

REQUEST FOR ARBITRATION BY EMPLOY MEDIA LLC

I. INTRODUCTION

1. Claimant Employ Media LLC (“Employ Media”), by counsel, pursuant to Article 4 of the ICC Rules of Arbitration, hereby commences arbitration against Respondent the Internet Corporation for Assigned Names and Numbers (“ICANN”). This dispute arises out of ICANN’s improper allegations that Employ Media has breached its registry agreement and ICANN’s unwarranted threats to terminate that agreement, in violation of both the plain terms of the registry agreement and ICANN’s Bylaws and Articles of Incorporation.

2. ICANN, the respondent in this arbitration, is the gatekeeper through which the Internet’s future growth must pass. It is an internationally-organized nonprofit corporation responsible for coordinating the Internet’s domain name system (the “DNS”) and protecting the stability, integrity, and utility of this system on behalf of the global community. With such power, of course, comes significant responsibility to act in a fair, reliable, and predictable manner. Ironically, although ICANN is itself a monopolist, its Bylaws expressly require it to “promot[e] competition.”¹

3. As part of its role in coordinating the DNS, ICANN oversees the delegation of top-level domains (“TLDs”) to qualified applicants.² ICANN has awarded contracts to a number of entities, called registry operators, to operate one or more TLDs and to maintain the definitive registry of domain names for those TLDs. Employ Media is one of those entities.

4. On 5 May 2005, ICANN and Employ Media executed an agreement (the “Registry Agreement” or “Agreement”) appointing Employ Media as the registry operator for

¹ Bylaws for Internet Corporation for Assigned Names and Numbers, Art. I, § 2 (Core Values) (as amended 18 Mar. 2011), *available at* <http://www.icann.org/en/general/bylaws.htm> (last visited 29 Apr. 2011) (“Bylaws”), C-Exh. 1.

² As explained in more detail below, a TLD is the string of letters, such as “COM,” “GOV,” “ORG,” “EDU,” and so on, following the rightmost “dot” in domain names.

the .JOBS sponsored TLD, or “sTLD.”³ The parties amended the Agreement on 12 March, 6 August, and 15 September 2010.

5. Pursuant to the .JOBS Registry Agreement, as the registry operator, Employ Media has the responsibility for operating the .JOBS sTLD. The .JOBS sTLD is a web domain established to serve the needs of the international human resource management community (the “.JOBS community”). As a sponsored TLD, .JOBS operates in accordance with policies and practices approved by its sponsoring organization, the Society for Human Resource Management (“SHRM”), which ensures that the .JOBS sTLD serves the needs of the .JOBS community. SHRM, as the largest human resources institution in the world, representing more than 250,000 members in over 140 countries, is clearly qualified to represent the needs of the .JOBS community. SHRM effectuates its role in part through a “Policy Development Process” (“PDP”), which is overseen by the SHRM PDP Council. Both SHRM and the PDP Council act independently from Employ Media.

6. For the first several years of its operation, the .JOBS sTLD allowed registrations of only one category of domain names, referred to herein as <companyname> domain names.⁴ During this time period, Employ Media did not receive a single written complaint, from ICANN or from any other source, as to its management of the .JOBS sTLD.

7. As it operated the .JOBS sTLD, Employ Media evaluated other ways in which the .JOBS sTLD could further serve the .JOBS community, in accordance with its mandate under the Registry Agreement. In August 2010, after several months of consultation with SHRM and SHRM’s PDP Council, and approval from ICANN, Employ Media began accepting proposals

³ As explained in more detail below, a sponsored TLD is a type of TLD operated under policies established by an organization which represents a particular community that the TLD is intended to benefit.

⁴ The <companyname> category of names permits employers to register at the second level for the legal name under which the company does business or a name by which the company is commonly known; for example, eBay has registered “eBay.jobs.”

for registration of <non-companyname> domain names, such as occupational or geographic terms.⁵

8. This dispute began when ICANN staff unilaterally and improperly issued a Notice of Breach to Employ Media on 27 February 2011, threatening to terminate the Registry Agreement in its entirety, in a manner that is violative of the plain terms of the Registry Agreement. ICANN staff's actions threaten the secure and stable operation of the .JOBS domain and present an existential threat to Employ Media.

9. At the heart of this dispute is ICANN's apparent about-face from its own prior approval of this expansion by its Board of Directors (the "ICANN Board"). ICANN's stance in the Notice of Breach represents pure revisionist history in that it disregards the rigorous requirements that ICANN imposed on Employ Media to achieve ICANN's prior approval of the .JOBS expansion:

- First, Employ Media proposed the expansion to SHRM; in June 2010, after a period of testing and market research, and review by both SHRM's PDP Council and the SHRM Executive Committee, SHRM concluded, and reported to Employ Media, that it would serve the needs of the .JOBS community to allow registration of <non-companyname> domain names so that job postings could be further organized based on location, occupation, and other meaningful descriptors.
- Next, also in June 2010, ICANN staff determined that the proposed expansion of .JOBS would not create any technical or competition problems within the DNS, and reported this determination to the ICANN Board.
- Finally, on 5 August 2010, after soliciting and reviewing public comments on the proposed .JOBS expansion, the ICANN Board approved an amendment to the Registry Agreement expressly permitting the implementation of the .JOBS expansion.

⁵ For example, "nursing.jobs" or "seattle.jobs."

10. Upon ICANN's approval of the .JOBS expansion, as memorialized in a 6 August 2010 amendment to the Registry Agreement, Employ Media allowed registration of a number of <non-companyname> domain names that created a network of job-related sites providing direct connections to many Fortune 1000 companies and their job listings. This network, called the ".JOBS Universe," allows employers around the world **to list jobs for free** and to distribute job listings to multiple relevant web sites based on geographic locations and industry or career keywords.

11. However, in response to perceived competitive threats, a coalition of companies that opposed Employ Media's proposal organized themselves as "The .JOBS Charter Compliance Coalition" ("the Coalition")⁶ and filed a request that the ICANN Board reconsider its earlier approval of that proposal and the resulting amendments of the Registry Agreement. In December 2010, the ICANN Board declined to reverse its prior approval of the .JOBS expansion.

