Mr. Fassett initiated a series of conversations with SHRM, and in particular with Gary Rubin, SHRM's Senior Vice President of Publishing and E-Media. Mr. Rubin is also a member of the senior management team that is responsible for the overall operation of SHRM. As mentioned above, he has submitted a witness statement in this arbitration.

25.   Both Mr. Fassett and Mr. Embrescia were immediately impressed with SHRM's mission, its diversity, and its global reach.[18] SHRM was also interested in Employ Media's idea for the .JOBS TLD, and felt that it would be well-suited to act as the TLD's sponsoring organization. As Mr. Rubin recalls in his Witness Statement:

I felt SHRM would be well-suited for such a role, given its vast national and international human resources expertise and experience, knowledge of the human resource professional community, and diverse membership. I was interested in Mr. Fassett's idea because I thought it would give the

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[16]   Society for Human Resource Management, *available at* http://www.shrm.org/about/Pages/default.aspx (last visited 11 July 2012), C-139; Witness Statement of Gary Rubin ("Rubin Statement"), para. 6.

[17]   Society for Human Resource Management, Mission and History, *available at* http://www.shrm.org/about/history/Pages/default.aspx (last visited 11 July 2012), C-139. *See also* Rubin Statement, para. 8.

[18]   Embrescia Statement, para. 13; Fassett Statement, para. 22.

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human resource community another method to reach job seekers. I also thought that .JOBS would help job seekers and employees using the Internet to find one another more efficiently.[19]

26.　　After numerous discussions with Mr. Fassett, internal discussion within SHRM, and research concerning the qualifications and financial support of Mr. Embrescia and Second Generation, SHRM agreed to serve as the sponsoring organization for the proposed TLD.[20] There is no dispute in this arbitration that ICANN reviewed SHRM's credentials to serve as the .JOBS TLD sponsoring organization and agreed to its appointment for such purpose.[21]

3.　　ICANN's RFP for the new TLD Round

27.　　In December 2003, ICANN issued its RFP for the new sTLD round. The RFP provided the following guidance to applicants about formulating the mission of the proposed sTLD, and how it should serve the "Sponsored TLD Community":

> The proposed sTLD must address the needs and interests of a clearly defined community (the Sponsored TLD Community), which can benefit from the establishment of a TLD operating in a policy formulation environment in which the community would participate.

28.　　While seeking sTLDs that would serve the needs and interests of a clearly defined community, ICANN also stated that it sought sTLDs that would benefit "broad global communities" and that would have "lasting value."[22]

29.　　The RFP further stated that the precise scope of the policy formulation authority delegated to the Sponsoring Organization was not a rigid or fixed criterion. Rather, that scope would vary from one sTLD to another:

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[19]　　Rubin Statement, para. 10.

[20]　　*Id.* at para. 11.

[21]　　In its Notice of Breach ICANN has repeatedly criticized SHRM for allegedly failing to carry out its role as sponsoring organization properly. The Tribunal will appreciate, however, that SHRM is not a party to this arbitration because there is no agreement to arbitrate between SHRM and ICANN.

[22]　　ICANN New sTLD Application and Request for Proposal (15 Dec. 2003) ("ICANN Request for Proposal"), C-7 at 6.7.

The scope of delegation of the policy formulation role need not be (and is not) uniform for all sTLDs, but is tailored to meet the particular needs of the defined Sponsored TLD Community and the characteristics of the policy formulation environment.[23]

30. Thus, if ICANN selected an sTLD for inclusion in the DNS, ICANN and the registry operator would negotiate and agree upon the "scope of delegation of the policy formulation role," which would be reflected in the parties' registry agreement.

4. Employ Media's Application for the .JOBS TLD

31. Following the release of the RFP on 15 December 2003, Employ Media – principally Mr. Fassett and Mr. Brian Johnson (currently Employ Media's General Counsel, but outside counsel at that time) – worked on the Application, which was submitted to ICANN in March 2004. The Application is included as Claimant's Exhibit 8. As the Tribunal will see, it is a lengthy, detailed, and elaborate document, from which ICANN has only selectively quoted in its Answer.[24]

32. In connection with the Application, Mr. Fassett and Mr. Johnson worked on the .JOBS Charter in consultation with SHRM.[25] Consistent with the criteria set forth in the RFP, Employ Media fashioned a definition of the .JOBS Community that was "precisely defined, so it [could] be readily determined which persons or entities make up that community" – but which also "[c]ategoriz[ed] a broad and lasting field of human, institutional, or social endeavor."[26] Thus, the Application made it clear that approval for the .JOBS TLD was being sought "to serve the needs of the international human resource management community (the 'Community')." This is precisely the same definition of the target community that is included in the .JOBS Charter. The application went on to state:

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23   *Id.*

24   In its Answer, ICANN has done as much as it can to focus attention on Employ Media's original TLD application. However, as the Tribunal will come to appreciate in the course of this arbitration, it is neither Employ Media's application, nor the resulting 2005 Registry Agreement that are at the heart of this dispute. Instead, it is the 2010 amendments to the Registry Agreement and the Parties' common understanding and intentions in connection with those amendments that form the nucleus of issues that the Tribunal must decide. It will not be lost on the Tribunal that ICANN's Answer pays scant attention to the facts and circumstances leading up to the 2010 amendment to the Registry Agreement, or to the language of the amendments themselves. (The confidential version of Employ Media's application is included as Exhibit 8. The redacted version, which was posted on ICANN's website, is attached as Exhibit 9.)

25   Fassett Statement, para. 26; Rubin Statement, para. 12.

26   *See* ICANN Request for Proposals C-7, at 5.

> "[H]uman 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, training, development, promotion, termination and retirement.[27]

This definition remained unchanged throughout the application and approval process, and was included, with the precise same wording, in the Registry Agreement.

33. Employ Media (in consultation with SHRM) decided to launch the .JOBS TLD with only <companyname>.JOBS domains.[28] As Mr. Fassett explains in his Witness Statement, it made sense "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."[29]

34. Employ Media was perfectly clear in its Application (and everywhere else) that the initial practice of limiting domain names to company names was "revisable/amendable," and discussed the requirements that would have to be satisfied "in the event that other [types of] domains are made available for registration." The Application specifically envisioned that names beyond <companyname>.JOBS could be added to the TLD:

> 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).*[30]

35. Employ Media submitted its Application on 15 March 2004. Ten other applications were also submitted. ICANN posted the non-confidential portions of all of the applications online for public comment, and began a several month process of evaluating the applications. During the evaluation process, ICANN and Employ Media corresponded about the application, and were in

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[27]   Registry Agreement, Appendix S, Part I, C-19 ("Charter").

[28]   Fassett Statement, paras. 14-16, 26-28.

[29]   *Id.* para. 15.

[30]   Employ Media's New sTLD RFA Application ("Application") at 38, C-7.

frequent communication. At no point in the evaluation process did ICANN ask Employ Media to change the Charter definition of the .JOBS Community, or to include any restrictions on the use of domain names in the proposed TLD or the content of .JOBS websites, or express reservations about SHRM as an appropriate Sponsoring Organization.

36.   Following the evaluation, the ICANN Board unanimously approved the .JOBS application in a Board Resolution dated 13 December 2004.[31] The Resolution authorized ICANN's "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."[32] In issuing the Resolution, the Board specifically requested that, during the negotiations, "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."[33] The Resolution stated further that:

> [I]f 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 President shall present such proposed terms to this board, for approval and authorization to enter into an agreement relating to the delegation of the sTLD.[34]

37.   As discussed in the following section, the Parties succeeded in negotiating – and the ICANN Board approved – a Registry Agreement that clearly addressed, *inter alia*, how broad-based policy-making would be created for the sponsored community, and how the .JOBS TLD would be differentiated in the name space.

B.   The 2005 .JOBS Registry Agreement

38.   In early 2005, Employ Media began negotiations with ICANN staff regarding the terms of the .JOBS Registry Agreement. Employ Media was represented in these negotiations primarily by Mr. Fassett and Mr. Johnson, although Mr. Embrescia was involved in some of the discussions as well.

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[31]   ICANN Special Meeting of the Board, Resolutions on .JOBS sTLD Approval to Enter Negotiations, Special Meeting of the Board, 13 Dec. 2004, *available at* http://www.icann.org/en/minutes/resolutions-13dec04.htm (last visited 11 July 2012) ("ICANN Board Resolutions on .JOBS sTLD Negotiation), C-12.

[32]   *Id.*

[33]   *Id.*

[34]   *Id.*

ICANN was represented in the negotiations by Mr. Kurt Pritz, a Senior Vice President at ICANN; Mr. John Jeffrey, ICANN's General Counsel; and Mr. Dan Holloran, ICANN's Deputy General Counsel.

39.   The Registry Agreement (including all of its appendices), as negotiated by Employ Media and ICANN staff, was finalized in March 2005. ICANN posted the agreed-upon draft at ICANN's website for the purposes of public comment. The draft was also submitted to the ICANN Board of Directors for the Board's consideration. In April 2005, the ICANN Board passed a resolution unanimously approving the Registry Agreement.[35] ICANN and Employ Media executed the Registry Agreement on 5 May 2005.[36]

40.   The 2005 .JOBS Registry Agreement consists of a main body, based on ICANN's model registry agreement, followed by Appendices 1-7 (which set forth a variety of technical and other requirements[37]), and an "Appendix S." Appendix S sets forth more detailed information about the Community to be served by the sTLD, the Sponsoring Organization for the sTLD, and the manner in which the Registry Operator and Sponsoring Organization will carry out the responsibilities for managing the sTLD that have been delegated to them under the Registry Agreement.

41.   The terms that are relevant to this dispute are mostly contained in the main body of the Registry Agreement and in Appendix S. Given the importance of the Agreement's terms to the resolution of this dispute, we set forth below and discuss in some detail the relevant provisions of the 2005 Agreement. The terms of the 2005 Registry Agreement demonstrate that: (1) ICANN delegated broad discretion to Employ Media and SHRM to develop the rules and policies for the TLD – including the categories of second-level domain that could be included in the TLD, and the uses to which they could be put; (2) the Parties specifically envisioned that the TLD could evolve and expand beyond the initial launch plan of <companyname.jobs> domains; and (3) even in the original Agreement, there were no restrictions prohibiting the ultimate use of a .JOBS second-level domain as a job board (i.e, the specific issue which would appear to have motivated ICANN's breach notice following intensive lobbying from the fee-based job board industry).

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[35]   ICANN Regular Meeting of the Board Minutes, 8 Apr. 2005, *available at* http://www.icann.org/en/groups/board/documents/minutes-08apr05-en.htm, C-18.

[36]   Registry Agreement, C-19.

[37]   The technical nature of Appendices 1-7 is indicated by their titles: (1) Data Escrow Specification; (2) Escrow Agreement; (3) Zone File Access Agreement; (4) Registry Operator's Monthly Report; (5) Whois Specifications; (6) Schedule of Reserved Names; and (7) Functional and Performance Specifications.

42. We discuss, first, the relevant provisions contained in the main body of the Registry Agreement, and second, the relevant provisions contained in Appendix S. Notably, little, if anything, is said by ICANN regarding these provisions in its Answer.

1. Relevant Provisions in the Main Body of the Agreement

43. The main body of the Registry Agreement (which, again, is based on ICANN's model registry agreement) sets forth provisions that are generally applicable across all sTLDs. On the very first page, in the Agreement's introductory article, Section 1.3 sets forth ICANN's broad delegation of authority to Employ Media:

> ICANN hereby designates Employ Media LLC as the sole registry operator for the sponsored TLD ("Registry Operator"). ICANN hereby *delegates to Registry Operator the authority to develop the policies for the sponsored TLD* consistent with the requirements of Section 3.1(g) of this Agreement and Appendix S.[38]

Similarly, Section 3.1(d) ("Registry Operations") in Article III ("Covenants") provides that Employ Media is responsible for "Registry Restrictions." The Agreement delegates broad authority to the Registry Operator to carry out that responsibility. Thus, Section 3.1(d)(i) provides in relevant part:

> (A) Registry Operator *shall establish policies, in conformity with the charter, for the naming conventions within the sponsored TLD and for requirements of registration*, consistent with Section 3.1(g).
>
> (B) Registry Operator *shall be responsible for establishing procedures for the enforcement of applicable charter restrictions on registration within the TLD*, as described in more detail in the sponsored TLD charter included in <u>Appendix S</u>, which Appendix shall also include the description of the sponsored community and the delegated authority with respect thereto.[39]

44. Section 3.1(g) – the section referred to in the provisions above – is headed "<u>General Obligations of the Registry Operator to Sponsored Community</u>." Section 3.1(g) sets forth the general obligations of the Registry Operator in *"developing or enforcing standards, policies, procedures, or*

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[38] Registry Agreement, sec. 1.3. Section 3.1(g) and Appendix S are discussed in detail below.

[39] Registry Agreement, sec. 3.1(d)(i) (emphasis added).

practices with respect to the TLD, as to which obligations ICANN acknowledges Registry Operator has engaged [SHRM] as the sponsoring organization . . . ."[40]

45. The Agreement's terms and termination provisions set a very high threshold for ICANN to terminate the Agreement or not to renew it. Section 4.1 in Article IV ("Term of Agreement") provides for the "initial term" of the Agreement to be ten years. However, the Agreement *"shall be renewed* upon the expiration of the initial term . . . , *and following any renewal term,"* unless:

> (i) an arbitrator or court has determined that Registry Operator has been in fundamental and material breach of Registry Operator's obligations set forth in Sections 3.1(a), (b), (d) or (e); <u>Section 5.2</u> or <u>Section 7.3</u> despite notice and an opportunity to cure in accordance with <u>Article VI</u> hereof *and* (ii) following the decision of such arbitrator or court, Registry Operator has failed to correct the conduct found to constitute such breach.[41] (emphasis added)

46. Similarly, Sections 6.1 ("<u>Termination by ICANN</u>") and 6.2 ("<u>Notice; Opportunity to Cure</u>") provide that ICANN may terminate the Agreement only if the Registry Operator remains in fundamental and material breach of the same obligations set forth in Section 4.1, following a written and detailed notice and an opportunity to cure. Thus, Section 6.1 provides:

> ICANN may terminate this Agreement if Registry Operator fails to cure any *fundamental and material breach* of Registry Operator's obligations set forth in Sections 3.1(a), (b), (d), or (e); <u>Section 5.2</u> or <u>Section 7.3</u> despite notice and an opportunity to cure in accordance with <u>Section 6.3</u> within thirty calendar days after ICANN gives Registry Operator written notice of the breach, which *notice shall include with specificity the details of the alleged breach.* (emphasis added).[42]

Section 6.3 provides in relevant part:

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[40]   Registry Agreement, sec. 3.1(g)(emphasis added).

[41]   Registry Agreement, sec. 4.1. These Sections refer to the Registry Operator's obligation to preserve "security and stability" (Section 3.1(a)); obligation to comply with and implement all "Consensus Policies" established by ICANN (Section 3.1(b)); obligations concerning "Registry Operations" (Section 3.1(d)); obligation concerning "Fees and Payments" owed to ICANN) (Section 3.1(e)); and obligation to comply with an order of specific performance made by an arbitral tribunal (Section 5.2). Although the provision also refers to Section 7.3, there is no such section contained in the Registry Agreement.

[42]   Registry Agreement, sec. 6.1.

This Agreement may be terminated in the circumstances described in Section 6.1 above only following written notice to Registry Operator and Registry Operator's failure to cure in the prescribed time period, with Registry Operator being given an opportunity during that time to initiate arbitration under Section 5.1(b) to determine the appropriateness of termination under this Agreement.[43]

2. Relevant Provisions in Appendix S

47. Appendix S sets forth detailed provisions concerning the sTLD community, the authority delegated to the Registry Operator and the Sponsoring Organization, and the manner in which the Registry Operator and Sponsoring Organization is to carry out the responsibilities for managing the TLD and operating the business that has been delegated to it under the Registry Agreement.

48. Part I of Appendix S sets forth the .JOBS Charter, which, as stated above, was never modified in any respect from the submission of the .JOBS Application in March 2004 to the present. The Charter was specifically drafted to account for the possibility that the TLD would eventually encompass geographic, occupational, and industry names in addition to <companyname>.JOBS domains.[44] The Charter contains six separate Articles. Article 1 of the Charter provides that the .JOBS TLD will "serve the needs of" and defines the "Community" as the "international human resource management community." Article 1 further explains:

> "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, training, development, promotion, termination and retirement.[45]

49. Articles II and III of the Charter set forth the respective responsibilities of Employ Media and SHRM in managing and overseeing the .JOBS sTLD. Article II provides:

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[43]   Registry Agreement, sec. 6.3. Section 6.3 further provides: "In event Registry Operator initiates arbitration concerning the appropriateness of termination by ICANN, Registry Operator may at the same time request that the arbitration panel stay the termination until the arbitration decision or until the arbitration panel has granted an ICANN request for lifting of the stay."

[44]   *See* Fassett Statement, para. 40; Embrescia Statement, para. 16.

[45]   Registry Agreement, Appendix S, Part I.I.