12. Undaunted, the Coalition persisted with its campaign to stifle competition, claiming that the .JOBS community would not benefit from the .JOBS expansion and demanding that ICANN staff investigate Employ Media's compliance with the .JOBS Registry Agreement. Despite ICANN's mission and requirement to promote competition, ICANN staff acquiesced to the Coalition's pressure and demanded that Employ Media provide answers to a litany of questions which in Employ Media's view it had already answered multiple times. Despite the fact that ICANN staff was re-visiting questions which had already been decided, Employ Media again fully cooperated with staff's requests and demonstrated its full compliance with the amended .JOBS Registry Agreement.

⁶ Coalition members include Monster Worldwide, Inc., CareerBuilder, LLC, The American Society of Civil Engineers, The American Staffing Association, Boxwood Technology, Inc., The American Society of Association Executives, The International Association of Employment Web Sites, CollegeRecruiter.com, Dice, HigherEdJobs, Indeed, JobG8, Jobing, Vet Jobs, WorkinSports.com, AHA Solutions (American Hospital Association), The Newspaper Association of America, and Shaker Recruitment Advertising & Communications.

13. Nonetheless, on 27 February 2011, with virtually no notice whatsoever to Employ Media or the ICANN Board, ICANN staff issued a Notice of Breach, alleging that Employ Media had breached the .JOBS Registry Agreement by allowing registration of the <non-companyname> class of names. Strangely, **this is the very class of names approved by the ICANN Board** in the August 2010 amendment to the .JOBS Registry Agreement. Further, although their complaints focused on alleged non-compliance with the .JOBS expansion, ICANN staff **threatened to terminate the Registry Agreement in its entirety**, even though Employ Media has allocated thousands of <companyname> domain names over the last six years without dispute. In a move seemingly intended to appease the Coalition, while harming Employ Media, ICANN staff also proceeded to publish its Notice of Breach.

14. Thereafter, the parties engaged in a contractually-required process of Cooperative Engagement. Unfortunately, that process has failed. Employ Media now files this Request for Arbitration pursuant to Section 5.1(b) of the Registry Agreement.

15. Reserving its rights to amend the relief requested herein, Employ Media seeks, at a minimum:

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

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

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

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

(5) A declaration that ICANN has breached the .JOBS Registry Agreement and violated its Articles of Incorporation and Bylaws by, *inter alia*, failing to operate in an open and transparent manner and failing to treat Employ Media in a non-discriminatory manner;

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

(7) An award of costs and reasonable attorneys' fees; and

(8) Such other relief the Tribunal may deem appropriate.

16. Pursuant to Article VI of the Registry Agreement, Employ Media requests a stay of ICANN's right to terminate that Agreement during the pendency of this arbitration.

II. THE PARTIES' CONTACT INFORMATION

A. Claimant

17. The Claimant in this arbitration is Employ Media LLC. Employ Media's contact details are as follows:

Thomas J. Embrescia, Chairman and CEO
Brian Johnson, Vice President and General Counsel

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Cleveland, OH 44115
Phone: 216.361.1000
Fax: 216.426.1400

18. Claimants are represented in this arbitration by:

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B. Respondent

19. The Respondent is the Internet Corporation for Assigned Names and Numbers (previously defined as “ICANN”). ICANN’s contact details are:

Rod Beckstrom, CEO and President
ICANN
4676 Admiralty Way, Suite 330
Marina del Rey, CA 90292-6601
rod.beckstrom@icann.org
Phone: 310.823.9358
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20. Correspondence to ICANN may also be copied to:

John Jeffrey, General Counsel
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III. BACKGROUND ON THE PARTIES

A. Employ Media

21. Employ Media is a Delaware limited liability company with its headquarters in Cleveland, Ohio. Employ Media was established to manage the .JOBS sTLD, and its sole business is operation of the TLD.

22. The majority owners of Employ Media are Second Generation, Ltd., and X Gen, Ltd. (collectively, "Second Generation"), both of which are limited partnership investment companies owned by Mr. Thomas J. Embrescia and his family. Second Generation is also located in Cleveland, Ohio. Second Generation focuses on entrepreneurial investments; it is invested in numerous industries, including media ownership, FCC licensing for radio and television, direct marketing, manufacturing, and real estate. Second Generation thus brings to Employ Media a wealth of experience in business development, management, and marketing.

23. Mr. Thomas J. Embrescia is a 30-year veteran of the broadcast industry, who has developed many television and radio affiliates and successful marketing companies. Mr. Embrescia co-founded Employ Media with Mr. Ray Fassett.

24. Mr. Fassett, a vice president of Employ Media, has extensive background in both Internet start-ups and employment recruiting. Mr. Fassett worked for many years with a company that specialized in holding career fairs around the United States, and he has substantial experience with a very successful on-line career portal. Applying his job recruiting expertise, Mr. Fassett identified an unmet need in the market: human resource practitioners, on behalf of their employers, needed to be able to connect directly with job seekers on-line.

25. In the early 2000s, Mr. Fassett and Mr. Embrescia first discussed the possibility of using a TLD to meet this need. They believed that a TLD would be a useful platform to efficiently direct job seekers to an organization's job postings and employment-related information. When ICANN announced in December 2002 that it intended to solicit proposals for sponsored TLDs, Mr. Fassett and Mr. Embrescia renewed their discussions, and began preparing a proposal for an sTLD to serve the needs of the international human resources management community. They chose the string ".JOBS" for their proposed sTLD.

B. Society for Human Resource Management

26. .JOBS is a “sponsored TLD,” meaning that it operates according to policies established by a sponsoring organization that represents the .JOBS community and ensures that the sTLD serves the needs of that community. The sponsoring organization for the .JOBS sTLD is the Society for Human Resource Management (previously defined as SHRM).

27. SHRM is the largest human resources (“HR”) institution in the world:

Representing more than 250,000 members in over 140 countries, the Society serves the needs of HR professionals and advances the interests of the HR profession. Founded in 1948, SHRM has more than 575 affiliated chapters within the United States and subsidiary offices in China and India.⁷

28. As the sponsoring organization, SHRM is responsible for ensuring that the registration requirements established for the .JOBS sTLD serve the needs of the .JOBS community. SHRM effectuates its role in part through the Policy Development Process (previously defined as “PDP”), overseen by a PDP Council.⁸ As the sponsoring organization, SHRM acts independently from Employ Media. As such, Employ Media does not participate in SHRM’s PDP, but may propose policy amendments to be evaluated by the PDP Council.

29. SHRM is **not** a party to this arbitration.

C. ICANN

30. Respondent, ICANN, is a public benefit, non-profit corporation established under the laws of the State of California on 30 September 1998. ICANN is headquartered in Marina del Rey, California.

⁷ SHRM, About the Society for Human Resources Management, *available at* <http://www.shrm.org/about/pages/default.aspx> (last visited 29 Apr, 2011).

⁸ The PDP and its Council are described in more detail in Section IV.D, *infra*.

1. ICANN's Structure and Function

31. ICANN was established “for the benefit of the Internet community as a whole.”⁹ Under its Articles of Incorporation, ICANN must “carry[] out its activities in conformity with relevant principles of international law and applicable international conventions and local law”¹⁰ As set forth in its Bylaws, ICANN has a limited, technical mission: “to coordinate, at the overall level, the global Internet’s systems of unique identifiers, and in particular to ensure the stable and secure operation of the Internet’s unique identifier systems.”¹¹ Because it is a technical body, ICANN’s Bylaws limit its involvement in policy formulation to “policy development reasonably and appropriately related to these technical functions.”¹²

32. ICANN must carry out its mission in conformity with the principles espoused in its Bylaws and Articles of Incorporation, including objectivity, transparency, and accountability. For example, ICANN’s Bylaws specifically state that it “shall not apply its standards, policies, procedures, or practices inequitably or single out any particular party for disparate treatment”¹³ ICANN is also obligated to operate “in an open and transparent manner and consistent with procedures designed to ensure fairness.”¹⁴ These obligations have been incorporated into many of ICANN’s contracts, including the .JOBS Registry Agreement.

33. ICANN is managed by a Board of Directors. The ICANN Board consists of 16 voting directors from around the globe, “who in the aggregate [are to] display diversity in geography, culture, skills, experience, and perspective.”¹⁵ ICANN’s President and CEO

⁹ 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), C-Exh. 2.

¹⁰ *Id.*

¹¹ Bylaws, Art. I, § 1 (Mission), C-Exh. 1.

¹² *Id.*

¹³ *Id.* at Art. II, § 3 (Non-Discriminatory Treatment).

¹⁴ *Id.* at Art. III, § 1 (Transparency).

¹⁵ *Id.* at Art. VI, § 2(2) (Directors and Their Selection).

oversees its day-to-day operations with support from a sophisticated international staff on several continents.

2. The DNS and TLDs

34. ICANN's core function is the technical management of the Internet's Domain Name System (previously defined as DNS). The DNS is a database of Internet names and addresses that coordinates the easier-to-remember, "human-readable" domain names for computers and websites with the complicated and less user-friendly numerical strings, known as "IP addresses," that are actually processed by computers. Each domain name is made up of a series of characters, separated by dots.

35. The string of letters following the right-most dot in each domain name—such as ".COM," ".GOV," ".EDU," and so on—is the "top-level domain," or TLD. Under the TLDs are the second-level domains, such as "amazon" (in amazon.com), or "harvard" (in harvard.edu).

36. Many TLDs have three or more characters and are referred to as "generic" TLDs, or "gTLDs." Generic TLDs are further subdivided into sponsored TLDs, or "sTLDs" and unsponsored TLDs, sometimes referred to as "uTLDs," but most often referred to as simply "gTLDs".¹⁶ According to ICANN, and of importance in this dispute, the major difference between sTLDs and gTLDs is:

[A]n unsponsored TLD operates under policies established by the global Internet community directly through the ICANN process, while a sponsored TLD is a specialized TLD that has a sponsor representing the narrower community that is most affected by the TLD. **The sponsor thus carries out delegated policy-formulation responsibilities over many matters concerning the TLD.**¹⁷

¹⁶ For the sake of consistency, this document will use the common practice of referring to unsponsored TLDs as "gTLDs." ICANN is in the process of refining the vocabulary used to refer to various types of TLDs, but such further distinctions are not relevant to this dispute.

¹⁷ ICANN, Top-Level Domains (gTLDs), *available at* <http://www.icann.org/tlds/> (last visited 29 Apr. 2011) (emphasis added).

37. As Vint Cerf, a former Chair of the ICANN Board who is widely recognized as one of the “fathers of the Internet,” has explained:

the difference [between a sponsored and a generic TLD] is actually quite important because **in the sponsored TLD, it is the intent of ICANN to remand to the operator of the sponsored TLD more policy-making authority** than would normally be remanded to the operator of the generic top level domain. So a **substantial degree of autonomy and authority is transferred to the sponsor** of a sponsored TLD.¹⁸

3. ICANN’s Contractual Arrangements for Managing the DNS

38. As a sophisticated corporate actor, ICANN manages the DNS through a series of detailed contractual relationships. At the TLD level, ICANN delegates responsibility for the operation of each TLD to a registry operator through a contract referred to as a registry agreement. ICANN’s registry agreements generally contain standard terms, established by ICANN, that require, among other things, that the registry operator preserve the security and stability of the DNS, abide by ICANN consensus policies, manage data in certain ways, and pay a fee for each registration in the TLD.

39. For sponsored TLDs, the registry agreements with ICANN also describe the policy-making authority delegated to the registry operator and the sponsoring organization. A portion of the agreements called “Appendix S” describes the scope of the delegated authority and requires that the delegated policy authority be exercised to serve the needs of the sponsored community. The appendix also contains a “Charter” describing the community.