The .JOBS TLD will be managed by Employ Media in accordance with (i) the provisions of this charter (the "Charter"); (ii) the interests of the Community; and (iii) policy directives from the Society for Human Resource Management ("SHRM"), as "Sponsor."[46]

Article III provides:

SHRM shall act as the policy delegate responsible for establishing registration requirements for second-level domains in the .JOBS TLD, consistent with this Charter and in the interests of the Community. As the world's largest human resource management association, SHRM's tax-exempt purposes include the promotion of the use of sound and ethical human resource practices.[47]

50.   Article IV sets forth who may request registration of a second-level domain within the .JOBS TLD.

The following persons may request registration of a second-level domain with the .JOBS TLD:

- Members of SHRM; or

- Persons engaged in human resources 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.[48]

51.   Finally, Article V of the Charter provides that "[t]he Sponsor may establish stricter requirements for permitting registrations."[49] Article VI provides that "Employ Media will promptly

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[46]   *Id.* at Part I.II.

[47]   *Id.* at Part I.III.

[48]   The Human Resource Certification Institute is an internationally recognized certifying organization for the human resource profession. SHRM and the Human Resource Certification Institute are partner organizations. For more information, *see* Human Resource Certification Institute, About, http://www.hrci.org/About/, C-134.

[49]   *Id.* at Part I.V.

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convey to ICANN any modifications that are made to the definition of the Community as determined by the Sponsor."[50]

52.   Thus, there is absolutely nothing in the Charter that limits the categories of second-level domain names to <companyname>.JOBS or that would limit the use of second-level .JOBS domain to preclude the possibility of a job board.   There is certainly nothing in the Charter even remotely suggesting, as ICANN does in its Answer, that only "individual human resource managers seeking to promote employment opportunities within their own organizations" are eligible registrants.   The language is simply not there.

53.   Part II of the Appendix S – with the heading "**Delegated Authority**" – sets forth nineteen broad areas of responsibility for the development of policies for the sTLD that "are delegated to the Registry Operator, who has engaged [SHRM] as policy delegate . . . , provided the other provisions of the Sponsored TLD Registry Agreement and its Attachments are followed."[51]   The delegated areas of responsibility include:

> 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 the scope of the Charter (Attachment 1) 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 (Attachment 1) is not exceeded.
>
> * * *
>
> 5.   Mechanisms for enforcement of the restrictions in items 1, 2 and 3, including procedures for cancellation of registrations.
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> * * *
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> 9.   Matters concerning the operation of the registry for the Sponsored TLD.
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> * * *

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[50]   *Id.* at Part I.VI.

[51]   Registry Agreement, Appendix S, Part II, C-19 ("Delegated Authority").

14.   Uses and practices by registrants with respect to Registered Names.

* * *

18.   Authorization to initiate the .jobs Policy Development Process (PDP) in place between the Registry Operator and the policy delegate, currently the Society for Human Resource Management, and to enact such policies produced by the PDP.[52]

54.   As the list demonstrates, the authority expressly delegated to Employ Media and SHRM is broad, and includes, *inter alia*, the authority to determine naming conventions, who may register domains, and how domains may be used.

55.   Part VII(3) of Appendix S sets forth in detail the Policy Development Process, or PDP, referred to in Item 18 of the list of delegated responsibilities. This part of the Registry Agreement also demonstrates that the parties envisioned that rules and policies for the TLD were not permanently fixed as of the TLD's launch. Rather, they could change and evolve. Thus, under the heading "**Policy-Making and Differentiation**," Section 3 of Part VII begins by stating:

> Policy is created by SHRM and implemented and enforced by Registry Operator (here, Employ Media). Certain policies have already been created and are embodied in the Employ Media/policy delegate (here, SHRM) agreement. *Additional policies and modifications to current policies will be created, reviewed and accepted/rejected as explained below.*[53] (emphasis added)

56.   Section VII(3) further provides that any "new policies and/or changes to current policies and/or the Charter" are to be considered by a Policy Development Council (the "Council") appointed by SHRM. Any proposed additional policies or changes to existing policies must be considered by the Council, which then sets forth its recommendation whether to approve or reject any proposed additions or changes. If the Council recommends approval of the proposed additions or changes, approval of both the SHRM Executive Committee and Employ Media are required for their implementation.[54]

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[52]   *Id.*

[53]   Registry Agreement, Appendix S, Part VII.3.

[54]   As mentioned above (and discussed in detail below), at the request of ICANN, SHRM undertook an elaborate PDP before approving the addition of geographic and occupation names to the TLD (even though it is less than clear that such a PDP is required where, as here, both Employ Media and SHRM already agreed that the addition was in the best interests of the Community).

57.   Given Employ Media's plan to limit the launch of the TLD to <companyname>.JOBS domains, Appendix S also included language reflecting that limitation. Prior to its amendment in 2010 – Part VII(2) of Appendix S provided:

> .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.

It provided further:

> 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); (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.[55]

As Mr. Fassett and Mr. Embrescia explain in their Witness Statements, they did not include – and ICANN did not insist upon – any such limitations in the Charter itself, because they envisioned that geographic, industry, and occupational names might later be added to the TLD.[56] Thus, in 2010, when ICANN agreed to amend Appendix S, no changes were made to the Charter. However, as we discuss below, language was added to Appendix S to reflect <non-companyname> second-level domains as a new category of name within .JOBS.

58.   As mentioned above, in approving Employ Media's Application for the .JOBS sTLD, the ICANN Board's resolution dated 13 December 2004 had specifically requested 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."[57] In approving the 2005 Registry Agreement nearly four months later – after extensive negotiations between Employ Media and

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[55]   Registry Agreement, Appendix S, Part VII.2.

[56]   Fassett Statement, para. 40; Embrescia Statement, para. 16.

[57]   ICANN Board Resolutions on .JOBS sTLD Approval to Enter Negotiation, C-.12.

the ICANN staff, and following a public notice and comment period – the ICANN Board's resolution dated 8 April 2005 stated that those concerns had been specifically addressed:

> [I]n response to the Board resolution on 13 December 2004, *the applicant has provided satisfactory details as to the broad-based mechanism for policy-making for the sponsored community*, and how this sTLD would be differentiated in the name space.[58]

Accordingly, the ICANN Board resolved that "the proposed agreement with Employ Media concerning the .JOBS sTLD is approved, and the President [of ICANN] is authorized to take such actions as appropriate to implement the agreement."[59]

59.   The Parties executed the Registry Agreement on 5 May 2005. By September 2005, .JOBS names were available for registration.

C.   Discussions of Expansion and the Shared Domain Beta Test

60.   As detailed above, Employ Media was open and transparent from the outset about the possibility of adding other categories of domain names to the TLD during the application process and the drafting and negotiation of the original Registry Agreement. After the launch of .JOBS in 2005, Employ Media continued openly and publicly to discuss its plans to add new categories of domain names. Thus, in the several years after the launch, Employ Media discussed the possibility not only with SHRM and ICANN, but also with members of the Community, including job board companies (subsection 1), and launched a beta test featuring geographic, occupational, and industry names, specifically to demonstrate the object and scope of the expansion (subsection 2).

1.   Employ Media Openly and Publicly Discussed its Expansion Plans, Including with SHRM, ICANN, and Major Job Board Companies

61.   Although it launched the .JOBS TLD with only <companynames>.jobs domain names, Employ Media was completely open about its intention to consider and add additional types of domain names. Indeed, just prior to launch, Employ Media had registered to itself a list of over a thousand names that it might eventually seek to include in the TLD – including names such as accounting.jobs,

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[58]   ICANN Board Meeting Minutes, 8 April 2005 2005, *available at* http://www.icann.org/en/groups/board/documents/minutes-08apr05-en.htm, C-18 (emphasis added).

[59]   *Id.*

construction.jobs, California.jobs, nursing.jobs, workathome.jobs, and so on.[60] (During the negotiations of the Registry Agreement, ICANN staff had specifically told Employ Media that "[t]here [was] nothing in the agreement that prohibits the registry from reserving names to itself."[61]) Moreover, there can be no doubt that ICANN knew that Employ Media had registered these names. Employ Media paid – and ICANN accepted – the $2 annual fee required for each such registration.[62] It would have made no sense for Employ Media to self-register these names, but for the fact that it eventually intended that they would be available as part of an expansion; and ICANN knew this. ICANN, however, raised no objections.

62.   Of the three major fee-based job boards, only CareerBuilder expressed any interest in working with .JOBS. For some time, CareerBuilder offered its clients the opportunity to register for a .JOBS domain as part of an overall "Brandbuilder" website design and hosting package that CareerBuilder was selling to corporate clients for $25,000. But Employ Media was selling its <companynames>.jobs domains at significantly lower prices, and concluded far more domains names could be sold at the going retail price.[63]

63.   Later in 2005, CareerBuilder also partnered with Employ Media in the aftermath of Hurricane Katrina.[64] After securing the approval of SHRM, EmployMedia and CareerBuilder launched the site Katrina.jobs, which allowed multiple employers who were interested in providing jobs for hurricane survivors to post those jobs for free. CareerBuilder managed the site, and updated the job postings frequently. Employ Media and CareerBuilder jointly promoted the site, which attracted attention for news sources such as CNN. It also attracted attention from the job board industry, which was obviously watching .JOBS closely. At least one writer affiliated with the industry wrote a critical article about Katrina.jobs. The article complained that Katrina.jobs "mark[ed] . . . the first bending of

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[60]   Fassett Statement, para. 43.

[61]   *See* Email from Esme Smith to Brian Johnson, 16 Mar. 2005, C- 14.

[62]   Fassett Statement, para. 43.

[63]   Fassett Statement, para. 45 n.25.

[64]   Fassett Statement, para. 47; John Zappe, Dot-Jobs Get First Use as Katrina Job Board at 1, Workforce, 26 Sept. 2005, *available at* http://www.workforce.com/apps/pbcs.dll/article?AID=/20050926/NEWS01/309269997&template=printarticle, C-21. Mr. Fassett received 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 Employ Media was 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.

the rules by Employ Media . . . . [T]he rules that were approved permitted only a company's own jobs to be posted to the site."[65] Employ Media received no complaints from ICANN.[66]

64. Aside from these few experiments, Employ Media operated the .JOBS TLD for several years with only <companyname> registrations. In June 2007, however, SHRM published the results of a survey which concluded that "niche" job board – *i.e.*, job boards that "concentrate on either a specific location or a specific profession" – were of increasing utility and importance to the human resources community.[67] The study led to further discussions between Employ Media and SHRM as to whether, when, and how an expansion of the .JOBS TLD should be implemented. These discussions went on for some time, as both Employ Media and SHRM gave careful consideration to the issue.

65. By 2009, both Employ Media and SHRM felt the time was right to take more concrete steps with respect to the addition of geographic, occupational, and industry names to the .JOBS domain. The factors leading to the decision included, among other things: the results of SHRM's June 2007 study; the dramatic growth of the use of Google and similar search engines (which led job-searchers to conduct their searches based on geographical, industry, and occupational terms); and the related concern that the .JOBS sTLD, if limited to only <companynames>, was not going to serve the needs of the Community as successfully as it otherwise might, because job-seekers were increasingly searching for jobs not by company name, but rather by geographical, industry, and/or occupational identifiers.

66. As Mr. Rubin explains in his Witness Statement:

> As .JOBS developed, Employ Media expressed its desire on several occasions to expand the types of names available within the .JOBS domain. It suggested use of non-company names as websites on the

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[65] John Zappe, Dot-Jobs Get First Use as Katrina Job Board, *supra* note 47, C-21. As discussed below, the author of the article, John Zappe, would later write critically of Employ Media's proposed expansion plans – including in communications written directly to ICANN.

[66] In another experiment, Employ Media worked with the City of Buffalo, New York to increase the recruitment of police officers and firefighters. Buffalo had launched a recruitment campaign in the fall of 2007 called "Take the Test" (meaning the test to qualify for the Police or Fire Departments). Employ Media helped the City of Buffalo to set up a domain called "takethetest.jobs." *See* Fassett Statement, para. 47; David Bertola, Buffalo Police on Recruiting Mission, Business First, 1 Nov. 2006, *available at*
http://www.bizjournals.com/buffalo/stories/2006/10/30/daily21.html, C-23.

[67] Society for Human Resource Management, 2007 Advances in E-Recruiting; Leveraging the .JOBS Domain, June 2007, C-24.

Internet as an additional if not better way to serve the needs of the Community. In 2009, I felt this evolution in approach made sense, particulary given the changes in social media, such as the increased use of Craig's List, LinkedIn and other similar vehicles for HR interaction, and our desire for the .JOBS sTLD to gain more traction.[68]

67.   Although Employ Media and SHRM believed that, based on the plain language of the Registry Agreement, it was within their delegated authority to expand the .JOBS TLD beyond <companynames>, Employ Media nonetheless discussed its plans with ICANN. In February 2009, Mr. Craig Schwartz, who then served as ICANN's Chief Registry Liaison, visited Employ Media's offices in Cleveland. As Mr. Fassett's contemporaneous notes demonstrate, Mr. Embrescia and Mr. Fassett specifically told Mr. Schwartz several times of their plans to add geographic and industry names to the .JOBS domain:

> Tom mentioned repeatedly our [proposed] delegation of certain names *such as newyork.jobs* at our discretion. Craig offered no objectionable reason for doing so. Ray mentioned on a number of occasions SHRM's recent 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 contact related.[69]

Indeed, the next day, 24 February 2009, Mr. Schwartz wrote Mr. Fassett an email thanking Employ Media for hosting the meeting, and stating: "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."[70] He did not mention any concerns about the addition of geographic and occupational names that both Mr. Fassett and Mr. Embrescia had mentioned to him.

68.   On 2 March 2009, Employ Media posted a link on its website announcing that it was considering the addition of geographic, industry, and occupational names in the near future.[71] Around

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[68]   Rubin Statement, para. 17.

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

[70]   Email from Craig Schwartz to Ray Fassett and Tom Embrescia, 24 Feb. 2009, C-28.

[71]   March 2009 Announcement, *available at* http://goto.jobs/rules.asp (last visited 5 Aug. 2012), C-130; *see also* Email from Brian Johnson to Tom Embrescia, 2 Mar. 2009, C-31A.

the same time, Employ Media, in an effort led primarily by Mr. Embrescia, again approached companies such as Monster, CareerBuilder, and HotJobs.[72] Employ Media told them of their plans to expand and invited them to make proposals to be involved in the expansion. Given Employ Media's very open and public discussion of its expansion plans, it did not take long for the word to spread.

69. In April 2009, Ere.net published an article on its website entitled "Dot-JOBS Addresses Could Be Opened Up."[73] Ere.net is a website that reports on online recruiting issues, particularly related to job boards, and is loosely affiliated with an association of fee-based boards called the International Association of Employment Web Sites ("IAEWS"). (The IAEWS later became one of the driving forces behind the .JOBS Charter Compliance Coalition.) The author of the article, John Zappe, had previously written critically about Employ Media and the Katrina.jobs domain[74] – and would later write additional criticisms about Employ Media, including communications sent directly to ICANN.[75] The article reported that Employ Media was "weighing the possibility of opening up the registry to allow regional and occupational names," and quoted Mr. Embrescia as saying that "the addresses would go to job boards, social networks, or other organizations."[76]

70. Thus, Employ Media's plans were publically known. Employ Media made no efforts to conceal them. To the contrary, as Mr. Embrescia explains in his Witness Statement, "[w]e also spoke publically about our plans to expand, hoping that it would bring us new ideas."[77]

71. Although Employ Media invited the major job board companies to make proposals to be involved in the expansion, most of these companies showed no interest.[78]

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[72]   *See, e.g.*, Email from Tom Embrescia to Gary Rubin, 24 Feb. 2009, C-27; Email from Gary Rubin to Tom Embrescia, 25 Feb. 2009, C-30; Email from Tom Embrescia to Marty Ponpadur, 12 Mar. 2009, C- 32.

[73]   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.

[74]   John Zappe, Dot-JOBS Bows with Site to Aid Katrina Victims; Online Recruiting, (online job sites make a confusion), Workforce, 10 Oct. 2005, *available at* http://www.highbeam.com/doc/1G1-138014036.html (subscription required), C-22.

[75]   *See* Discussion *infra*

[76]   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.

[77]   Embrescia Statement, para. 24.

72. One organization, however – DirectEmployers – was very interested in developing ideas that would serve the human resources management community. DirectEmployers is a non-profit association of employers working together to share online recruitment strategies and to pool their resources to make on-line recruiting more efficient and less expensive for all employees, not just their members. DirectEmployer's diverse membership includes more than 500 domestic and international companies that are in the Fortune 5000.[78] Because Direct Employers' business and affairs are managed by a Board of Directors consisting of representatives of its member employees (*i.e.*, employers), it acts in the interests of the member employers and of employers generally.

73. After discussions with Employ Media about expansion, DirectEmployers proposed developing a series of sites using geographic, occupational, and industrial terms. As Mr. Fassett explains in his Witness Statement, the proposal would allow:

> any employer [to] 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."[80]

74. Employ Media was intrigued by DirectEmployers's proposal, but wanted to test whether it would really serve the needs and interests of the Community as envisioned.

2. **Employ Media's 2009 Shared Domain Beta Test Publicly Used Geographic, Industry and Occupational Domain Names as Job Boards**

75. After multiple discussions with DirectEmployers, Employ Media concluded that the best way to determine whether the additional name categories served the needs and interests of the .JOBS Community was through a "shared domain beta test" – a pilot program that would allow the intended customers to try out and evaluate the product. The term "beta test" comes from the world of software development, where early versions of programs are frequently evaluated through such testing to gather real data for decision-making. The term "shared domain" indicated that domains would not be limited to a single company. Thus, for example, both Starbucks and Microsoft could both post job listings in a "shared" domain such as Seattle.jobs; both United Airlines and American Airlines could post job

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[78]   Embrescia Statement, para. 25.