40. As mentioned above, while the registry operator manages the TLD and coordinates with the sponsoring organization to establish community policies for sTLDs, retail sellers called registrars handle the sale of second-level domains and other domain names within the TLD. A company can become a registrar for one or more TLDs by completing an

¹⁸ *ICM Registry, LLC v. Internet Corporation for Assigned Names and Numbers (“ICANN”)*, ICDR Case No. 50 117 T 00224 08, Testimony of Vint Cerf, 23 Sept. 2009, Tr. pp. 596:16-597:1, available at <http://www.icann.org/en/irp/icm-v-icann/transcript-testimony-icm-independent-review-proceeding-23sep09-en.pdf> (last visited 29 Apr. 2011) (emphasis added).

accreditation process and signing ICANN's Registry Accreditation Agreement. Registry operators for sTLDs, in conjunction with sponsoring organizations, must set policies for what second-level domains or other domain names are available within their TLD and restrict access to those TLDs to qualified registrants. Registry operators may also establish the terms under which a registrant may use a particular domain name in order to make sure that such use is consistent with the purpose of the TLD. In essence, an sTLD registry operator determines what names are available and makes those names available to registrars on a wholesale basis, and registrars then sell those names on a retail basis according to the terms established by the registry operator.

IV. SUMMARY OF RELEVANT FACTS

A. ICANN Approves the Establishment of the .JOBS sTLD

41. Seven generic TLDs (.EDU, .COM, .NET, .ORG, .GOV, .MIL, and .INT) predated ICANN's formation. Global interest in the creation of additional TLDs was at the heart of ICANN's creation and provided the fundamental motivation for the U.S. Government's transfer of its DNS management role to the private sector. Seven new TLDs were added in 2000 as a result of a limited round of applications conducted by ICANN.¹⁹ In December 2003, ICANN published a Request for Proposals ("RFP") soliciting applications for more new sTLDs. Applications for the second round of new sTLDs were submitted in 2004, resulting in the approval of eight new sponsored TLDs to date.²⁰

42. In response to the 2003 RFP, Employ Media submitted an application for the .JOBS sTLD (the ".JOBS Application"). The .JOBS sTLD proposed:

to serve the needs of the international human resource management community (the "Community"). . . . "[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

¹⁹ These were .AERO, .BIZ, .COOP, .INFO, .MUSEUM, .NAME, and .PRO.

²⁰ These were .ASIA, .CAT, .JOBS, .MOBI, .POST, .TEL, .TRAVEL, and .XXX.

organization—people as individuals and groups, their recruitment, selection, assignment, motivation, compensation, utilization, services, training, development, promotion, termination and retirement.²¹

43. The .JOBS Application specifically noted that:

one of the many duties of an HR manager of an entity (a member of the Community) is to attract quality employees to the entity. . . . In performance of these duties, it is incumbent upon these members of the Community to market their employer, and further to promote access to information regarding the employer to potential employees.²²

Thus, in order to achieve these goals, “[a] shared and common need of th[e] Community is for a reasonable and consistent method for promotion and location by way of a descriptive format within a new Top Level addressing hierarchy.”²³

44. Although the .JOBS Application stated that “current policy” for the .JOBS sTLD would limit registration to names in the form of <companyname.jobs>, it also made it abundantly clear that the policy could be amended to allow registration of other categories of domain names after an evaluation by SHRM’s PDP Council to determine if such names would serve the needs of the .JOBS community.²⁴

²¹ Employ Media, New sTLD RFP Application, submitted 14 Mar. 2004, *redacted version available at* <http://www.icann.org/en/tlds/stld-apps-19mar04/jobs.htm> (last visited 29 Apr. 2011), (“JOBS Application”), pp. 3-4, Conf. C-Exh. 1.

²² *Id.* at p. 4.

²³ *Id.* at p. 5.

²⁴ *Id.* at p. 15 (“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 the legal or commonly-known name (e.g., dupontcanada.jobs”); *id.* at p. 38 (“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

(continued...)

45. Additionally, the .JOBS Application specified that only “qualified applicants” would be able to request registration in the .JOBS sTLD and that qualified applicants are either members of SHRM or are engaged in HR management practices and support the SHRM Code of Ethics.²⁵ The current requirements for SHRM membership are virtually the same as when Employ Media submitted the .JOBS Application in 2004.²⁶

46. As it did with all of the applications submitted in response to the 2003 RFP, ICANN posted Employ Media’s Application on its website for public comment. ICANN then evaluated the .JOBS Application according to the criteria established in the RFP. At certain points before approval, ICANN asked Employ Media to answer questions or supplement its .JOBS Application. On 13 December 2004, the ICANN Board approved the .JOBS Application and directed ICANN staff to negotiate the terms of a registry agreement.

47. Pursuant to the ICANN Board’s directive, such negotiations ensued, commencing in earnest in January 2005 and lasting approximately three months. These negotiations included at least one face-to-face meeting between representatives of Employ Media, senior ICANN staff, and ICANN’s outside counsel, as well as numerous phone calls and emails. ICANN’s main concern during negotiations was the fee Employ Media would pay ICANN for each registration in the .JOBS sTLD. ICANN never played—nor did it negotiate for—any role in defining the sponsored .JOBS community, nor did it ever request that Employ Media change the Charter for the .JOBS sTLD.

(continued...)

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).”).

²⁵ *Id.* at p. 4 (“The minimum threshold to be a Qualified Applicant is thus both being engaged in human resource management and being supportive of the [SHRM] Code [of Ethics].”).

²⁶ Members must either hold human resource positions or have a bona fide interest in human resource management and must pay an annual registration fee of at least US \$180.00. Members also agree to abide by the SHRM Code of Ethics as a condition of membership.

48. ICANN posted a draft of the .JOBS Registry Agreement to its website in March 2005. The ICANN Board approved the final agreement in April 2005. The parties thereafter executed the final .JOBS Registry Agreement on 5 May 2005.

49. At no time during the application process or the registry agreement negotiations did ICANN express concerns about or offer any suggested language for the .JOBS Charter, requirements for registration, the terms of the .JOBS registrant agreement, or the .JOBS registry/registrar agreement. By virtue of entering into the .JOBS Registry Agreement, ICANN bargained away the right to develop, direct or implement policy for the .JOBS sTLD by delegating that responsibility to Employ Media and its sponsoring organization SHRM.

B. Relevant Provisions of the .JOBS Registry Agreement Ensure the .JOBS sTLD Serves the Community's Interests

50. The .JOBS Registry Agreement establishes that the .JOBS sTLD is to “serve the needs of the international human resource management community,”²⁷ describing that community as follows:

“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.²⁸

51. The .JOBS Registry Agreement requires Employ Media to operate the .JOBS sTLD in accordance with certain ICANN consensus policies related to the provision of registry services, the security, stability, and interoperability of the Internet, and the resolution of disputes related to registration of domain names. The Registry Agreement also requires Employ Media to

²⁷ .JOBS Registry Agreement, Appendix S, Part I (.JOBS Charter) (as amended through 15 Sept. 2010), available at <http://www.icann.org/en/tlds/agreements/jobs/> (last visited 29 Apr. 2011), C-Exh. 3.

²⁸ *Id.*

ensure secure and stable handling of registry data. In addition to the general duties of a registry operator, the Registry Agreement also expressly delegates authority to Employ Media to:

establish policies, in conformity with the charter, for the naming conventions within the sponsored TLD and for requirements of registration²⁹

52. Further, as the registry operator for the .JOBS sTLD, Employ Media is:

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 Appendix S, which appendix shall also include the description of the sponsored community and the delegated authority with respect thereto.³⁰

53. Notably, the .JOBS Registry Agreement also specifies that ICANN delegates “responsibility for development of policies for the Sponsored TLD” to Employ Media. As previously mentioned, Employ Media chose SHRM to serve “as policy delegate.”³¹ Employ Media selected SHRM prior to submitting its .JOBS application, and SHRM’s stellar reputation and qualifications to serve as the policy delegate were well known to ICANN when it approved the .JOBS sTLD.

54. The delegated authority—*i.e.*, the power to establish policies and practices for the .JOBS sTLD—is very broad, and includes:

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

²⁹ *Id.* at Art. 3.1(d)(i)(A).

³⁰ *Id.* at Art. 3.1(d)(i)(B).

³¹ *Id.* at Appendix S, Part II (Delegated Authority).

3. Restrictions on how Registered Names may be used (which need not be uniform for all names within the Sponsored TLD) provided the scope of the Charter . . . is not exceeded.

...

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.³²

55. In exercising this delegated authority, however, the Charter requires that Employ Media act:

in accordance with (i) the provisions of this charter (the “Charter”); (ii) the interests of the [.JOBS] Community; and (iii) policy directives from the Society for Human Resource Management (“SHRM”), as “Sponsor.”³³

56. Likewise, registration requirements approved by SHRM must be “consistent with th[e] Charter and in the interests of the [.JOBS] Community.”³⁴

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

(a) members of SHRM; or

(b) 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

³² *Id.*

³³ *Id.* at Appendix S, Part I (.JOBS Charter).

³⁴ *Id.*

Management, as amended from time to time, a copy of which is attached hereto.³⁵

58. Notably, **nowhere** in the Charter is there any mention of restricting registrations to <companyname.jobs>. In fact, so long as registration policies are in “the interests of the Community” and in accordance with “policy directives from [SHRM],” those policies fully comply with the Charter.³⁶ In short, aside from protecting the stability and security of the .JOBS sTLD, the underlying “spirit and intent” of the .JOBS Registry Agreement is that the .JOBS sTLD should operate to serve the needs of the .JOBS community. Thus, if names in forms other than <companyname.jobs> serve the needs of the .JOBS community and are consistent with SHRM’s policy directives, there is no contractual prohibition on the registration of those names.

59. To be clear, Employ Media and SHRM deliberately drafted the Charter this way. The initial phase of the .JOBS sTLD was limited to registrations in the form of <companyname.jobs> only because such names provided a logical starting point for the sTLD; the intent was never to limit the .JOBS sTLD in perpetuity. Employ Media always anticipated that the .JOBS sTLD would evolve, including through expansion to include other categories of names if such names served the needs of the .JOBS community. The .JOBS Registry Agreement reflects this. The delegated authority to determine naming conventions, by its very nature, includes the authority to expand the categories of names available. Indeed, the .JOBS Registry Agreement specifically recognizes that “[t]he Registry Operator may from time to time introduce new categories of domain registrations, consistent with the Charter and in compliance with the provisions of this Sponsored TLD Registry Agreement.”³⁷ Thus, from the very outset, ICANN was well aware that the .JOBS sTLD would likely expand beyond the <companyname.jobs> class of names.

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Id.* at Appendix S, Part IV (Start-Up Plan).

C. Operation of the .JOBS sTLD

60. After the execution of the .JOBS Registry Agreement in May 2005, Employ Media officially launched the .JOBS sTLD and began accepting registrations for <companyname> domain names. Employ Media operated, and continues to operate, the .JOBS sTLD using a “pending-create” process. Instead of allowing real-time registrations of domain names, Employ Media only allows the addition of a new domain name to the .JOBS sTLD after it has reviewed and approved the application for that name. Review of <companyname> applications ensures that the applications are submitted by qualified applicants and that the name requested is an appropriate legal or commonly used <companyname>. When Employ Media first launched the .JOBS sTLD, the back end provider was unable to collect all of the necessary information for Employ Media to review and verify applications. Employ Media established a temporary process to allow full verification while the back-end provider modified its systems to collect the information needed by Employ Media. Notably, from the launch of the domain until today, no domain name has been added without Employ Media’s review and approval of the corresponding application.