[79]   DirectEmployers, Member Companies, *available at* http://www.directemployers.org/about/member-companies, C-133. DirectEmployers' members include companies such as Alcatel-Lucent, American Express, Aetna, AOL, ExxonMobil, Facebook, Fujitsu, IBM, Intel, Maersk, and Volvo – just to name a few. *Id.*

[80]   Fassett Statement, para. 51.

listings in a "shared" domain such as pilots.jobs; hospitals anywhere could post job listings in a "shared" domain such as hospitalworkers.jobs; and so on. Further, this could be accomplished though automation bringing new efficiencies for employers that did not exist in the status quo .COM job board industry spectrum.

76.   Employ Media believed that a beta test would be the best means to evaluate a number of questions relating to the proposal, including:

- whether search engines would take users to the domain names based on searches combining the word "jobs" with a geographic, industry, or occupational search, and whether such searches would yield results that ranked high among the search returns;

- whether job seekers would use the domains once directed there by the searches they had conducted;

- most importantly, whether it was valuable to the .JOBS community—that is, that it would help HR personnel perform their recruiting function.[81]

77.   To help evaluate these questions, Employ Media and DirectEmployers implemented measures to track rankings in search results, number of visitors to various pages, the types of searches that brought Internet users to the beta websites, and the types and numbers of jobs posted on various pages.[82] Employ Media was very pleased with the results of this tracking: the new sites were being indexed by Google and Bing immediately, and some were even appearing on the first page of Google search results.[83] 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 the result of the beta.[84]

78.   To evaluate further the beta's value to the .JOBS community, Employ Media, with the assistance of DirectEmployers, formed a ".JOBS Advisory Council" to consult with employers and test

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[81]   *Id.* para. 55.

[82]   *Id.* para. 56.

[83]   *Id.*

[84]   *Id.*

their reaction to the beta.[85] The .JOBS Advisory Council comprised nearly 50 human resource professionals from Fortune 500 companies—in other words, all were members of the .JOBS Community.

79.   The beta test launched in mid-August 2009, and included a few hundred domain names.[86] Most of these domain names were selected from the list of approximately 1600 names that Employ Media had registered to itself just prior to the launch of the .JOBS sTLD in 2005.

80.   It soon became obvious that the beta was a success within the .JOBS community. In mid-September, Mr. Fassett reported that after the first 30 days of the beta being live on the Internet, "we've had over 5,000 unique visitors excluding the 20 or so unique people that may comprise us and DE[] people," and "over 18,000 page views.[87] Representatives from major companies – including, for example, Hyatt, General Dynamics, Lockheed Martin, ABB, and Nestle – signed up to create specialized job postings in the beta.[88] The enthusiastic response to the beta test from those on the Advisory Council was a clear indication that DirectEmployers' proposal served the needs and interests of the .JOBS Community.

81.   Not only was the beta used by the .JOBS Community, it was also widely publicized by both DirectEmployers and Employ Media, and attracted media and other public attention.[89] This also meant that it generated an outcry from some existing, fee-based job boards that wanted to avoid new competition—even though Employ Media was more than willing to partner with any of those companies if they proposed new ideas for using .JOBS domains to serve the Community. Instead, however, these fee-based job board operators eventually banded together to work against Employ Media.

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[85]   *Id.*

[86]   *Id.*

[87]   Email from Ray Fassett to Tom Embrescia, et al., 16 Sept. 2009, C-34; Fassett Statement, para. 56.

[88]   Email from Ray Fassett to Tom Embrescia, et al., 15 Oct. 2009, C-35.

[89]   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. 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.usatoday.com/tech/news/2010-02-26-online-jobs_N.htm, C-40.

82.   As Employ Media was still exploring the benefits of the beta test, Ere.net – specifically,

Mr. Zappe – sent an email dated 28 October 2009 to ICANN. Mr. Zappe's email began by providing

ICANN with the following "background" information concerning the beta test:

> Employ Media maintains it has the right to sell or assign the occupational
> and geographic (and geo-occupational) names at any time. These would
> be the NewYork.JOBS and Nursing.JOBS addresses. It has, in fact,
> permitted a third party job board operator, Employers Direct, to make
> sure of such designations. (See Boston.jobs, Atlanta.jobs, etc.)
>
> The Society for Human Resources says it sees no conflict there with the
> purposes of the sTLD, but in any event the decision is up to the registrar
> [sic].[90]

Mr. Zappe's email then cited various provisions of Employ Media's Registry Agreement, as well as its

original application for the sTLD, reflecting Employ Media's intention to launch the domain with only

<companyname.jobs> second-level domains. Mr. Zappe's email posed a series of questions, including:

"Does the agreement between Employ Media and ICANN permit the use of geographic and occupation-

specific nomenclature? If not, is the use described above proper?"[91]

83.   At the time Mr. Zappe sent his email, much of the ICANN community was in Seoul,

South Korea for ICANN meetings. Mr. Schwartz (who, as mentioned above, was then serving as

ICANN's Chief Registry Liaison) and Mr. Fassett were both in Seoul for the meetings. Mr. Schwartz

showed Mr. Fassett the email he had received from Mr. Zappe. There can therefore be no question that

ICANN knew at that time about the beta test and its specific details (e.g., that it included geographic,

occupational, and industry name domains, which were being used as job boards) given that they were

described in Mr. Zappe's email. Mr. Fassett recalls discussing the beta test with Mr. Schwartz in

connection with Mr. Zappe's email, and that Mr. Schwartz was fully aware of the beta test, the types of

names being used in the beta test, and the uses to which the names were being put.[92] Very significantly

for present purposes, Mr. Schwarz sent an email to Mr. Fassett later that day, informing him that he

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[90]   Email from John Zappe to Michele Jourdan, 28 Oct.2009, C-36.

[91]   Id.

[92]   Fassett Statement, para. 56.

(Mr. Schwartz) had responded to Mr. Zappe that *"Employ Media is operating in compliance with its registry agreement . . . ."* [93]

84.   After receiving this message from Mr. Schwartz, Employ Media was understandably surprised when, on 11 November 2009, Mr. Schwartz informed Employ Media that ICANN planned to conduct a compliance review of Employ Media's operation of the .JOBS sTLD. [94] Mr. Embrescia arranged for a face-to-face meeting in Marina del Rey with ICANN's General Counsel, John Jeffrey, and Senior Vice President, Kurt Pritz (both of whom had been involved in the drafting and negotiation of the Registry Agreement), on 24 November 2009. [95] Mr. Embrescia explained the beta test in detail, observing that it was available online and visible to anyone. He also acknowledged the language in Appendix S that limited names in the .JOBS sTLD to <companyname>.jobs domains, but expressed Employ Media's view that the Registry Agreement delegated the authority to Employ Media and SHRM to consider the expansion of the sTLD to include additional categories of names, particularly in the limited context of a beta test. [96]

85.   Mr. Embrescia recalls that during this meeting, ICANN, and in particular, Mr. Jeffrey, was very supportive of Employ Media's initiative, and that if amendments to the Registry Agreement were determined by ICANN to be necessary, ICANN would assist Employ Media to implement them. As Mr. Embrescia testifies in his Witness Statement:

> John [Jeffrey] further stated that Employ Media was doing exactly what we were supposed to be doing. He told us that TLDs are meant to grow and evolve. He stated to me in no uncertain terms that he would assist us with any amendments to Appendix S, if needed, to permit what we were doing with non-company names. . . . I couldn't have been clearer about what our plans were for non-company names at this meeting including potentially thousands of names being operated by DirectEmployers. John [Jeffrey] promised to help with whatever was needed from ICANN to accomplish our plans. [97]

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[93]   Email from Craig Schwartz to Ray Fassett, 28 Oct. 2009. C-37.

[94]   Fassett Statement, para. 61.

[95]   Embrescia Statement, para. 31.

[96]   Embrescia Statement, para. 32.

[97]   *Id.*

86.   On the same day as Mr. Embrescia's meeting with Mr. Jeffrey and Mr. Pritz (*i.e.*, 24 November 2009), David Giza – ICANN's Senior Director of Contractual Compliance – sent an email to Mr. Fassett, which further confirms that ICANN was fully aware of why and how the shared domain beta was being implemented. Mr. Giza's email observed that the beta test included geographic names such as CA.JOBS and occupational names such as CHIROPRACTOR.JOBS and VETERINARIAN.JOBS. He observed that certain of these addresses "appear to be used for job board listings," and that "[s]ome industry leaders further believe this business practice violates both the spirit and the letter of the Registry Agreement with ICANN."[98] Mr. Giza further asserted that "there is some concern in the Community that if such addresses are to be awarded, the process should be open, transparent and fair, with all interested parties having an equal opportunity to apply and receive one or more of these designations."[99] Again, there can be no doubt that ICANN knew exactly what EmployMedia was seeking to do with the introduction of <non-companyname> domains, and the precise issues that were on the table with respect to how these names might be used.

87.   On 9 December 2009, Mr. Giza, along with two other ICANN officials – William McKelligot, an ICANN Contract Compliance Auditor, and Samantha Eisner, an ICANN in-house lawyer – visited Employ Media's offices in Cleveland. The ICANN officials met with Mr. Embrescia, Mr. Fassett, and Mr. Johnson. Employ Media again explained the details of the shared domain beta test. As Mr. Fassett testifies in his Witness Statement:

> I recall that during that meeting, Brian [Johnson], Tom [Embrescia], 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 [*i.e.*, each employer posting the listing], and explained why we had chosen to work with Direct Employers.[100]

88.   The next week, on 14 December 2009, Employ Media provided a draft response to a list of questions that Mr. Giza had included in his 24 November 2009 email to Mr. Fassett. Once again, Employ Media was completely open and transparent about its desire to expand the types of domain

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[98]   Email from David Giza to Ray Fassett, 24 Nov. 2009, C-41.

[99]   *Id.*

[100]   Fassett Statement, para. 64.

names in the sTLD beyond <companyname>.jobs, and about the possibility that such domains could be used as job boards. Thus, with respect to <companyname> domains, Employ Media's response stated:

> "Company names" is one example of a business decision we've made to provision domain names. *It has never been our business view that we were forever confined to any single method of provisioning,* and in fact we interpret various parts of the Registry Agreement as being consistent with this thinking in both intent and purpose.[101]

With respect to the use of such domain names as job boards, Employ Media explained:

> For every .jobs domain 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 as for any other type of entity or organization).[102]

89. Employ Media provided these materials in draft to ICANN, because, in the spirit of the meetings it had with ICANN staff in November and December 2009, it wanted to work constructively with ICANN to resolve these issues amicably.[103] Employ Media was again surprised, therefore, when ICANN responded with a lengthy 20 January 2010 email from Mr. Giza asserting that "ICANN has determined that certain domain name registrations involved in the .JOBS shared domain beta are in violation of the Registry Agreement."[104] The 20 January 2010 email identified "three categories of the shared domains 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;

- Geographic names; and

- Industry and occupational identifiers.[105]

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[101]   Letter from Ray Fassett to David Giza, 14 Dec. 2009, C-43.

[102]   *Id.*

[103]   Fassett Statement, para. 66.

[104]   Letter from David Giza to Tom Embrescia, 20 Jan. 2010), C-5.

[105]   *Id.*

90.   Significantly, however, ICANN made clear in its 20 January 2010 email that ICANN was not opposed to the inclusion of additional name-types (including geographic, industry, occupational, or other <non-companyname>.jobs domain registrations) in the .JOBS sTLD, and that nothing in the .JOBS Charter prohibited the addition of such names. Instead, ICANN maintained the Employ Media need to follow "proper processes" before such additional name-types could be included. According to ICANN's 20 January 2010 email:

> By the very terms set forth in the Registry Agreement, *the Charter is separate from the policy restricting the types of domain names that can be registered within the .JOBS sTLD. ICANN does not suggest that policies allowing the use of the shared domains set forth in the beta could not be reached;* however, Employ Media has not yet deployed nor followed the proper processes in reaching its determination to allow for registration of the geographic, industry/occupation-based, and other non-companyname.jobs domain name registrations.[106]

Thus, ICANN acknowledged that the "use of the shared domains set Forth in the beta" could be "reached" through policy changes that did not involve changing the Charter, given that the Charter is "separate from the policies restricting the types of domain names that can be registered within the .JOBS sTLD."[107] Specifically, ICANN stated that to include such additional categories of domains in the .JOBS sTLD, Employ Media and SHRM would need to undertake a Policy Development Process, or PDP, as set forth in Appendix S to the Registry Agreement. (ICANN would later also require that Employ Media participate in a Registry Services Evaluation Process in connection with the new categories of second-level domain and negotiate related amendments to the Registry Agreement, as discussed below.)

91.   The 20 January 2010 email concluded by stating that ICANN looked forward to "working collaboratively with Employ Media to facilitate its return to compliance with the Registry Agreement," and asking Employ Media to contact Mr. Giza to formulate "a mutually acceptable Remediation Plan."[108]

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[106]   *Id.*

[107]   *Id.*

[108]   *Id.*

92.   On 21 January 2010 – the day after receiving Mr. Giza's email – Messrs. Embrescia and Fassett had a phone call with ICANN staff to discuss the requested remediation plan.[109] On 25 January 2010, Employ Media provided ICANN with a draft remediation plan, which specifically proposed a PDP as requested by ICANN.[110] Once again, Employ Media was entirely open and transparent about what it wanted the PDP to evaluate: the inclusion of geographic, industry, and occupation-based domain names, which could potentially be used as job boards. Employ Media also proposed in its draft remediation plan to continue the shared domain beta test, as a way "to encourage further participation and feedback by way of a functional model that can be shared, seen, and touched towards obtaining real data, rather than just an intangible notion of mere speculation and opinion."[111]

93.   ICANN responded to Employ Media's draft remediation plan with a letter dated 5 February 2010, sent by Mr. Giza. ICANN acknowledged that "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 . . . .*"[112] However, ICANN insisted, *inter alia*, that Employ Media shut down the shared domain beta test in order to return to "full compliance." ICANN also stated that it had learned that DirectEmployers' hoped to launch as many as 25,000 domain names on the .JOBS sTLD. ICANN "urge[d] Employ Media to suspend any full launch of the shared domains *until the proper processes have occurred* and only domains that are not in violation of Employ Media's Registry Agreement are registered for use."[113]

94.   Employ Media had worked extremely hard on, and devoted considerable resources to, the shared domain beta test, which had proven to be a considerable success in the short time it was available. Nonetheless, in the spirit of cooperation, Employ Media immediately took steps to take down the beta. On Saturday, 6 February 2010 – the day after receiving ICANN's request to end the

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[109]   Fassett Statement, para. 71.

[110]   Email and Attachment from Ray Fassett to David Giza, 25 Jan. 2010, C-46A.

[111]   .JOBS Remediation Plan at 2, 25 Jan. 2010, C-46.

[112]   Letter from David Giza to Ray Fassett, 5 Feb. 2010, C-49.

[113]   *Id.* at 4.

shared domain beta test, Mr. Fassett wrote to Mr. Giza and others at ICANN that Employ Media had taken the requisite steps to suspend the beta.[114]

95.   Although Employ Media hoped the issues raised by ICANN could be resolved within a matter of days or weeks, it in fact took nearly a year for Employ Media to complete all of the procedures imposed on it by ICANN.

D.   Employ Media's Compliance With a Series of Processes Required by ICANN Also Demonstrates That ICANN Knew All of the Details Concerning the Expansion

96.   As discussed in this Section, ICANN informed Employ Media that in order to effectuate the type of expansion envisioned by the shared domain beta test, Employ Media would have to undertake a series of processes, specifically: a Policy Development Process, or PDP (discussed in subsection 1); a Registry Services Evaluation Process, or RSEP (subsection 2); and amendments to the Registry Agreement (subsection 3). After ICANN issued a formal resolution approving the expansion on 5 August 2010, Employ Media's plans to get the expansion up and running were again delayed when – on 20 August 2010 – the .JOBS Charter Compliance Coalition submitted a Request for Reconsideration of Board Action, which the ICANN Board finally rejected on 9 December 2010 (subsection 4). In short, the expansion that precipitated ICANN's breach notice and the allegations contained in its Answer, have been the subject of no less than four separate ICANN-mandated processes, in the context of which every aspect of Employ Media's registry service expansion was commented upon, scrutinized and debated.

1.   The Policy Development Process (PDP)

97.   As discussed above, Part VII(3) of Appendix S of the Registry Agreement sets forth the procedures of a PDP. Employ Media, the SHRM Executive Committee, or any member of the Community may request a PDP to "consider new policies and/or any changes to current policies and/or the Charter (each, a 'proposed amendment')." SHRM is required to conduct the PDP to evaluate the proposed amendment(s). In conducting the PDP, SHRM is "contractually obligated to act independently of Employ Media and Employ Media's desires." SHRM is also "contractually obligated to act in the interests of the Community."[115]

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[114]   Email from Ray Fassett to David Giza, et al., 6 Feb. 2010, C-50.

[115]   Registry Agreement, Appendix S, Part III, C-20.