61. Just after the launch, in the summer of 2005, Employ Media’s Chairman Mr. Thomas J. Embrescia held a series of meetings with various for-profit on-line job boards, including Monster.com, HotJobs and CareerBuilder. Mr. Ray Fassett also made a presentation to an organization called DirectEmployers Association (“DirectEmployers”). The goal of these meetings was to educate and inform possible users and providers of content about the value of a <companyname.jobs> domain, and to explore potential opportunities to cooperate in offering new and beneficial services to the .JOBS community. Several of the for-profit job boards expressed interest in acquiring <non-companyname> domain names. Mr. Embrescia informed them that it was not yet time to expand the domain to offer <non-companyname> domain names, but that such expansion might occur in the future, as the .JOBS sTLD evolved.

62. Beginning in mid-2007, expansion discussion renewed. In particular, a 2007 study by SHRM on trends in the human resource industry noted increased reliance on specialized, or niche job boards to reach job seekers. After reviewing this study, Employ Media approached SHRM to discuss how the .JOBS sTLD could expand to provide employers a better platform for targeting job seekers.

63. Then, in late 2008, Employ Media began stating publicly that it was considering expanding the .JOBS sTLD to include <non-companyname> domain names, and that it would be interested in receiving proposals for expansion plans to serve the needs of the .JOBS community. DirectEmployers reached out to Employ Media several times in late 2008 and early 2009 to discuss a possible proposal for expansion.³⁸

64. In spring 2009, DirectEmployers submitted a proposal for a network of several hundred <non-companyname> domain names, in formats like <location.jobs> and <occupation.jobs>. This network would serve as a platform to organize job postings such that job-seekers could review postings in a certain geographic area or in a particular industry—a goal clearly in line with the .JOBS sTLD’s purpose of providing the .JOBS community with “a reasonable and consistent method for promotion and location” of job-related material online.³⁹ Employ Media, following consultation with SHRM, saw the potential benefits of the proposal; it therefore allowed DirectEmployers to launch a beta test—*i.e.*, a “dry run”—of the proposed platform in August 2009.

65. By allowing the launch of this platform through the limited forum of a beta test and monitoring the response, including the number of job postings and the number of site users, Employ Media was better able to gauge community interest in expansion of the .JOBS sTLD. The beta test created a functional model of what the .JOBS sTLD expansion would look like, resulting in real data, rather than just mere speculation and opinion of how the .JOBS community might use the expanded TLD. Additionally, Employ Media hoped that a successful beta test would result in other proposals for the further development of the domain.

³⁸ DirectEmployers is a non-profit HR consortium of leading global employers, including more than 500 Fortune 1000 companies. It was formed in 2001 by employers who were concerned about the rapidly rising costs and the future of online recruitment, and its mission is to improve labor market efficiency through the sharing of best practices, the creation of industry standards, the promotion of research, and the development of technology, including Internet-based systems and software that would increase recruiting efficiency and reduce costs.

³⁹ .JOBS Application at p. 5, Conf. C-Exh. 1.

66. Employ Media and SHRM received input from a broad and diverse group of stakeholders in the .JOBS community, and concluded that expansion of the .JOBS sTLD, as modeled by the beta test, served the needs of the .JOBS community. ICANN staff, however, expressed concerns that the geographic and occupational names in the beta test did not comply with the .JOBS Registry Agreement. Although Employ Media disagreed, it nonetheless acceded to ICANN staff's request to halt the beta test until: (1) SHRM determined and documented that the new names would serve the needs of the .JOBS community; (2) ICANN approved Employ Media's plans to offer a "new registry service;" and (3) to the extent necessary, the .JOBS Registry Agreement was amended to allow for the new category of registrations. Throughout the negotiations with ICANN, ICANN staff led Employ Media to believe that the planned expansion of the .JOBS sTLD would be perfectly acceptable to ICANN upon completion of these steps.

D. The ICANN Board Approves Registration of <Non-companyname> Domain Names in the .JOBS sTLD

67. Following its communications with ICANN staff regarding the beta test, Employ Media formally requested approval from SHRM to allow registration of new categories of domain names. Employ Media proposed to SHRM that:

[t]o the extent that any policies, practices or business rules in .jobs govern Employ Media's ability to provision, allocate, register (to third parties or itself), allow use of in the DNS (by third parties or itself), reserve or remove from reserve, any non-"companyname" domain names, including industry and occupational domains, geographic domains, dictionary term domains and two-character domains, all such 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-"companyname" domain names.⁴⁰

⁴⁰ SHRM, Notice of Decision on Employ Media Proposed Amendment Concerning .JOBS TLD (3 June 2010), *available at* <http://policy.jobs/> (last visited 29 Apr. 2011) ("Notice of PDP Decision"), C-Exh. 4.

68. SHRM submitted the proposal to its PDP Council.⁴¹ The PDP Council “requested, reviewed, and discussed survey research of HR professionals and public comments on the proposed amendment.”⁴² The final report of the market research requested by the PDP Council concluded that **“response to the new .jobs classifications proposed by .JOBS was mostly positive, and with little indication of negative impact on the HR community,”** and further stated that “[t]he new .jobs classifications are generally viewed as positive additions to the toolset for HR Generalists and Employment/Recruitment professionals.”⁴³ On 3 June 2010, the PDP Council approved, by a seven to one majority, a resolution **allowing** the registration of <non-companyname> domain names in the .JOBS sTLD:

Having considered whether the Employ Media proposed amendment attached at Exhibit A hereto (the “Proposed Amendment”) will serve the needs of the international human resource management community, the .jobs PDP Council finds that approval of the Proposed Amendment would serve the needs of the international human resource management community, and therefore hereby approves the Proposed Amendment, recognizing that it is the sole obligation and responsibility of Employ Media to implement the Proposed Amendment in a manner that complies

⁴¹ The PDP Council members represent the varied interests and perspectives of the community, including, without limitation, individuals representing the small employers, large employers, union employers, non-union employers, government employers, private employers, international employers, academic employers, service employers, manufacturing employers, high technology employers, and recruitment companies. For each proposed policy change, the PDP Council’s Staff Manager creates a report describing the proposed policy and the party submitting the proposal, after which the PDP Council votes to disregard the proposed amendment, approve it or research it further. If the PDP Council requests additional research, a Task Force is formed to report on the positions of groups or parties regarding the proposal. Upon reviewing the Task Force’s report, the PDP Council then votes again on whether to accept or reject the proposal. A majority of the PDP Council must approve the proposal for it to be adopted. PDP Council members decide whether to accept or reject a proposal based on their determination as to whether the proposal serves the needs of the community. Before an approved proposal is implemented, both the SHRM Executive Committee and Employ Media also review it to ensure that it serves the needs of the .JOBS community.

⁴² Notice of PDP Decision, C-Exh. 4.

⁴³ SHRM, .Jobs–SHRM/PDP Council Survey: Final Report (3 June 2010), *available at* <http://www.icann.org/en/registries/rsep/jobs-survey-results-15jun10-en.pdf> (last visited 29 Apr. 2011), C-Exh. 5.

with the .jobs Charter, with all ICANN rules and regulations, and with all applicable laws and regulations.⁴⁴

69. Convinced that the proposal was sound from a technical perspective and served the needs of the .JOBS community, Employ Media submitted a request for approval to ICANN of a new registry service.⁴⁵ ICANN evaluates such requests according to its Registry Services Evaluation Process (“RSEP”). Under the RSEP, if a registry operator wishes to offer new registry services that are subject to the registry agreement or that might impact users of the TLD, the new services must be reviewed and approved by ICANN. When a request for a new registry service is submitted, ICANN staff review the proposal to determine if it might raise significant stability, security, or competition issues. If ICANN staff believe that such issues might arise from the new service, the proposals are referred to experts for further review.

70. Before submitting the final RSEP request, Employ Media and ICANN staff discussed drafts of the request to ensure that it accurately described the planned expansion of the .JOBS sTLD. The final RSEP request specifically stated that Employ Media sought approval to allow registration of <non-companyname> domain names in accordance with a “Phased Allocation Program” for the distribution of this new category of domain names. The final RSEP request described the Phased Allocation Program as having three main components: (1) an RFP process inviting interested persons to propose specific plans for <non-companyname> domain names; (2) an auction for domain names not allocated through the RFP; and (3) a first-come, first-served release of domain names not registered through the first two processes. As an attachment to the final RSEP request, Employ Media submitted the report of SHRM’s market research. The final RSEP request also included proposed amendments to the .JOBS Registry Agreement.

⁴⁴ Notice of PDP Decision, C-Exh. 4.

⁴⁵ Employ Media, Request for Registry Service Evaluation (submitted 9 June 2010) *available at* <http://www.icann.org/en/registries/rsep/jobs-proposal-09jun10-en.pdf> (last visited 29 Apr. 2011), C-Exh. 6.

71. After reviewing Employ Media's final RSEP request, ICANN staff did not "identif[y] any significant competition or security and stability issues" with Employ Media's proposal.⁴⁶

72. In light of the conclusion of the RSEP evaluation, ICANN proceeded to consider the proposed amendments to the .JOBS Registry Agreement. The amendments clarified that <non-companyname> registrations were permitted; added certain protections to avoid inappropriate registrations of <non-companyname> domain names; and described the Phased Allocation Program as explained in the final RSEP request.

73. ICANN posted these contractual amendments on its website on 15 June 2010 and accepted public comments on the issue for a month following. ICANN received some comments opposing the amendments, most notably from Monster.com. Although some opponents, including Monster.com, expressly disavowed concern for competitive pressure from an expanded .JOBS sTLD, it was nonetheless clear that the objecting parties were concerned about exactly that: pre-existing, for-profit job boards were concerned that the .JOBS proposal would cause additional competition by allowing employers to communicate more efficiently with potential employees without the use of existing, entrenched online job boards and without the need for payment.

74. At its 5 August 2010 meeting, after considering Employ Media's proposal and the public comments received, the ICANN Board approved the proposed amendments to the Registry Agreement. The Board's review is reflected in the resolution approving Employ Media's proposal:

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

⁴⁶ Email from Patrick Jones, Senior Manager, Continuity & Risk Management, ICANN, to Ray Fassett, EVP, Operations & Policy, Employ Media LLC, re Proposal #201005, Phased Allocation Program in .JOBS, 15 June 2010, *available at* <http://www.icann.org/en/registries/rsep/icann-to-employmedia-201005-15jun10-en.pdf%20%20> (last visited 29 Apr. 2011), C-Exh. 7.

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

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

RESOLVED (2010.08.05.20), the .JOBS amendment is approved, and the President and General Counsel are authorized to take such actions as appropriate to implement the amendments.⁴⁷

75. Based on the foregoing, there can be no doubt that the ICANN Board fully approved the expansion of the .JOBS sTLD, including the current registration of a network of geographic, industry, and occupational names (described in more detail in paragraphs 88 and 89 below). Thus, ICANN staff's subsequent attempt to terminate the .JOBS Registry Agreement because of those names can only be described as arbitrary, capricious, discriminatory, disproportionate and baseless. The approved expansion of the .JOBS sTLD encompasses exactly the types of names evaluated by Employ Media during the beta test and fully disclosed to ICANN. ICANN also knew that Employ Media sought the ICANN Board's approval of the .JOBS Registry Agreement amendments to allow the full-scale launch of the beta-tested name structure. Employ Media was completely candid with ICANN on this matter throughout the RSEP and .JOBS Registry Agreement amendment process. ICANN staff therefore have no basis for its current complaints, given that Employ Media simply implemented an expansion the ICANN Board itself approved.

⁴⁷ ICANN Board Resolution, Approval of RSEP Request for Phased Allocation Program in .JOBS, Special Meeting of the Board (5 Aug. 2010), *available at* <http://www.icann.org/en/minutes/resolutions-05aug10-en.htm> (last visited 29 Apr. 2011), C-Exh. 8.

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

E. Current Registration Restrictions and Practices for the .JOBS sTLD Ensure that Registrations Serve the Needs of the .JOBS Community

77. Before registering a name in the .JOBS sTLD, whether the registration is for a <companyname> or a <non-companyname> domain name, registrants must agree to the policies set forth in the Registrant Agreement ("Registrant Agreement"); and registrants for <non-companyname> domain names must also agree to additional policies. These policies are binding on both the person requesting registration (for instance, the HR professional applying for the domain) and the actual registrant of record (the company that owns the domain).