98.   SHRM actually conducted two PDPs concerning Employ Media's proposed expansion. The first PDP Council approved the amendments on 4 March 2010. However, while SHRM believed that the first PDP was conducted fairly and impartially, for reasons discussed below, SHRM became concerned that the first PDP could be criticized for lacking impartiality. Accordingly, SHRM decided to start over, constituting a new PDP Council and conducting a PDP with far more elaborate processes (including a survey of the Community). On 3 June 2010, the second PDP Council also approved the amendments. The two PDPs are discussed in turn.

a.   The First PDP

99.   Based on ICANN's instructions and Employ Media's request, SHRM constituted a first PDP in February 2010. SHRM began by appointing a PDP Council, made up of nine members representing the interests of large, small, government, education, and union employers, as well as employment firms.[116] Each member of the Council was also a member of SHRM. Bill Warren, the Executive Director of DirectEmployers (and also a SHRM member), was appointed as Staff Manager. This was done because, as Executive Director of DirectEmployers, he was extremely familiar with the issues, and as Staff Manager, he would not have the right to vote on the proposed amendments.

100.   The first PDP Council received four proposed Amendments and four Issue Reports, corresponding to each of Employ Media's proposals. Employ Media sought approval for:

(1)   the registration and use of two-character domain names;

(2)   the registration and use of geographic domain names;

(3)   the registration and use of industry and occupational identifiers; and

(4)   the registration of dictionary and non-company names.[117]

101.   The Issue Reports and Proposed Amendments specifically stated that such names had been the subject of the shared domain beta test, and that, if approved, it was likely that a third party

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[116]   Rubin Statement, para. 23.

[117]   Rubin Statement, para. 22; *see also* Bill Warren, .JOBS Issues Report, 15 Feb. 2010, *available at* http://www.goto.jobs/4%20Issues%20Reports.pdf, C-51.

would be providing similar content in the same or similar types of sites. As Mr. Rubin testifies in his Witness Statement,

> [SHRM] understood that these proposals were intended to permit other proposals similar to uses employed by DirectEmployers Association – *including, specifically, the registration of non-company names within the .JOBS domain that in my expectation would likely be used to list multiple employers' jobs* on one site or a variety of sites.[118]

102. On 4 March 2010, the first PDP Council met. After extensive discussion of the proposed amendments, the PDP Council, with one member abstaining, voted unanimously to approve the amendments.[119]

103. After the first PDP concluded, Mr. Rubin spoke with Peter Weddle, a member of the first PDP Council who had opposed the .JOBS expansion and who had abstained on the vote. Mr. Weddle at the time was the Executive Director of the IAEWS (which, as mentioned above, is one of the leading participants in the Coalition).[120] Mr. Weddle told Mr. Rubin that he (Mr. Weddle) thought the process had been fair.[121] However, Mr. Weddle also told Mr. Rubin that he believed that the first PDP had the appearance of lacking impartiality.[122] In particular, Mr. Weddle observed that Mr. Warren, the Staff Manager, was also the Executive Director of DirectEmployers and, as such, questions could be raised about the process that had been followed.

104. After carefully considering Mr. Weddle's comments, Mr. Rubin concluded that SHRM needed to avoid even the appearance of a lack of impartiality.[123] Accordingly, after consultations with others at SHRM, Mr. Rubin decided to conduct a second PDP, without Mr. Warren's involvement, with several new members to the Council (including someone who represented the interests of the job board industry), and with more elaborate procedures to canvass and consider the views of the Community.[124]

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[118]   Rubin Statement, para. 22.

[119]   Rubin Statement, para. 23; SHRM PDP Council Teleconference Meeting Minutes, 4 Mar. 2010, C-57.

[120]   Rubin Statement, para. 24.

[121]   *Id.*

[122]   *Id.*

[123]   *Id.*

[124]   *Id.*

Mr. Rubin informed Employ Media of his decision – which included discarding the first PDP's approval of the proposed amendments and essentially starting over. As Mr. Rubin recalls in his Witness Statement:

> I informed Employ Media that we would be conducting a second PDP under these new conditions. Employ Media was not enthusiastic about my decision, but, nonetheless, understood that this was SHRM's call to make.[125]

b.   The Second PDP

105. Mr. Rubin decided that he himself would serve as the Staff Manager (again, a non-voting role) for the Second PDP. As with the first PDP, it was important to SHRM to select a PDP Council that would reflect a wide variety of viewpoints. All members of the new PDP Council were SHRM members. On 30 March 2010, Mr. Rubin provided the new Council with certain materials they would need to consider the proposed amendments, including a new .JOBS Issue Report, which, again, explained precisely what Employ Media was proposing to do.[126]

106. The new PDP Council met for the first time on 9 April 2010. As Mr. Rubin testifies in his Witness Statement:

> The discussion that day was far-ranging: the Council discussed the .JOBS Charter and the general purpose of the .JOBS sTLD; Employ Media's and ICANN's history; and the merits of the proposal itself. From the first day, the Council understood that the requested change could result in job boards. Ultimately, the PDP Council decided that it needed to gather additional information and discuss the issue further.[127]

107. The PDP Council held several further meetings in April 2010. At a Council meeting on 28 April 2010, the Council decided it would obtain input from the Community in two ways.[128]

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[125]   Rubin Statement, para. 24.

[126]   The new .JOBS Issue Report was similar to the reports that Mr. Warren had prepared for the first PDP Council, but discussed the proposed amendments in a single Issue Report as opposed to four separate ones. Society for Human Resource Management, .JOBS Issue Report, Mar. 2010, C-55.

[127]   Rubin Statement, para. 29; .JOBS PDP Council Conference Call Meeting Minutes, 9 Apr. 2010, C-70.

[128]   .JOBS PDP Council Conference Call Meeting Minutes, 30 Apr. 2010, C-76.

108. First, the Council decided to implement a field study. A survey was e-mailed to 2,908 SHRM members who identified themselves in SHRM membership data as "HR Generalists" or "Employment/Recruitment" professionals. The survey explained that:

> .jobs is considering some additions to the current companyname.jobs business model. These changes would allow the creation of new URLs designed to target specific professions, geographic areas, using dictionary words, e.g., Diversity, Spanish-Speaking etc., two character names, or combinations of all of these.[129]

It then asked respondents to rate the usefulness of the new .JOBS proposal for recruitment needs. Mr. Rubin provided the results of the field study to the PDP Council in May 2010. Sixty seven percent (67%) of respondents rated it "more useful" or "significantly more useful" than the existing .JOBS structure. Slightly more than sixty percent (60%) of respondents thought the availability of non-companyname.JOBS addresses would benefit job-seekers or job-recruiters, compared to only sixteen percent (16%) that thought it might create confusion in the market.[130]

109. Second, the Council publicly sought comments from the Community. The Council decided to post two questions on the SHRM website, but also decided that the answers would remain confidential, to encourage participation. After explaining the Proposed Amendment, the two questions posed were: (1) "How might this be helpful for HR professionals?"; and (2) "How might this be problematic for HR professionals?"[131]

110. As Mr. Rubin describes in his Witness Statement, the overall response to the first question was "clearly positive":

> The comments pointed to the benefits of a dedicated web space for job postings, the value of registrations combining location and occupation (e.g., clevelandnurses.jobs), the ability to reach a targeted set of job seekers, adding needed legitimacy to job postings, reducing costs to employers, and providing employer control over job postings.[132]

In response to the second question, the most frequent comment was that the proposal could complicate the

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[129]   .JOBS – SHRM/PDP Council Survey, Final Report at 5, 3 June 2010, C-80.

[130]   Rubin Statement, para. 35; .JOBS – SHRM/PDP Council Survey, Final Report, p. 7-8, 28 May 2010, C-80.

[131]   Rubin Statement, para. 37; PDP Open Community Survey Results, 31 May 2010, C-78.

[132]   Rubin Statement, para. 37.

job search process by providing more places where job seekers would have to look for job postings. Several comments also indicated concern about the additional competition that the proposed expansion would provide for fee-based job boards.[133]

111. On 3 June 2010, the PDP Council met to vote on the Employ Media proposal.[134] Before the vote, the Council discussed the results of the field study and the comments that were received in response to the publicly-posted questions. The Council then voted on whether Employ Media's proposed amendment would "serve the needs of the international [human resource] management community."[135] The amendment was approved by a vote of seven to one.[136]

112. As required by the PDP rules, Employ Media and the SHRM Executive Committee reviewed the amendment after the Council had voted to approve it. In connection with the review by the SHRM Executive Committee, Mr. Rubin provided briefing documents to the Executive Committee, and gave them an in-person summary of the field study and the comments received in response to the publicaly posed questions. Mr. Rubin also summarized the supporting and opposing views. After this discussion, the SHRM Executive Committee approved the PDP Council vote approving the Proposed Amendment.[137]

113. ICANN was provided with copies of the minutes from all of the PDP Council meetings, so that, again, there can be no question as to precisely what SHRM had approved.[138] There is, therefore, no basis for ICANN's complaint in its breach notice that it did not receive "sufficient information to confirm that Employ Media or SHRM conducted a meaningful process for changing the registration criteria."[139]

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133   Rubin Statement, paras. 39-40; PDP Open Community Survey Results, 31 May 2010, C-78.

134   Rubin Statement, para. 41; .JOBS PDP Council Conferences Call Meeting Minutes, 3 June 2010, C-81.

135   .JOBS PDP Council Conference Call Meeting Minutes at 4, 3 June 2010, C-81.

136   *Id.*, Rubin Statement, para. 41.

137   Rubin Statement, para. 42.

138   Fassett Statement, para 92.

139   Notice of Breach at 2, C-125.

2.   The Registry Services Evaluation Process

114.   Aside from the PDP, ICANN had also instructed Employ Media that it would be required to go through ICANN's Registry Services Evaluation Process, or RSEP. Under ICANN's RSEP policy, when a registry operator seeks to offer a new registry service or modify an existing service, ICANN staff evaluates the proposed addition or modification to determine if it will affect the "Security or Stability" of the Internet, or create competition concerns.[140]

115.   Shortly after receiving ICANN's 2 March 2010 letter,[141] stating than an RSEP Request would be necessary, Employ Media began to work on the RSEP request, in close consultation with ICANN, in particular, Mr. Schwartz. The main purpose of the RSEP Request is to propose a "Phased Allocation Plan" as to how the new names would be allocated. The RSEP Request also had to set forth any proposed amendments to the Registry Agreement in order to implement these changes. Again, ICANN had specifically requested such changes.

116.   At ICANN's insistence, Employ Media waited for the results of the PDP before submitting the RSEP. But in the meantime, ICANN agreed to assist Employ Media in drafting the RSEP Request and negotiating the amendments to the Registry Agreement. In addition to the draft amendments to the Registry Agreement – which were exchanged back and forth between Employ Media and ICANN as negotiations proceeded – Employ Media also shared drafts of the other portions of the RSEP Request with ICANN.

117.   On 9 June 2010, a week after the SHRM Executive Committee approved the Proposed Amendment, Employ Media submitted its RSEP Request. Employ Media also provided ICANN with copies of all of the PDP Council's meeting minutes, as well as with a copy of SHRM's field study report.[142] On the first page of the RSEP Request, Employ Media set forth the Proposed Amendment, as approved by the PDP Council, SHRM's Executive Committee, and of course, by Employ Media itself:

> *"To the extent that any policies, practices or business rules on .JOBS*
> *govern Employ Media's ability to provision, allocate, register (to third*
> *parties or itself), allow use of in the DNS (by third parties or itself),*

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[140]   .JOBS Registry Agreement, sec. 3.1(d)(iv)(D), C-20.

[141]   Letter from Kurt Pritz to Tom Embrescia, 2 Mar. 2001, C-56.

[142]   Fassett Statement, para. 94.

*reserve or remove from reserve, any non-'companyname' domain names, including industry and occupational domains, geographic domains, dictionary term domains, and two-character domains, **all such policies, practices or business rules are amended to allow Employ Media, at Employ Media's discretion (provided that Employ Media maintains adherence to the .JOBS Charter), to provision, allocate, register (to third parties or itself), allow use of in the DNS (by third parties or itself), reserve and remove from reserve, all such 'non-company' domain names.** "[143]*

118. Again, Employ Media's RSEP Request left no room for doubt that Employ Media was also seeking to allow the new types of domain names in the TLD to be used as job boards. The RSEP Request specifically acknowledged the possibility of objections from, among others, "[r]egistrants of domain names operating as job sites in other TLD's who would be concerned about increased choice and innovation with the community/marketplace."

119. Employ Media patterned its "Phased Allocation Program" for the RSEP Request after those it had seen in RSEPs submitted by other Registry Operators. Thus, Employ Media proposed – and ICANN subsequently approved in amending the Registry Agreement – language that would allow it discretion in how it allocated the new types of names:

*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 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 not to allocate any of such names.**[144]*

120. After reviewing Employ Media's final RSEP Request, ICANN staff responded on 15 June 2010 that ICANN did not "identif[y] any significant competition or security and stability issues" with Employ Media's proposal.[145] However, ICANN staff also informed Employ Media that ICANN needed more time to consider the proposed amendments to the Registry Agreement. Specifically,

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[143]   Employ Media RSEP, 9 June 2010, C-84 (Italics in original; boldface added).

[144]   Registry Agreement, Appendix S, Part VII.4, C-20.

[145]   Email from Patrick Jones to Ray Fassett, 15 June 2010, C-87.

ICANN intended to post the proposed amendments for a public notice and comment period, following which the ICANN Board would need to vote on them.

3. The Amendments to the Registry Agreement[146]

121. During the spring of 2010, ICANN and Employ Media had exchanged a number of drafts of the proposed amendments to the Registry Agreement, and had agreed to the language of the Registry Agreement amendments set forth in the RSEP Request. Here, too, Employ Media was entirely transparent in what it wanted to achieve. For example, in an email dated 1 April 2010, Mr. Fassett wrote to Mr. Schwartz: "the idea is to 'share' the domain for all employers to list employment opportunities. . . ."[147] The very next day, Mr. Fassett again wrote to Mr. Schwartz: "At the end of the day, our greatest urgency is to get the shared domain beta back online . . . ."[148]

122. Nor was there any question that ICANN knew exactly what Employ Media wanted to achieve, as the fee-based job boards and their affiliated organizations continued to complain loudly and publicly about the threatened competition. On 8 April 2010, for example, Ere.net published an article on its site entitled why "SHRM Must Reject the .Jobs Amendment," which stated that Employ Media's "proposed amendment is asking for permission to do what it already did in their beta."[149] The next day, 9 April 2010, Mr. Schwartz of ICANN sent Mr. Fassett an email dated 9 April 2010, observing that "ERE seems to be kicking up quite a storm."[150]

123. Nonetheless, ICANN and Employ Media continued with the required processes. According to ICANN, the final step to accomplish the goal – after the PDP and the conclusion that the RSEP Request did not pose issues of competition or stability and security for the Internet – was to amend certain language in Appendix S. The amendments drafted by ICANN and Employ Media made it clear that, under the amended Registry Agreement, "*[d]omain registrations are permitted for other*

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[146]   There were in fact three amendments to the Registry Agreement in 2010: on 12 March, 6 August, and 15 September. The 12 March and 15 September amendments relate to data escrow issues and are therefore not relevant to this dispute.

[147]   Email from Ray Fassett to Craig Schwartz, 1 Apr. 2010, C-64A.

[148]   Email from Craid Schwartz to Ray Fassett, 2 Apr. 200, C-64B.

[149]   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.

[150]   Email from C. Schwartz to Ray Fassett, 9 Apr. 2010, C-72.

types of names (e.g., occupational and certain geographic identifiers) in addition to the 'company names' designation."[151] The amendments also made clear that prior limitations in the Agreement – *e.g.*, the requirement that domain names be based on "the legal name of an employer and/or a name or abbreviation by which the employer is commonly known" – apply *only* to "company name" registrations, as opposed to the new occupational, geographic, and other types of names.[152]

124. Thus, for example, Appendix S, Part VII.2 was changed as follows (with the underscored language showing the amendments):

> *jobs* "company name" domain registrations are limited to the legal name of an employer and/or a name of 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.

Appendix S, Part VII.3 was amended as follows:

> 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 "company name" 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. Domain registrations are permitted for other types of names (e.g., occupational and certain geographic identifiers) in addition to the "company name" designation. These current policies are only revisable/amendable via the policy making process described herein.

125. And the language quoted above from the RSEP Request – concerning the Phased Allocation Program – was added in the following new provisions in Appendix S, Part VII.4:

> 4. .JOBS non-companyname Phased Allocation Program ("Phased Allocation Program") *The domain names included within the scope,*

[151]   Employ Media RSEP at 7, 9 June 2010,C-84.

[152]   *Id.* at 8.

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.[153]

The new language then set forth the Phased Allocation Program text from the RSEP Request, providing that Employ Media "may elect to allocate the domain names" via an RFP, an auction, or a first-come, first-served real-time release of any names not registered through the RFP or auction.[154]

126. In addition, the following language was deleted from Appendix S:

> 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.

127. On 15 June 2010, ICANN posted the proposed amendments on the ICANN website and began accepting public comment.[155] To be sure, ICANN received negative comments – but mostly from companies like Monster.com and other entities representing fee-based job boards. These commenters plainly understood what the amendments to the Registry Agreement would mean – *i.e.,* they would allow the registration of geographic, occupational, and industry names in .JOBS, and that there was no prohibition on the use of those names to post multiple employer job listings. Many of the commenters asserted that the amendments would be inconsistent with the Charter – an argument that the ICANN Board would later reject.

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[153]   Registry Agreement, Appendix S, Part VII.4, C-20.

[154]   *Id.*

[155]   Fassett Statement, para. 102; *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/pdfrZhVQaTGGo.pdf, C-91.

128. The representatives of the fee-based job boards also continued to voice their opposition to the amendments in other fora. For example, on 13 July, 2010, Peter Weddle – the Executive Director of the IAEWS who had resigned from the first PDP Council – published a letter in the IAEWS entitled "The Dot.Jobs Situation." Mr. Weddle wrote that "the community of online employment service companies" is "now threatened by a proposed change in the dot.jobs top level domain (TLD)." According to Mr. Weddle, Employ Media was

> attempting to extend the application of the TLD from its approved community – direct employers – into the online employment services community by including geocentric (Atlanta.jobs, NewYork.jobs, Athens.jobs) and occupation specific (nurse.jobs, salesperson.jobs, systemsanalyst.jobs) Web-sites. It now has a proposal to implement this plan before the governing board of [ICANN].[156]

In language that is remarkably similar to that later included in ICANN's Notice of Breach, and in ICANN's Answer in this arbitration, Mr. Weddle continued: "This proposal violates both the spirit and the letter of the charter holder's contract with ICANN,"[157] and would "grievously harm our community by confusing job seekers and employers who we have long supported and served so well."[158]

129. In August 2010, after considering Employ Media's proposed amendments, and the public comments offered in response, the ICANN Board approved the proposed amendments to the Registry Agreement. The briefing materials submitted to the ICANN Board prior to the vote specifically 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.*[159]

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

[157]   *Id.* Compare this language with that found, for example, in Paragraph 56 of ICANN's Answer ("Employ Media had breached the spirit, intent and express terms of the .JOBS Registry Agreement and Charter") and in ICANN's Notice of Breach (alleging that Employ Media "fail[ed] to operate and manage the .JOBS TLD in a manner consistent with the spirit and intention of the .JOBS registry").

[158]   *Id.*

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

130. Thus, there can be no question that the ICANN Board knew precisely what it was approving when, on 5 August 2010, it issued a Board resolution approving the amendments.[160]

131. Following the PDP, and the ICANN Board's approval of the amendments to the Registry Agreement, Employ Media began implementing the Phased Allocation Program exactly as set forth in the amended Agreement. In late August 2010, Employ Media posted its RFP, seeking proposals for <non-companyname> .JOBS domain names.[161] As Mr. Embrescia and Mr. Fassett both testify in their Witness Statements, Employ Media was fully expecting to receive a proposal from DirectEmployers.[162] But they were hoping to receive other proposals as well. More proposals – and more competition – could only work to Employ Media's benefit.

132. In response to its RFP, Employ Media ultimately received thirty-four expressions of interest and sixteen proposals, including from Coalition Members.[163] Employ Media concluded that DirectEmployers' proposal for "the .JOBS Universe" – an improved and expanded version of the beta – was the best and most extensive. As Mr. Fassett summarizes the .JOBS Universe in his Witness Statement:

> 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. . . . 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 . . . .[164]

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[160] ICANN Adopted Board Resolutions, p. 5, 5 Aug. 2010, *available at* http://www.icann.org/en/minutes/resolutions-05aug10-en.htm, C-98.

[161] .JOBS RFP Round 1 Application Form, 26 Aug. 2010, C-101.

[162] Embrescia Statement, para. 39; Fassett Statement, para. 109. Given its involvement in the shared domain beta test, DirectEmployers in some ways had an advantage (much in the way an incumbent might) over others who submitted proposals in response to Employ Media's RFP. On the other hand, it also had a disadvantage (much in the way an incumbent might) in that competitors knew fairly precisely what DirectEmployers was going to propose.

[163] Fassett Statement, para. 109.

[164] Fassett Statement, para. 128.

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133. In addition to the DirectEmployers' proposal, Employ Media selected several others.[165] At the end of September 2010, Employ Media was on the verge of announcing its selections, when the process was once again delayed.

4. The Coalition's Request for Reconsideration

134. As indicated above, certain fee-based the job boards had been closely monitoring the situation for some time. At some point around the ICANN Board's 5 August 2010 vote approving the amendments, a number of these entities self-proclaiming to be representing the job board industry formed the so-called ".JOBS Charter Compliance Coalition" (previously defined as the "Coalition").[166] The Coalition's members include groups ranging from Mr. Weddle's IAEWS to the Newspaper Association of America. It also included major on-line job board companies such as Monster and Career Builder. The Coalition was (and remains) well-funded, politically powerful, and extremely aggressive. It hired the law firm then known as Wilmer Cutler Pickering Hale and Dorr ("Wilmer") to represent it in lobbying, and otherwise exerting pressure on ICANN, to reverse its approval of the .JOBS amendments. Wilmer fielded a team led by partner J. Beckwith Burr – a former high-ranking official at the U.S. Department of Commerce who, while in government, was one of the driving forces behind the creation of ICANN.

135. On 20 August 2010, the Coalition filed a Request for Reconsideration of Board Action ("Reconsideration Request") with ICANN's Board Governance Committee ("BGC").[167] If nothing else, the Reconsideration Request was candid in complaining that the new registry service in .JOBS would create unwanted competition for Internet job boards that charge employers for posting job openings, often on a per-listing basis. Of note, the materials submitted by the Coalition included the DirectEmployers "White Paper," 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

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[165] Accepted applications were submitted by Bavaria Agrimedia GmbH, DisABLEDpersons.com, EDPhysician, InterActiveOne,Inc., RecruitMilitary LLC, and Ubilibet, S.L. *See* Fassett Statement, para 109.

[166] Fassett Statement, para. 110.

[167] *Id.*; .JOBS Charter Compliance Coalition, Petition for Reconsideration of Board Action, 20 Aug. 2010, http://archive.icann.org/en/committees/reconsideration/reconsideration-petition-jobs-20aug10-en.pdf, C-100.

"all employers worldwide, regardless of size of industry, [to] post jobs at no cost."[168] Once again, the precise details of Employ Media's expansion plans were well-known to everyone.

136. In September, 2010, the BGC announced that it would review the Coalition's Reconsideration Request[169] – meaning it would review the materials submitted by the Coalition, and then decide whether the Board's decision should be revisited.

137. Shortly after the BGC's announcement, Mr. Schwartz and Mr. Pritz asked Mr. Embrescia and Mr. Fassett not to proceed for the moment with the proposals that Employ Media had chosen following the RFP.[170] Although both Mr. Embrescia and Mr. Fassett were at this point eager to proceed with the process – and frustrated by the delays – they nonetheless agreed to ICANN's request.[171]

138. By late November 2010, however, the BGC still had not ruled on the Coalition's Reconsideration Request. As the BGC's review lingered on, Mr. Embrescia and Fassett spoke with Mr. Pritz and Mr. Jeffrey. Mr. Fassett testifies that during that conversation, Mr. Jeffrey told them "that the only thing holding the BGC up 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.'"[172]

139. Both Mr. Embrescia and Mr. Fassett were bewildered by the stated concern over a "self-managed class of names."[173] Many of the domain names used in the beta had been names that Employ Media had registered to itself upon launch of the .JOBS sTLD. DirectEmployers operated the platform, but all of the names were registered to Employ Media – and that was how DirectEmployers had proposed to proceed with the .JOBS Universe service following the RFP. As noted above, Employ Media had always paid – and ICANN had always accepted – the fees due for these self-registrations.[174]

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[168]   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 ("White Paper"). As Mr. Fassett's Statement testifies, he had also provided a copy of the White Paper to Mr. Schwartz previously. Fassett Statement, para. 122.

[169]   ICANN, BGC Announcement on Reconsideration Request 10-2, 20 Sept 2010, C-104.

[170]   Embrescia Statement, para. 47; Fassett Statement, para. 112.

[171]   Embrescia Statement, para. 48; Fassett Statement, para. 113.

[172]   Fassett Statement, para. 115; *see also* Embrescia Statement, para. 49.

[173]   Embrescia Statement, para. 49; Fassett Statement, para. 117.

[174]   Fassett Statement, para. 43.

During the negotiation of the Registry Agreement, ICANN staff had informed Employ Media – in writing – that "[t]here was nothing in the agreement that prohibits the registry from reserving names to itself."[175] The RSEP Request – in the drafting of which ICANN staff had participated, and which the ICANN Board had approved – specifically stated that Employ Media would henceforth have the "discretion" "to provision, allocate, register (to third parties or itself)" all of the new "non-'company' domain names" at issue.[176] Under the amendments to Appendix S, Employ Media specifically "reserve[d] the right not to allocate any such names" at all.[177] Again, ICANN staff had been involved in drafting this language – and the ICANN Board had approved the language when it approved the Registry Agreement amendments.

As Mr. Embrescia recalls in his Witness Statement:

> I remember asking John [Jeffrey] why the self-managed class was a hang up with the BGC and that John was unable to provide a reason, other than saying that this was the issue the Coalition was complaining about to ICANN Board members.[178]

140. As both Mr. Embrescia and Mr. Fassett testify in their Witness Statements, the solution they proposed was simply to assign the names to DirectEmployers, which, as ICANN knew at this point, had been selected by Employ Media to participate in a major part of the .JOBS expansion following the RFP. As both Mr. Embrescia and Mr. Fassett testify, Mr. Jeffrey indicated that this would be a satisfactory solution.[179] According to Mr. Embresica:

> I told John [Jeffrey] that if [the self-managed names issue] really was the only issue holding up the BGC, then we could just agree to not have the self-managed class. This way we'd take the issue away from the Coalition's lobbying efforts to the ICANN Board which were holding up the BGC. I remember telling John "we'd just register the names to DirectEmployers," rather than to ourselves. By this time, we had made ICANN aware that DirectEmployers was one of the selected applicants.

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[175] *See* Email from Esme Smith to Brian Johnson, 16 Mar. 2005, C-14.

[176] Employ Media RSEP at 1, 9 June 2010, C-84.

[177] Registry Agreement, Appendix S, Part VII.4, C-20.

[178] Embrescia Statement, para. 49.

[179] *Id.*; Fassett Statement, para. 131.

* * *

John advised that by removing from the equation the very issue Coalition lobbyists were successfully pressuring members of the ICANN Board about would then free up the BGC to make its decision – one he felt would be favorable to us.[180]

141. Accordingly, Employ Media agreed that it would not "self-register" the new names in the sTLD to itself. Instead, it would register the names to DirectEmployers, and any others who successfully sought particular domain names through the Phased Allocation Program.

142. The BGC was scheduled to vote on the Coalition's Reconsideration Request at ICANN meetings in Cartagena, Colombia in December 2010. In reviewing the Reconsideration Request, the BGC's task was to determine if the ICANN Board had granted its approval for the .JOBS amendments "without consideration of material information."[181] On 9 December 2010, the BGC issued its recommendation that the ICANN Board *not* reconsider its approval of the .JOBS Registry Agreement amendments. The BGC recommendation stated, *inter alia*:

> [T]here 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 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 reconsidering the ICANN Board's 5 August 2010 Action. Further, the Board did not fail to consider material information available at the time of the Action.[182]

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[180]   Embrescia Statement, para. 51.

[181]   Bylaws, Art. IV, Sec. 2(2) (Reconsideration), C-129.

[182]   ICANN Meeting of the Board Governance Committee Minutes at 10-11, 9 Dec. 2010, *available at* http://www.icann.org/en/groups/board/documents/minutes-bgc-1-09dec10-en.htm, C-112.

143. The ICANN Board reviewed the BGC's recommendation, and, on 10 December 2010, issued a Resolution adopting it.[183]

144. After all this, Employ Media was indeed surprised when on 24 December 2010 (*i.e.*, Christmas Eve), ICANN informed Employ Media that the Coalition had submitted a letter dated 17 December 2010 to ICANN, complaining that Employ Media was allowing Direct Employers to run job boards. The letter did not raise any issues that had not been previously addressed through the PDP, RSEP, amendments to the Registry Agreement, and Reconsideration Request. Nonetheless, ICANN's Director of Contractual Compliance, Stacy Burnette, forwarded on the letter to Employ Media with a cover email that stated:

> ICANN received the attached letter regarding an alleged charter violation by Employ Media LLC. To assist ICANN in making a determination about the merits of this complaint, please respond to the claims made in the letter and provide as much detail in your response as possible.
>
> Please send me your response by 24 January 2010 [sic]. Let me know if you have any questions.
>
> Happy Holidays![184]

145. After the New Year, on 21 January 2011, the *Washington Post* ran a story entitled, "Launch of .jobs Web site shakes up employment advertising industry." According to the article:

> A massive network of employment Web sites – where any company can list job openings for free – launched this week over the protests of newspapers and online recruitment companies, who fear billions of dollars in lost revenue.
>
> The 40,000 sites, with Web addresses that all end in ".jobs," have the potential to upend companies such as Monster.com and CareerBuilder.com, which just a decade ago set up for-profit jobs classifieds online that roiled the media companies that printed the listings on paper.[185]

The *Post* article quoted Mr. Weddle, as well as ICANN's Mr. Schwartz:

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[183] ICANN Meeting of the Board, Adopted Board Resolutions, Response to Reconsideration Request 10-2, 10 Dec. 2010, *available at* http://www.ICANN.org/en/groups/board/documents/resolutions-10dec10-en.htm#8, C-113.

[184] Email from Stacy Burnette to Ray Fassett, 24 Dec. 2010, C-115.

[185] Ian Shapira, Launch of .JOBS Web Sites Shakes Up Employment Advertising Industry, Washington Post, 21 Jan. 2011, C-118.

"I think [these new job sites] are going to be a formidable challenge," said Peter Weddle, executive director of the [IAEWS], which last year fought approval of the new .jobs Web sites, and whose members include major newspapers as well as Monster and CareerBuilder. "ICANN is a small organization with a lot of influence, but with nobody overseeing its application over the rules."

Craig Schwartz, ICANN's chief registry liaison, rejected those accusations. . . .

"I don't agree that we're not accountable to anyone. We're accountable to the global Internet and its stakeholders," Schwartz said. "That's why it takes a lot of time to process new rules. It's the nature of our global governance structure."[186]

146. On the same day that the article in the *Post* appeared, Mr. Schwartz forwarded it to Mr. Fassett with a cover email that read: "FYI...and it doesn't paint the detractors in a very good light."

147. In the meantime, Employ Media received a letter from ICANN dated 1 February 2011, posing a series of questions about Employ Media's relationship with DirectEmployers.[187] As Employ Media responded in a letter to ICANN dated 11 February 2011 (and as Employ Media had previously informed ICANN on a number of prior occasions), the registration of the <universe.jobs> domain was in full compliance with the Charter.[188] As Mr. Fassett explains in his Witness Statement, ICANN was honing in on the difference between the beta, where Employ Media held the self-managed class of domain names, and the .JOBS universe, where the domain names were registered to DirectEmployers.[189] -But the .JOBS universe was structured this way specifically because the BGC had raised concerns about Employ Media's self-managed class of names under the beta. Employ Media had registered the names to DirectEmployers to accommodate ICANN's concerns, and had told ICANN exactly what it was doing.[190] There is no prohibition in the Registry Agreement – or anywhere else – against Employ Media

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[186]   *Id.*

[187]   Letter from Stacy Burnette to Brian Johnson, 1 Feb. 2011, C-119.

[188]   Letter from Brian Johnson to Stacy Burnette, 11 Feb. 2011, C-121. ICANN sent a letter to SHRM with similar inquiries, Letter from Stacy Burnette to SHRM, 1 Feb. 2011, C-120, and SHRM also responded on 11 February 2011. Letter from Henry Hart and Gary Rubin to Stacy Burnette, 11 Feb. 2011, C-123.

[189]   Fassett Statement, para. 131.

[190]   Embrescia Statement, para. 51.

registering the names to themselves or to any third party. Indeed, the RSEP and amended Registry Agreement said that Employ Media could do precisely that.

148. After sending its 11 February 2011 letter to ICANN, Employ Media did not hear back from ICANN until the evening of Sunday, 27 February 2011, when Ms. Burnette emailed the Notice of Breach to Mr. Fassett and Mr. Johnson. ICANN had previously told Employ Media that its practice was always to discuss a Notice of Breach with the recipients before posting it publicly. However, not only did ICANN post the Notice of Breach on its website that Sunday evening; ICANN had apparently already shared the Notice of Breach with the Coalition, even before sending it to Employ Media. The Coalition issued a detailed Press Release concerning the Notice of Breach on the morning of Monday, 28 February 2011.[191]

E.   ICANN'S Notice of Breach

149. ICANN's Notice of Breach is poorly written, vague in the extreme, and often stated in tentative and uncertain terms. But under any analysis, it is a remarkable document given the context of the previous year's events – including the PDP, the RSEP, the amendments to the Registry Agreement, and the Coalition's Reconsideration Request. Although sent under the signature of Mr. Jeffrey, ICANN's General Counsel, it appears to have been heavily influenced by the assertions previously made by the Coalition (and previously rejected, including by the ICANN Board).

150. The Notice of Breach begins by asserting that the "breach" in question

> results from Employ Media and its sponsoring organization, the Society of Human Resource Management's (SHRM) failure to establish policies, in conformity with the defined purpose and intent of the .JOBS registry; and further *may* be inconsistent with the .JOBS Charter for the naming conventions within the sponsored TLD and for requirements of registration as required by Section 3.1(d)(i)(A) of the .JOBS Registry Agreement.[192]

151. In addition to the alleged "failure to establish policies" in conformity with the "purpose and intent of the .JOBS registry" – which alleged failure, according to Notice of Breach, "may" be

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[191]   Press Release, .JOBS Charter Compliance Coalition, .JOBS Charter Compliance Coalition Applauds ICANN's Delivery of Firm Breach Notice to Employ Media LLC Regarding Improper .JOBS Expansion, 28 Feb. 2011, *available at* http://www.asaecenter.org/AboutUs/newsreldetail.cfm?itemnumber=57763., C-126.

[192]   Notice of Breach at 1.

inconsistent with the .JOBS Charter – the Notice also asserts that Employ Media had committed a "failure to operate and manage the .JOBS TLD in a manner consistent with the spirit and intention of the .JOBS registry."[193]

152. While asserting that Employ Media is required to establish policies "in conformity with the Charter," the Notice of Breach goes on to say that the Charter language is itself "specious."[194] Specifically, the Notice of Breach takes issue with the Article IV of the Charter, which, again, provides that "[t]he following persons may request registration of a second-level domain within the .JOBS TLD:"

> 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...[195]

153. Of course, this language had been in the .JOBS Charter when the ICANN Board approved Employ Media's application in 2004, and when the ICANN Board approved the .JOBS Registry Agreement in 2005. It remained unchanged in the Charter, set forth in Appendix S, even as the ICANN Board approved amendments to other portions of Appendix S in 2010. Employ Media had been operating the .JOBS sTLD pursuant to this same Charter language for more than 5 years.

154. The Notice of Breach further asserted that "[t]here is not sufficient information to confirm that Employ Media or SHRM conducted a meaningful process for changing the registration criteria."[196] In fact, the BGC had already rejected the Coalition's assertion that the ICANN Board had approved the .JOBS expansion "without consideration of material information." [197] And, in approving the expansion, the ICANN Board had before it extensive information concerning SHRM's deliberations

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[193] *Id.*

[194] *Id.* at 2.

[195] Registry Agreement, Appendix S, Part I, C-19.

[196] Notice of Breach at 2.

[197] Bylaws, Art. IV, Sec. 2(2) (Reconsideration), C-129.

(including the minutes of all meetings), the results of SHRM's field study, and the results of the questions that SHRM had publicly posted on its website. The Board also had the benefit of the public notice and comment process it had conducted before approving Employ Media's RSEP Request and Registry Agreement amendments. Moreover, in approving the RSEP Request and Registry Agreement amendments, the ICANN Board had specifically stated in its Board Resolution that:

> [T]he 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 allocation of certain types of domain names via phased allocation mechanisms. [198]

It stated further that

> 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 . . . . [199]

155. The Notice of Breach further complains that "[t]he recently launched *universe.jobs* appears to be a job board that advertises job openings for multiple employers," and that "Employ Media and SHRM, through DirectEmployers Association, intend to use the .JOBS TLD primarily to compete with other internet job boards." [200] But as detailed above, ICANN was repeatedly informed by Employ Media in multiple communications that that was precisely the intent of the expansion. For months, members of the job board industry had complained to ICANN about such competition. For months, the media had reported on these same facts.

156. In short, there is simply no way to reconcile these assertions in the Notice of Breach with the voluminous factual record contradicting virtually every assertion made within it. Based on this record, it is inconceivable that ICANN could have served the Notice of Breach — or offered the assertions therein — in anything remotely approaching good faith.

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[198] Approval of RSEP Request for Phased Allocation Program in .JOBS, 5 Aug. 2010, http://www.icann.org/en/groups/board/documents/resolutions-05aug10-en.htm, C-93A.

[199] *Id.*

[200] Notice of Breach at 3.

157. ICANN's lack of good faith is all the more evident in its threat to terminate the entire Registry Agreement within thirty days of the Notice of Breach, unless Employ Media agreed to "cancel or disavow" the new registrations. If ICANN had truly believed that the new registry service violated the Registry Agreement in any manner, ICANN itself could have invoked the arbitration clause of the Agreement. Instead, it responded by threatening to destroy Employ Media's business in its entirety.

158. Following the Notice of Breach, Employ Media once again reached out to ICANN to attempt to find an amicable solution. But ICANN – apparently having succumbed completely to the demands of the Coalition – was inflexible in its insistence that the entire *universe.jobs* platform be dismantled.[201] Accordingly, Employ Media had no choice but to file its Request for Arbitration.

III. THE TRIBUNAL SHOULD ISSUE THE DECLARATORY RELIEF REQUESTED BY EMPLOY MEDIA

159. Under any analysis, ICANN's Notice of Breach is deficient both procedurally and substantively. Given the gravity of a Breach Notice – which threatens to destroy a Registry Operator's business in its entirety – the Registry Agreement provides strict requirements for ICANN to issue such a Notice. First, the Notice must "include with specificity the details of the alleged breach."[202] Second, such Notices are to be issued only for breaches that are alleged to be "fundamental and material." As set forth below, ICANN's Notice of Breach fails to meet even these threshold requirements.

160. Beyond its procedural deficiencies, ICANN has failed to identify *any* aspect of Employ Media's expanded registry service that breaches *any* provision of the amended Registry Agreement – let alone one that constitutes a "fundamental and material" breach. Indeed, the plain and unambiguous terms of the amended Registry Agreement clearly permit the expansion, and permit it to be implemented in precisely the manner that Employ Media has chosen to implement it. Again, that is not surprising, given that the Parties drafted the amendments specifically to accomplish these goals. As also set forth below, in interpreting the Agreement, the Tribunal need not look beyond its plain and unambiguous terms. But if it chooses to do so, the Tribunal will find that the extrinsic evidence

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[201]   Fassestt Statement, para. 134.

[202]   Registry Agreement, Art. VI, sec. 6.1, C-19.

overwhelmingly supports Employ Media's position. The "spirit" and "intent" (to use ICANN's words)[203] of the amended Agreement are indeed precisely captured in its plain language.

161. Finally, ICANN's Notice of Breach violates not only the procedural and substantive requirements of the Registry Agreement for issuing such a Notice. The Notice of Breach – and the manner and circumstances in which ICANN issued it – violate ICANN's obligations, including its Covenants, as set forth in the Agreement. ICANN required Employ Media to undertake a lengthy and elaborate series of procedures to obtain approval for its <non-company names> expansion; ICANN then formally approved the <non-company names> expansion. Employ Media implemented this expansion exactly in the manner described to, and approved by, ICANN. With virtually no warning, ICANN then proceeded to issue the Notice of Breach (and to do so publicly) – threatening to terminate Employ Media's entire business, simply for launching an expansion that ICANN had specifically approved. The purported bases for the Notice are so flimsy that it is impossible to reach any conclusion other than that ICANN simply gave in to the intense lobbying efforts undertaken by the Coalition. Such conduct plainly breaches ICANN's covenants under the Agreement (which in turn are based on ICANN's constitutive documents) to "operate in an open and transparent manner"[204] that is "[c]onsistent with ICANN's express mission and core values"[205]; not to "apply standards, policies, or practices arbitrarily, unjustifiably, or inequitably"[206]; and not "to single out Registry Operator for disparate treatment unless justified by substantial and reasonable cause."[207]

A. Choice of Law and Burden of Proof

162. Before turning to these issues in greater detail, we address the question of choice of law and burden of proof.

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[203] See Respondent's Answer, para. 56.

[204] Registry Agreement, Art. III, sec. 3.2(a).

[205] Id. at Art. I, sec. 1.3.

[206] Id. at Art. III, sec. 3.2(b).

[207] Id.

1.   Choice of Law

163.   The Registry Agreement does not contain a choice of law provision indicating the Parties' agreement to apply the substantive law of any particular jurisdiction to disputes related to the Agreement. It is therefore for the Tribunal to "apply the rules of law which it determines to be appropriate."[208] The Tribunal is not bound by the choice-of-law rules of the arbitral seat, but instead is free to consider the factors that it considers the most appropriate to the case.[209]

164.   Given that ICANN is a California corporation, with its principal place of business in California, and that Employ Media performs its responsibilities under the Registry Agreement principally from Ohio, where it is headquartered, the two most logical choices for the application of state law are California and Ohio. At the same time, ICANN's constitutive documents (which are referenced in the Registry Agreement) provide that ICANN is charged with "carrying out its activities in conformity with relevant principles of international law . . . and local law."[210]

165.   Employ Media agrees that its obligations under the Registry Agreement are properly determined under state contract law. Given that the basic principles of contract law here at issue do not differ under the laws of California and Ohio, Employ Media will rely on authorities from both jurisdictions in demonstrating why its expansion does not breach (materially or otherwise) any provision of the Registry Agreement. With respect to ICANN's obligations under the Registry Agreement – in particular, its covenants of "open and transparent" conduct and "equitable treatment" – Employ Media will rely on both state and international authorities to demonstrate that ICANN has violated these obligations.

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[208]   Rules of Arbitration of the International Chamber of Commerce, Art. 17.1, 1998 (the "1998 Arbitration Rules") (CL-1).

[209]   *See, e.g.*, GARY B. BORN, INTERNATIONAL COMMERCIAL ARBITRATION, 2116 (2d ed. 2009) (CL-10) ("[T]ribunals possess broad freedom to select the applicable choice-of-law rules and applicable substantive law. . . . [T]his approach does not require the arbitral tribunal to apply the conflicts of laws rules of the arbitral seat, nor of any other specified jurisdiction . . . .") (footnote omitted).

[210]   Articles of Incorporation of Internet Corporation for Assigned Names and Numbers, Art. 4, 21 Nov. 1998, *available at* http://www.icann.org/general/articles.htm (last visited 29 Apr. 2011), CL-1A. In *ICM Registry v. ICANN*, the Independent Review Panel concluded that ICANN, "in carrying out its activities 'in conformity with the relevant principles of international law,' is charged with acting consistently with relevant principles of international law, including the general principles of law recognized as a source of international law." ICDR Case No. 50 117 T 00224 08, Declaration of the Independent Review Panel para. 140, 19 Feb. 2010 (CL-12).

2. **Burden of Proof**

166. ICANN commenced this dispute by serving its Notice of Breach, alleging that Employ Media is in breach of the Registry Agreement, and threatening to terminate the Agreement "if the stated breach is not cured within 30 calendar days . . . ."[211] Unable to persuade ICANN to change its position in any respect, Employ Media had no choice but to commence this arbitration seeking declaratory relief.

167. In its Answer, ICANN states that by commencing the arbitration, Employ Media has "taken on" the burden of proof on every issue – including providing that it is *not* in breach of the Agreement.[212] ICANN's position amounts to this: ICANN can serve a Notice of Breach on a registry operator, and then terminate the registry operator's business in thirty days if the operator does not accept the allegations of ICANN's notice and does not act in accordance with ICANN's desires. If the registry operator disputes that it is in fundamental and material breach, and exercises its right under the registry agreement to challenge ICANN's allegations of breach in arbitration, then the burden of proof shifts to the operator to prove it is not in breach as alleged by ICANN, while ICANN bears no burden at all.

168. Here, as elsewhere, ICANN's position is unsustainable as a matter of law or fairness. The applicable principle in determining the burden of proof in an ICC arbitration is *actori incumbit probatio* – the burden of proof is upon him who affirms.[213] The burden of proof is not upon the person who denies. Thus, ICC tribunals do not rigidly determine who bears the burden of proof on a given issue – particularly in a case seeking declaratory relief – based on the formalistic nomenclature of who is designated as "claimant" and who is designated as "respondent." As ICANN's Answer makes clear, ICANN is alleging that Employ Media has committed "fundamental and material breaches" of the Registry Agreement, and has requested "a finding from the Panel that," *inter alia*:

(a)   ICANN's Notice of Breach letter was appropriate; [and]

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[211]   Notice of Breach at 4, C-125.

[212]   Respondent's Answer, para. 52.

[213]   *See, e.g.*, W. LAURENCE CRAIG, ET AL., INTERNATIONAL CHAMBER OF COMMERCE ARBITRATION 646 (3d ed. 2000) (CL-8) ("The principle *actori incumbit probation* has been applied by ICC arbitrators as a fundamental concept of the international legal community.") (citing cases).

      (b)   ICANN may, but is not required to, terminate the Registry Agreement with Employ Media . . . .[214]

169. Consistent with the principle of *actori incumbit probatio*, ICANN bears the burden of providing its allegations that Employ Media has "fundamentally and materially" breached the Registry Agreement, even though Employ Media has commenced this arbitration seeking a declaration that it has not, as alleged by ICANN, committed any breach (let alone a fundamental and material breach) of the Agreement. Placing the burden on ICANN to prove its alleged "fundamental and material" breaches of the Agreement by Employ Media is also consistent with state law, if state law were applicable to the issue of burden of proof.[215] Also consistent with the principle of *actori inbumbit probatio*, Employ Media bears the burden of proof on its affirmative defenses (*i.e.*, estoppel and laches), and on its claim that ICANN, by issuing the Notice of Breach, is itself in violation of its obligations under the Registry Agreement and its Articles and Bylaws.

170. In the final analysis, as demonstrated below, regardless of who carries the burden of proof, it is clear that Employ Media is entitled to all the relief it seeks.

B.   **The Procedural Deficiencies of the Notice**

    1.   **Failure to Provide Specificity**

171. Section 6.1 of the Registry Agreement provides that any Notice of Breach issued by ICANN "shall include *with specificity the details* of the alleged breach." As described above in Section II.E, ICANN's Notice of Breach is so vague and lacking in detail that it is impossible to determine, on the basis of the Notice, how ICANN contends that Employ Media is breaching the Agreement. Indeed, much of the Notice is self-contradictory and nonsensical. It alleges that Employ Media and SHRM have failed to establish policies and have failed to act consistently with the .JOBS Charter. But at the same time the Notice alleges that the Charter itself is "specious."[216] (Again, the Charter has been in place, unchanged, since Employ Media applied for the sTLD in 2004.) Is the Notice of Breach

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[214]   Respondent's Answer, para. 60.

[215]   *See, e.g., Monarch Life Ins. Co. v. Selby*, 2008 WL 6405192, at *2 (C.D. Cal. 2008) ("California law . . . makes plain that the burden of proof does not change simply because a claim is presented in the context of a declaratory relief action") (CL-21); *Continental Ins. Co. v. Louis Marx & Co., Inc.*, 64 Ohio St. 2d 399, 401 (Ohio 1980) (holding that the burden of providing an exclusion in an insurance contract always rests on the insurer regardless of whether the insurer or insured is seeking declaratory relief.) (CL-7).

[216]   Notice of Breach at 2.

complaining about Employ Media's failure to act consistently with the Charter? Or is the Notice complaining that the "specious" .JOBS Charter (which ICANN itself approved many years before) has allowed Employ Media to act somehow improperly? Employ Media should not be required to guess the case it must answer.

172. The Notice also asserts that under the Charter, anyone can register a domain name simply by joining SHRM – and that such "specious restrictions . . . do not serve the international human resource management community."[217] First, it is neither within ICANN's mandate nor its competence to determine whether or not a second-level domain registrant or the use to which that registrant puts a .JOBS domain name "serve[s] the international human resources management community." Second, even assuming *arguendo* the premise of the argument – *i.e.*, that persons might join SHRM only so that they can then register domains in .JOBS – there is no explanation in the Notice as to why the identity of the person registering the site has any bearing on whether the site serves the Community. Moreover, it is impossible to understand how Employ Media's inclusion of this provision of the Charter – which is itself part of the Registry Agreement – could also breach the Agreement. ICANN is arguing, in effect, that a provision of the Registry Agreement constitutes a fundamental and material breach of the Registry Agreement.

173. Toward the end of the Notice of Breach, ICANN finally provides some measure of specificity regarding its complaint – while at the same time acknowledging that the true motivation of the Notice is only to assist the Coalition avoid the competition of the new registry service. The Notice of Breach asserts:

> The recently launched *universe.jobs* appears to be a job board that advertises job openings for multiple employers. It is our understanding that one registrant, who is a member of SHRM, registered forty-thousand domain names in the .JOBS TLD for use on this job board. *It appears that Employ Media and SHRM, though the Direct Employers Association, intend to use the .JOBS TLD primarily to compete with other internet job boards.*[218]

174. Again, Employ Media – and the Coalition itself – had repeatedly told ICANN that the purpose of the amendments was to allow job boards of this nature. Employ Media had specifically

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[217] *Id.* at 3.

[218] *Id.* (emphasis added).

informed ICANN that it had accepted the universe.jobs proposal from DirectEmployers, and had described the proposal to ICANN in detail.[219]

2. Failure to Allege a Fundamental and Material Breach

175. No one could seriously contend that the Notice of Breach is alleging a "fundamental and material breach" of the Registry Agreement. A breach is "fundamental and material" only if it frustrates the fundamental purpose of the contract:

> A material breach is a failure to do something that is so fundamental to a contract that the failure to perform that obligation defeats the essential purpose of the contract or makes it impossible for the other party to perform under the contract.[220]

Both California and Ohio law adopt this view.[221]

176. Even assuming *arguendo* that Employ Media's expansion could in any way be deemed to breach the Registry Agreement (and, as demonstrated below, it cannot be), it is inconceivable that the expansion could breach an obligation so fundamental to the Registry Agreement as a whole (*i.e.*, an agreement that also encompasses the registration of <company names>) that the "failure to perform that obligation defeats the essential purpose of the contract or makes it impossible for the other party to perform under the contract."[222] As stated above, if ICANN had truly believed that the expanded service breached the Registry Agreement, it could have commenced an arbitration seeking a declaration to that effect. Indeed, the arbitration clause in the Registry Agreement specifically provides that the parties may request the Arbitral Tribunal to require specific performance (*e.g.*, to discontinue the expansion).

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[219]   *See* Embrescia Statement, para. 49; *see also* Fassett Statement, paras. 120, 126.

[220]   23 Williston on Contracts § 63:3 (CL-9) (internal quotes omitted).

[221]   *See, e.g., See Wyler v. Feuer*, 85 Cal. App. 3d 392, 403-04 (Cal. Ct. App. 1978) (CL-28) ("Case law has uniformly held that a failure of consideration must be 'material,' or go to the 'essence' of the contract before rescission is appropriate."); *Superior Motels, Inc. v. Rinn Motor Hotels, Inc.*, 195 Cal. App. 3d 1032, 1051 (Cal. Ct. App. 1987) (CL-27) ("The law sensibly recognizes that although every instance of noncompliance with a contract's terms constitutes a breach, not every breach justifies treating the contract as terminated"); *O'Brien v. Ohio State Univ.*, 2007 Ohio 4833 at *56 (Ohio Ct. App. 2007) (CL-22) ("At common law, a 'material breach' of contract is a party's failure to perform an element of the contract that is 'so fundamental to the contract' that the single failure to perform 'defeats the essential purpose of the contract or makes it impossible for the other party to perform.'") (quoting 23 Williston on Contracts § 63:3); *see also Marion Family YMCA v. Hensel*, 178 Ohio App. 3d 140, 142-43 (Ohio Ct. App. 2008) (also citing to 23 Williston on Contracts § 63:3 for the definition of "material breach").

[222] 23 Williston on Contracts § 63:3 (CL-9) (internal quotes omitted).

Instead, in an effort to intimidate Employ Media into discontinuing the expansion, ICANN threatened to terminate the entire business.

177. For these reasons alone, the Notice of Breach is deficient, and warrants a declaration from the Tribunal that there is no basis for ICANN to modify or terminate, in whole or in part, the Registry Agreement.[223]

C.   **None of ICANN's Allegations Constitute a Breach of the Agreement, Let Alone a Fundamental and Material Breach**

178. Although ICANN's outside counsel have at least attempted to add a bit of clarity to the Notice of Breach in their Answer to Employ Media's Request for Arbitration, the allegations remain frivolous. We will address each of the three ways in which ICANN alleges that Employ Media has breached the Registry Agreement, as set forth in ICANN's Answer.[224] For each, we will demonstrate why the plain and unambiguous language of the Agreement expressly permits the activities about which ICANN complains. Because the language of the Agreement is clear, the Tribunal need not look to extrinsic evidence of the Parties' intent.[225] However, given ICANN's invocation of the Agreement's "spirit and intent," we will also demonstrate that the extrinsic evidence completely refutes ICANN's contention that Employ Media's new registry service violates the "spirit and intent" of the Agreement in any respect.

1.   **ICANN's First Allegation of Breach: that "by allowing third-party job boards within .JOBS, Employ Media has transcended the very purpose behind the creation of the TLD and has exceeded the scope of the .JOBS Charter."**

179. ICANN is unable to point to a single provision in the Registry Agreement that prohibits third-party job boards within the .JOBS sTLD. There has never been such a provision in the Registry Agreement – not even prior to the 2010 amendments.

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[223] Because it is critical that Employ Media have certainty in how it may carry out its business, Employ Media respectfully requests that even if the Tribunal agrees that the Notice is procedurally deficient, the Tribunal nonetheless proceed to issue a declaration that the expansion of the .JOBS registry service, as carried out in the universe.com program, does not breach the Registry Agreement.

[224] Respondent's Answer, paras. 53-59.

[225] *Shifrin v. Forest City Enters., Inc.*, 64 Ohio St. 3d 635, 638 (Ohio 1992) (CL-25); *Kelly v. Med. Life Ins. Co.*, 31 Ohio St. 3d 130, 132 (Ohio 1987) (CL-15); *ACL Tech., Inc. v. Northbrook Prop. & Cas. Ins. Co.*, 17 Cal. App. 4th 1773, 1791 (Cal. 1993); *see also* Cal. Civ. Proc. Code § 1856 (West 2011) (CL-5).

180. The only restriction on the types of domain names in the original Registry Agreement was the requirement that domain names be limited to <companyname>.jobs. Part VII.3 of Appendix S provided that ".jobs domain registrations are limited to the legal name of any employer and/or a name or abbreviation by which the employer is commonly known."[226] As explained above, the language in Part VII.3 (as well as similar language in Part VII.4) was amended by the Parties to read instead (with the new language underscored):

> .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.[227]

181. But even before the amendment, there was nothing in the Registry Agreement itself to prohibit the posting of multiple jobs from different employers on a single site (*i.e.* a job board) with a company name – *e.g.*, monster.jobs or careerbuilder.jobs. Indeed, as discussed above, prior to the 2010 amendments, Employ Media had teamed with CareerBuilder to launch the Katrina.jobs site, which – as critics noted – was a jobs board.[228] To the extent that ICANN is arguing that it authorized the use of geographic, industry, and occupational categories of name – which cannot be used to list job openings for multiple companies – the result would be nonsensical. There would be no reason to register, for example, an engineering.jobs domain in which only Boeing could post Boeing jobs, or a restaurant.jobs domain where any McDonald's could post McDonald's jobs, or an Ohio.jobs domain, where only Employ Media could post Employ Media jobs.

182. As set forth in detail above, the plain language of the Registry Agreement delegates to the Registry Operator and the Sponsor, *i.e.*, to Employ Media and SHRM, the authority to "develop policies

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[226]   Registry Agreement, Appendix S, Part VII.3, C-19

[227]   Registry Agreement, Appendix S, Part VII.3, C-20. As ICANN observes in its Answer, Employ Media's Registrant Agreement provided that "you cannot have a job board at your .JOBS domain which contains listings for jobs outside of Company." But this proviso – which would be nonsensical in the context of a newyork.jobs or accountant.jobs domain – was removed from Employ Media's Registrant Agreement following the Board's vote.

[228]   *See* Fassett Statement, para. 47; *see also* 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.

for the sponsored TLD"[229]– including, specifically, the uses to which .JOBS domains may be put. Under Appendix S, ICANN delegated to Employ Media and SHRM the authority to develop the policies for .JOBS concerning, for example, "[r]estrictions on how Registered Names *may be used* (which need not be uniform for all names within the Sponsored TLD),"[230] and "*[u]ses and practices* by registrants with respect to Registered Names."[231]

183. To be sure, Employ Media and SHRM are required to exercise their delegated authority consistent with the Charter. But the Charter is broadly drafted "to serve the needs of the international human resource management community (the 'Community')."[232] As long as Employ Media and SHRM follow the proper procedures set forth in Appendix S, it is up to them – not to ICANN, and certainly not to the fee-based job board industry – to make these decisions.

184. Thus – and in particular considering the 2010 amendments – the language of the Registry Agreement plainly and unambiguously allows the use of sites in .JOBS to be used as job boards. Therefore, the Tribunal does need not look to extrinsic evidence. However, the extrinsic evidence concerning the Parties' intent in amending the Registry Agreement in 2010 resolves any conceivable doubt. Going back to the shared domain name beta, Employ Media had informed ICANN that its intent was specifically to enable .JOBS domains to be used as job boards. For example, in response to questions that ICANN's Mr. Giza had posed to Employ Media about the beta, Employ Media wrote to ICANN:

> *[A] ".jobs* board *or similar site" can qualify if the domain name is submitted by a member of the global HR management Community* (the same qualification as for any other type of entity or organization).[233]

185. Similarly, Mr. Rubin testifies that it was clear that the proposed amendments that Employ Media placed before SHRM during the PDP

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[229]   Registry Agreement, Art. I, Sec. 1.3, C-19.

[230]   Registry Agreement, Appendix S, Part II.3, C-19.

[231]   *Id.* at Part II.14.

[232]   *Id.* at Part I.1.

[233]   Letter from Ray Fassett to David Giza, 14 Dec. 2009, C-43.

Were intended to permit other proposals similar to uses employed by DirectEmployers Association – *including, specifically, the registration of non-company names within the .JOBS domain that in my expectation would likely be used to list multiple employers' jobs on one site or a variety of sites.*[234]

186. In connection with drafting the RSEP Request and the amendments to the Registry Agreement, Mr. Fassett specifically wrote to ICANN's Mr. Schwartz:

> [T]he idea is *to "share" the domain for all employers to list employment opportunities* ....[235]

187. Indeed, the briefing materials submitted to the ICANN Board prior to its vote approving the amendments in August 2010 specifically explained that:

> .jobs is requesting that registration restrictions be relaxed to allow *for the creation of jobs boards* such as: engineering.jobs and ohio.jobs.[236]

The ICANN Board therefore voted to approve the amendments specifically knowing that their express intent was to allow "for the creation of job boards."

188. In light of this evidence, in addition to the plain language of the Agreement itself, ICANN's assertion that Employ Media has "fundamentally and materially" breached the amended Registry Agreement "by allowing third party job boards within .JOBS"[237] is manifestly frivolous. It appears to be offered with a complete and willful disregard of the record underlying the amendments, not to mention the plain language of the Agreement as amended.

189. To the extent that ICANN intends to invoke the "spirit and intent" of the Registry Agreement *prior* to the 2010 amendments that ICANN approved and entered, such "spirit and intent" is irrelevant in any event, but ICANN's representations as to any such "spirit and intent" are also false. It was never, at any point, the intention to limit permanently the name types or usages of the domains in

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[234]   Rubin Statement, para. 22.

[235]   Letter from Ray Fassett to Craig Schwartz, 1 Apr.2010, C-64A.

[236]   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.

[237]   Respondent's Answer, para. 53.

the .JOBS sTLD. Rather, the intent and understanding of both Parties was that the sTLD would grow and evolve. As stated in Employ Media's 2004 application for the sTLD:

> [A]dditional 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).*[238]

The 2005 Agreement specifically set forth the procedures by which "[a]dditional policies and modifications to current policies will be created, reviewed and accepted/rejected as explained below."[239]

190. Accordingly, based on the plain language of the amended Registry Agreement – and the abundant evidence that the plain language precisely captures the Parties' "spirit and intent" – the Tribunal should reject ICANN's assertion that Employ Media has breached the Registry Agreement "by allowing third-party job boards within .JOBS"[240] as frivolous.

2. **ICANN's Second Allegation of Breach: that "by espousing a view under which a .JOBS domain name can be issued based on a sole requirement that a human resources professional 'request' the domain, Employ Media has failed to enforce meaningful 'restrictions on registration within the TLD," as required by the Registry Agreement.**

191. In asserting that Employ Media is "espousing a view under which a .JOBS domain name can be issued based on a sole requirement that a human resources professional 'request' the domain,"[241] ICANN is specifically referring to Article IV of the .JOBS Charter – which is the only provision of the Registry Agreement that ICANN actually sets forth in its Notice of Breach. It is worth reproducing Article IV here:

> The following persons may request registration of a second-level domain with the .JOBS TLD:
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> • members of SHRM; or

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[238]   Application at 38.

[239]   Registry Agreement, Appendix S, Part VII.3, C-19.

[240]   Respondent's Answer, para. 53.

[241]   Respondent's Answer, para. 57.

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- persons engaged in human resources 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.[242]

192. Once again, this language has been part of the Registry Agreement since the Parties first executed the Agreement in 2005. It remains unchanged in the Registry Agreement as amended in 2010. Since Employ Media first proposed the Charter as part of its 2004 Application for the .JOBS sTLD, there have been no changes – not a single word – to this provision, or any other provision, of the Charter.

193. Employ Media has never "espoused" any view on this issue other than what is set forth in the plain language of the Charter. ICANN does not point to a single instance in which Employ Media has allowed a person to register a second-level domain who is not (1) a member of SHRM; or (2) a person engaged in human resources management practices that also meets one the three following criteria – (i) possesses salaried-level human resource management experience; (ii) is certified by the Human Resource Certification Institute; *or* (iii) is supportive of the SHRM Code of Ethical and Professional Standards in Human Resource Management.

194. ICANN appears to suggest that the criteria in Article IV of the Charter somehow fail to comport with a requirement in the Registry Agreement for "meaningful 'restrictions on registration within the TLD' . . . ."[243] ICANN purports to be citing Part II.2 and Part II.3 of the Appendix in providing this short quote from the Agreement.[244] The relevant provisions actually state as follows:

Part II. Delegated Authority

The following areas of responsibility for the development of policies for the Sponsored TLD are delegated to the Registry Operator, who has engaged The Society for Human Resource Management as policy delegate and VeriSign Naming and Directory Services, Inc., as a back-end provider to assist in provision of such responsibilities, provided the

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[242]   Registry Agreement, Appendix S, Part I.IV, C-19.

[243]   Respondent's Answer, para. 57.

[244]   Respondent's Answer, para. 57 (citing Registry Agreement, Appendix S, Part II.2-3).

other provisions of the Sponsored TLD Registry Agreement and its Attachments are followed:

* * * *

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 the scope of the Charter (Attachment 1) 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 (Attachment 1) is not exceeded.[245]

195. Thus, contrary to ICANN's apparent suggestion that Article IV of the Charter somehow does not comply with requirements in these provisions for "meaningful 'restrictions on registration within the TLD' . . . ," these provisions actually provide that the authority for determining whether there should be any such restrictions on registration within the TLD – and if so, what types of restrictions – has been delegated to Employ Media and SHRM. The proviso, of course, is that any such restrictions (or lack thereof) must be within the scope of the Charter. But since the restriction of which ICANN complains is itself contained in the Charter, it is impossible to see how the provisions quoted above could conflict with the Charter; they are explicitly subservient to the Charter.

196. It is essential to remember that the purpose of the TLD, as stated in the .JOBS Charter, is "to serve the needs of the international human resource management community."[246] The principal focus of the .JOBS TLD is therefore on the users of the site in .JOBS – i.e., the employers who want job-seekers to be able to find their job listings on sites such as engineers.jobs or newyork.jobs. The purpose of the Registry Agreement – and frankly, the mission of ICANN – do not involve the protection of the competitive interests of organizations like the Newspaper Association of America or the International Association of Employment Web Sites, whose members would like to continue charging employers higher fees for listing jobs in their newspapers or on their web sites.

197. And in fact, Employ Media has always imposed and enforced restrictions – and continues to impose and enforce restrictions – as are appropriate to the category of name at issue, and to serve the needs of the Community. Accordingly, all registrants for .JOBS domain names (whether for <companyname> or <noncompanyname> domains) must sign a registrant agreement, specifying that all

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[245]   Registry Agreement, Appendix S. Part II, C-20.

[246]   Registry Agreement, Appendix S, Part I.1, C-20.

domain names must be used in compliance with the .JOBS Charter and to serve the needs of the .JOBS Community. The registrant agreement also obligates the registrant to support the SHRM Code of Ethics, to certify that a qualified applicant has submitted the application, and to certify that any statements made during the registration process (and in the registrant agreement) are complete and accurate. Furthermore, the registrant agreement prohibits the use of .JOBS domain names for any purpose prohibited by law rule, statute or rule; for unsolicited email (i.e., spam); or to promote or engage in activities that cause harm to third parties (such as defamation, slander, harassment, invasion or privacy, identity theft, etc.) Additional requirements are set forth depending on whether the domain name at issue is for a <companyname> or <noncompany> domain. The applicant must represent and warrant that its application meets these criteria, and the obligation to comply with these criteria continues throughout the entire registration period for the domain.

198. In sum, the requirements used by Employ Media to determine who may register domain names in the .JOBS sTLD are entirely consistent with the plain language of the Registry Agreement. That language has never changed. ICANN's assertion that Employ Media has "fundamentally and materially" breached the Agreement by allowing persons to register domain names according to the criteria that have always been set forth in the Agreement is frivolous.

3. **ICANN's Third Allegation of Breach: that "by allowing DirectEmployers to register scores of the most valuable non-companyname.jobs domains through what appears to be a backroom deal, rather than through an open, fair and transparent allocation process, Employ Media has violated the terms of the Phased Allocation Program."[247]**

199. Here, too, ICANN's allegation is not only frivolous but also relies on a factual predicate (*i.e.*, a "backroom deal") that ICANN plainly knows to be untrue. The allegation simply parrots claims asserted by the Coalition, and panders to the Coalition's extensive lobbying efforts.

200. We begin, again, with the plain language of the amended Registry Agreement. As set forth above, the following language concerning the Phased Allocation Program was added to the Agreement as part of the 2010 amendments, specifically to address how non-employer name domains would be allocated:

Pursuant to the Phased Allocation Program, Registry Operator *may elect* to allocate the domain names via the following processes: 1) *Request for*

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[247]   Respondent's Answer, para. 58.

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 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 not to allocate any of such names.*[248]

201. Here, too, the Agreement unambiguously affords broad discretion to Employ Media as to how to allocate the new domain names (including the right to decide not to allocate them at all). Nor is there anything in the Agreement that prevents Employ Media from allowing persons to register domain names in bulk.[249]

202. As ICANN well knows, far from allocating the names in the universe.jobs platform to DirectEmployers through a "backroom deal," Employ Media posted an RFP on its website in August 2010, shortly after the ICANN Board had approved the new registry service and the amendments to the Registry Agreement.[250] As detailed above, Employ Media received 16 proposals, and concluded that DirectEmployers' proposal was by far the best and most complete.[251] Employ Media specifically informed ICANN of its selection of DirectEmployers, and explained its reasoning for the choice. But because the Coalition had at this point filed its Reconsideration Request, ICANN specifically asked Employ Media to hold off on announcing the selection and on implementing the new registry service. Indeed, when the BGC complained about the fact that many of the new domain names would be registered to Employ Media (and therefore constitute a "self-managed class" of names), Mr. Embrescia specifically discussed with Mr. Jeffrey, ICANN's General Counsel, the proposal that the names would be registered instead to DirectEmployers, as the successful respondent in Employ Media's RFP.[252]

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[248]   Registry Agreement, Appendix S, Part VII.4 (boldface added).

[249]   Indeed, other Registry Operators have allowed persons to register names in bulk. For example, Tralliance, the registry operator for the .TRAVEL TLD, developed a bulk purchase program whereby it solicited expressions of interest from business that would be required to commit to a minimum purchase of 25,000 domain names within one year. Press Release, Tralliance Corp., Tralliance Issues Reminder to Customers Regarding Bulk Purchase Program, 12 Feb. 2008, *available at* http://www.ttpc.travel/docs/PR2.12.08BulkPurchaseFINAL.pdf.

[250]   .JOBS RFP Round 1 Application, 26 Aug. 2010, C-101.

[251]   As noted above, Employ Media also accepted several other smaller proposals from among the sixteen submitted in response to the RFP. *See supra*, para. 154; see also Fassett Statement, para. 109.

[252]   *See supra* para. 162; *see also* Embrescia Statement, para. 51.

203. ICANN has failed to point to a single iota of evidence that there was anything improper or suspect in the manner in which Employ Media conducted its RFP or selected DirectEmployers' proposal. Indeed, the use of word "appears" with respect to the allegation of a "backroom deal" – a word used a number of times in both ICANN's Notice of Breach and Answer – illustrates how completely unsubstantiated the allegation is. Under these circumstances, for ICANN to issue a Notice of Breach – threatening to terminate Employ Media's entire business – is not only frivolous. It evinces manifest bad faith on ICANN's part.

204. In sum, for the reasons set forth above, the Tribunal should issue a declaration that ICANN has failed to identify a single aspect of Employ Media's new expansion service that constitutes a "fundamental and material" breach (or, for that matter, any sort of breach) of the Registry Agreement, and that Employ Media is entitled to continue the new expansion as described herein.

D.   ICANN's Claims of Fundamental and Material Breaches against Employ Media Are Barred by the Doctrines of Estoppel and Laches

205. Even assuming arguendo that ICANN's claims of fundamental and material breaches of the Registry Agreement had any merit (and, as demonstrated above, they do not), the claims would still be barred under the doctrine of estoppel and laches.

206. The doctrine of estoppel (sometimes referred to as *venire contra factum proprium*, i.e., no one may set himself in contradiction to his own previous conduct) is, of course, a basic principle of international commercial and public law.   It is also a doctrine recognized under both California and Ohio law.[253]

207. Under the principle of estoppel, ICANN is barred from alleging that Employ Media breached the Registry Agreement through the expansion of its registry service.   Employ Media repeatedly apprised ICANN of exactly what it wanted to achieve in the expansion (*e.g.*, through conversations, the shared domain beta test, numerous written communications, and formal submissions to ICANN).   ICANN specifically told Employ Media that it could undertake the expansion, if Employ Media successfully completed a series of elaborate and time-consuming processes.   In reliance on ICANN's representations, Employ Media undertook these processes (lasting the better part of a year), following which ICANN specifically approved the expansion. Then, in reliance on ICANN's approval

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[253]   *See, e.g., Doe v. Archdiocese of Cincinnati*, 116 Ohio St. 3d 538, 539-40 (Ohio 2008) (CL-9); *City of Goleta v. Superior Court*, 40 Cal. 4th 270, 279 (Cal. 2006) (CL-6).

– including the approval of the PDP, the RSEP Request, and the amendments to the Registry Agreement – Employ Media launched an RFP process, and, following that process, selected DirectEmployers' universe.jobs proposal, which has now been implemented. ICANN – having given Employ Media these instructions and approvals regarding the expansion, knowing that Employ Media would rely on them, and knowing exactly what Employ Media wanted to achieve – is now estopped from claiming that Employ Media's actions fundamentally and materially breach the Agreement.

208. To the extent ICANN is basing any claim of a fundamental and material breach on any sort of alleged deficiency in the .JOBS Charter itself, then such a claim is barred under the principle of laches as well as estoppel. As described above, ICANN's Notice of Breach asserts that the language included in Article IV of the Charter is "specious" (although it is not clear, based on ICANN's Answer, whether it is continuing that claim in this arbitration). The doctrine of laches bars a claim concerning conduct, where the party complaining of the conduct has unreasonably delayed in asserting its complaint, and/or has acquiesced in the conduct complained of, causing prejudice to the party receiving the complaint.[254] Again, the .JOBS Charter has been in place since the time of Employ Media's 2004 Application. It has remained in the Registry Agreement since ICANN first executed the Agreement in 2005. Employ Media has always relied on the Charter language, approved by ICANN, in carrying out its obligations and responsibilities under the Agreement. Employ Media continued to rely on that language as it envisioned the possibility of expansion in 2005, started to plan the expansion in 2009, and carried out the expansion (and the procedures that ICANN said were necessary to achieve it) in 2010 and 2011. And again, the Charter language remained in the Registry Agreement even as the Parties amended other parts of the Agreement in 2010. Under the doctrine of laches, ICANN cannot now claim that Employ Media has committed a fundamental and material breach based on any alleged deficiency in the language of the Charter.

209. In sum, while ICANN's claims of fundamental and material breach (or any type of breach) against Employ Media have no merit whatsoever, they are also barred under the doctrines of estoppel and laches.

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[254]   *Johnson v. City of Loma Linda*, 5 P.3d 874, 878 (Cal. 2000); *Schellinger Bros. v. City of Sebastopol*, 102 Cal. Rptr. 3d 394, 410–12 (Cal. Ct. App. 2009); *Stevens v. Nat'l City Bank*, 45 Ohio St. 3d 276, 285-86 (Ohio 1989).

E.   **In Issuing the Notice of Breach, ICANN Has Violated its Own Obligations under the Registry Agreement**

210. As set forth above, ICANN has violated its own obligations under the Registry Agreement by issuing a Notice of Breach that fails to "include with specificity the details of the alleged breach," that fails to allege a "fundamental and material breach of the Registry Agreement,"[255] and that offers no more than frivolous allegations of breach that have no basis in the terms of the Agreement or the applicable facts. More fundamentally, in issuing the Notice of Breach, ICANN has violated the specific Covenants it provided in the Agreement (which are in turn based on obligations undertaken in the Agreement and its constitutive documents), as well as its implied covenant of good faith and fair dealing.

211. ICANN's Covenants, as set forth in the Registry Agreement, are expressly based on ICANN's mission and core values, as set forth in its Articles of Incorporation and Bylaws. Section 3.2 of the Registry Agreement provides in relevant part:

> **Covenants of ICANN.** ICANN covenants and agrees with Registry Operator as follows:
>
> (a) Open and Transparent. Consistent with ICANN's expressed mission and core values, *ICANN shall operate in an open and transparent manner.*
>
> (b) Equitable Treatment. ICANN *shall not apply standards, policies, procedures or practices arbitrarily, unjustifiably, or inequitably* and *shall not single out Registry Operator for disparate treatment* unless justified by substantial and reasonable cause.[256]

212. ICANN's "mission," as stated in its Articles of Incorporation, is limited and technical: it is to promote "the operational stability of the Internet."[257] ICANN's "core values," as stated in its Bylaws, include, for example:

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[255]   Registry Agreement, Sec. 6.1, C-20.

[256]   *Id.* Sec. 3.2.

[257]   Articles of Incorporation of Internet Corporation for Assigned Names and Numbers, Art. 3, 21 Nov. 1998, *available at* http://www.icann.org/general/articles.htm, C-3. Thus, its purposes, as enumerated in the Articles, include such functions as "coordinating the assignment of Internet technical parameters as needed to maintain universal connectivity on the Internet"; "performing and overseeing functions related to the coordination of the Internet Protocol ('IP') address space"; "performing and overseeing functions related to the coordination of the

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- "Introducing and *promoting competition* in the registration of domain names where practicable and beneficial and in the public interest";

- "Employing *open and transparent* policy development mechanisms";

- "Making decisions by applying *documented policies neutrally and objectively,* with *integrity and fairness.*"[258]

213. As the Independent Review Panel concluded in *ICM Registry v. ICANN,*[259] in conducting its activities, ICANN "is charged with acting consistently with the relevant principles of international law, including the general principles of law recognized as a source of international law." These obligations are of course consistent with those that exist under state law – including the laws of California and Ohio – which specifically recognize that every contract implies a covenant of good faith and dealing on the part of each party to the contract.[260] The following observation of the Panel in *ICM* is equally applicable here:

> The paramount principle in play is agreed by both parties to be that of good faith, which is found in international law, in the general principles that are a source of international law, and in the corporate law of California.[261]

214. All of the covenants undertaken by ICANN arise from and overlap with the principle of good faith, which international tribunals and domestic courts have applied in a wide range of circumstances. The obligation of good faith of course applies between private parties in commercial relationships. But here, ICANN has taken on even stricter obligations by the terms of its covenants as set forth in the Agreement, by the provisions of its constitutive documents, and by virtue of its role as the sole global regulator of a critically important, international resource.

Internet domain name system ('DNS'), including the development of policies for determining the circumstances under which new top-level domains are added to the DNS root system"; and "overseeing operation of the authoritative Internet DNS root server system." *Id.* at Art. 4(i)-(iv).

[258]   Bylaws, Art. I, Sec. 2(6)-(8).

[259]   *ICM Registry v. ICANN,* para. 140 (CL-12).

[260]   *Ladd v. Warner Bros.,* 184 Cal App. 4th 1298 (Cal. Ct. App. 2010) (CL-16); *Acree v. Gen. Motors Acceptance Corp.,* 92 Cal. App. 4th 385 (Cal Ct. App. 2001) (CL-3); *Badie v. Bank of Am.,* 67 Cal. App. 4th 779 (Cal. Ct. App. 1998) (CL-4).

[261]   *ICM v. ICANN,* para. 141 (CL-12).

215. A party in the position of Employ Media, when interacting with a party in the position of ICANN, is entitled to "consistent and transparent behavior, free of ambiguity that involves the obligation to grant and maintain a stable and predictable legal framework . . . ."[262] Employ Media is entitled to expect that ICANN "will not act in a way that is manifestly inconsistent, non-transparent, unreasonable (i.e. unrelated to some rational policy), or discriminatory (i.e. based on unjustifiable distinctions)."[263] Similarly, "when the conduct of one party has led to raise legitimate expectations on the part of the second party, the first party is barred from changing its course of action to the detriment of the second party."[264]

216. These principles have been applied by international arbitral tribunals in a variety of settings. But they have also been applied by domestic courts (including California courts) involving, for example, professional associations and other entities whose activities impact the public interest. Such an entity is required to "follow[ ] its own standards and procedures"; the procedures must be "fair and reasonable"; and its substantive decisions must be made "in good faith," and in a manner that is "reasonable, not arbitrary or capricious."[265] It "must act reasonably, exercising its power in a fair and nondiscriminatory manner, and withholding approval only for a reason or reasons rationally related" to its mission.[266]

217. In this case, ICANN required Employ Media to undergo a series of elaborate procedures to obtain approval for its expansion. There is no question that Employ Media complied with all of these procedures. Following these procedures – including the PDP, the RSEP, and the amendments to the Registry Agreement – ICANN's Board approved the amendments that unambiguously allow the expansion at issue.

218. Accordingly, in reliance on these processes, and consistent with the provisions of the amended Agreement, Employ Media initiated an RFP, and selected DirectEmployers proposal for

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[262]   *LG&E Energy Corp. v. Arg. Republic*, ICSID Case No. ARB/02/1 (Decision on Liability of 3 October 2006), para 131 (CL-18).

[263]   *Saluka Inv. BV v. Czech Republic*, UNCITRAL (Partial Award) (March 17, 2006), para. 309 (CL-23).

[264]   *Gibraltar Football Ass'n v. Union des Associations Européennes de Football*, Arbitration CAS 2002/O/410 (Award of 7 October of 2003), at 11 (CL-11).

[265]   *Ironwood Owners Ass'n IX v. Solomon*, 178 Cal. App. 3d. 766, 772 (Cal. Ct. App. 1986) (CL-13).

[266]   *Laguna Royale Owners Ass'n v. Darger*, 119 Ca. App. 3d 670, 680 (Cal. Ct. App. 1981) (CL-17).

universe.jobs. After the Coalition submitted its Reconsideration Request in August 2010, ICANN then undertook another lengthy process to evaluate the Request, culminating in the ICANN Board's Resolution to deny the Request in December 2010.

219. Only two months later, and with virtually no warning, ICANN issued its Notice of Breach – completely ignoring the processes of the prior year and the amendments to the Registry Agreement, and threatening to terminate Employ Media's entire business based on grounds that can at best be described as entirely lacking in merit. In contrast to the well-documented, objective, and neutral processes by which ICANN approved the new registry service and amendments to the Agreement – which included, for example, opportunities for public notice and comment – ICANN's Notice of Breach, and the process (or lack thereof) by which it was issued, was arbitrary, unjustified, and inequitable; singled out Employ Media for disparate treatment; and was not issued in an open and transparent manner.

220. ICANN has given no coherent reason for its threatened breach of the Registry Agreement – whether based on the terms of the Registry Agreement or on any legitimate policy consideration. To the contrary, the Notice of Breach is plainly inconsistent with the policy processes that the Parties had carried out over much of the preceding year, and the plain terms of the Registry Agreement, which the parties had specifically amended as a result of those policy processes.

221. The Notice of Breach has also singled out Employ Media for disparate treatment. To the best of Employ Media's knowledge, ICANN has never threatened to terminate a Registry Agreement for a TLD where, as here, the Sponsoring Organization (not to mention ICANN) has specifically approved the action in question. Nor, to Employ Media's knowledge, has ICANN ever threatened to terminate a Registry Agreement as the result of the Registry Operator's decision to allow a party to register domain names following an RFP conducted by the Operator, or, for that matter, to allow a party to register multiple domain names. To the best of Employ Media's knowledge, ICANN has never issued a Notice of Breach, to a registry operator – and then immediately posted it publicly – without giving the operator prior notice.

222. In sum, there is simply no way to explain ICANN's issuance of the Notice of Breach, other than that it issued the Notice as a result of that lobbying pressure from the Coalition – and not for any legitimate reason or purpose. Indeed, the facts of this case are similar to that of *ICM Registry v. ICANN*, where the Independent Review Panel concluded intense ICANN had improperly reversed its decision to approve an sTLD after considerable pressure was placed on ICANN by those opposing the

sTLD in question. The Panel in *ICM* concluded that ICANN's reversal of its prior position "was not consistent with the application of neutral, objective and fair documented policy."[267]

223. Here, too, ICANN has breached its obligation of good faith and open and transparent conduct; its obligation not to apply standards, policies, or procedures arbitrarily, unjustifiably, or inequitably; and its obligation not to single out Registry Operator for disparate treatment unless justified by substantial and reasonable cause.

224. Therefore, the Tribunal should issue a declaration that ICANN, in issuing its Notice of Breach, itself violated its obligations under the Registry Agreement and its Articles of Incorporation and Bylaws.

IV.   CONCLUSION AND REQUEST FOR RELIEF

225. Employ Media respectfully requests the Tribunal to declare as follows:

a.   Employ Media has not materially breached the Registry Agreement by allowing entities to promote employment opportunities outside of their own organizations, and specifically, has not breached the Registry Agreement by allowing DirectEmployers to register universe.jobs and the other domain names included therein;

b.   The Notice of Breach letter sent by ICANN is not valid and appropriate;

c.   ICANN may not proceed to terminate the Registry Agreement, in whole or in part, with Employ Media;

d.   ICANN's issuance of the Notice of Breach was in itself a breach of ICANN's obligations under the Registry Agreement and of ICANN's Articles of Incorporation and Bylaws;

e.   ICANN's issuance of the Notice of Breach also breached the Registry Agreement's requirements that a Notice of Breach include with specificity the details of the alleged breach, and that the Notice of Breach be limited to breaches that are "fundamental and material."

f.   Employ Media is entitled to an award of its attorney's fees and costs; and

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[267]   *ICM v. ICANN*, para. 152.

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g. Employ Media is entitled to such other relief as counsel may advise or as the Tribunal may consider appropriate under the circumstances.

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