78. Among other things, the Registrant Agreement specifies that all domain names must be used in compliance with the .JOBS Charter to serve the needs of the .JOBS community. The Registrant Agreement also obligates the prospective 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. Further, the Registrant Agreement prohibits the use of .JOBS domain names for any purpose prohibited by law, statute or rule; for unsolicited email (spam); or to promote or engage in activities that cause various harms to third parties (such as defamation, slander, harassment, invasion of privacy, identity theft, etc.).⁴⁸

79. Domain names in the <companyname> category must also comply with the Terms of Appendix B of the Registrant Agreement. Appendix B requires, *inter alia*, that the registrant of record be an employer and that the domain include the company's legal name or a

⁴⁸ Employ Media, .JOBS Registrant Agreement, Appendix C (Sponsored TLD Compliance) (current as of 29 Apr. 2011) available at <http://goto.jobs/reg.agreement.asp> (last visited 29 Apr. 2011), C-Exh. 9.

name by which the company is commonly known. 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.⁴⁹ Moreover, Employ Media's process for creating requested domain names ensures that the policies are implemented. Under Employ Media's "pending-create" process, as described above, no domain name can be registered without verification that the request comes from a qualified applicant. For <companyname> applications, the request is first reviewed for completeness, then further reviewed to determine whether the requested domain qualifies as a <companyname>—either the company's name or a name by which it is commonly known.

80. Domain names not in the <companyname> category can *only* be allocated under the terms and conditions set forth in the Phased Allocation Program, as previously described to both SHRM and the PDP Council during the PDP, and ICANN during the RSEP.⁵⁰ In the first phase of this program, the RFP imposed additional requirements on registrants: each responding proposal had to describe how it would provide value to the .JOBS community and how the websites applied for would be used. By submitting a proposal, the applicant agreed that it was responsible for, among other things, ensuring that the proposed domain name complied with the .JOBS Charter. Employ Media reviewed each proposal to evaluate whether it would serve the needs of the community. When Employ Media approved the allocation of a domain name or names requested under the RFP, it then required the registrant to enter into another contract for the specific names allocated.

81. The current policies for registration of <companyname.jobs> domain names, as just described, are the same as the policies explained in the .JOBS Application (described in paragraphs 42-49, *supra*). They have not changed since the .JOBS sTLD was first created in 2005, and are no less restrictive than policies governing other sponsored TLDs.⁵¹ Employ Media

⁴⁹ *Id.*

⁵⁰ *Id.* at Appendix B (Product Categories).

⁵¹ Employ Media did eliminate the prohibition on posting third-party job listings on a <companyname> website, and made other minor alterations to various other restrictions on

(continued...)

has never received a formal complaint regarding the operation of the .JOBS sTLD or any name registered in .JOBS sTLD, in part because Employ Media's continued use of the "pending-create" process ensures registrations are appropriate. By limiting registrations for <non-companyname> names to specific applications reviewed and approved by Employ Media, and by requiring registrants for <non-companyname> to agree to the additional policies just described, the company ensures that all names registered serve the needs of the .JOBS community and do not create problems with the overall functioning of the .JOBS sTLD.

F. The ICANN Board Rejects a Request to Withdraw Its Approval of <Non-companyname> Registrations

82. Despite these protections, the approval from the .JOBS community as evidenced by the results of SHRM's PDP, and the approval from the ICANN Board, certain pre-existing for-profit job boards continued to oppose the evolution of the .JOBS sTLD. The reason for such opposition is not difficult to discern. These for-profit job boards viewed the evolution of the .JOBS sTLD as a serious competitive threat.

83. After the ICANN Board approved Employ Media's proposal, these pre-existing for-profit job boards banded together and created "The .JOBS Charter Compliance Coalition" (previously defined as "the Coalition"). In August 2010, just as Employ Media released its RFP, the Coalition filed a Request for Reconsideration of Board Action ("Reconsideration Request"). The Reconsideration Request wrongly asserted that the Phased Allocation Program violated the .JOBS Charter, and the Coalition further complained that the creation of new domain names through the Phased Allocation Program would adversely affect various Coalition members that offered online employment services, *i.e.* Internet job boards that charge employers for posting job openings.

84. ICANN's Board Governance Committee ("BGC"), the committee responsible for reviewing such requests, agreed to consider the Reconsideration Request. During the BGC's

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registrations, such as permitting the use of application information for publicity purposes, but made no substantive change to registration policies.

review of the Reconsideration Request, a number of interested parties submitted a wealth of materials. The BGC posed a series of questions to Employ Media and SHRM, and Employ Media met in person with the BGC.

85. To the extent that there was any ongoing confusion about Employ Media's plans for the .JOBS sTLD when the Coalition filed its Reconsideration Request, the BGC's review of that request provided ICANN abundant opportunity to resolve that confusion. The documents submitted by Employ Media and SHRM during the BGC's review, not to mention the information in the .JOBS RFP, which had by then been publicly posted, clearly described and demonstrated Employ Media's plans to expand the .JOBS sTLD. Additionally, these plans were obviously consistent with the beta test already completed, and thus anyone who wanted to delve into Employ Media's plans needed only to look at that beta test.

86. The BGC's remit in evaluating the Reconsideration Request was to determine if the ICANN Board had granted its approval "without consideration of material information."⁵² Having reviewed all of the information submitted—and thus having the full picture of Employ Media's plans—the BGC recommended that the ICANN Board reject the Reconsideration Request, concluding that the Board had considered all of the material information when it approved Employ Media's proposal. The ICANN Board then reviewed and adopted the BGC's recommendation.

87. During the BGC's review of the Request for Reconsideration, Employ Media did not allocate any names under the RFP, but did continue to review proposals. Given that the ICANN Board had approved the proposed expansion of the .JOBS sTLD, that ICANN staff had accordingly executed the relevant amendments to the .JOBS Registry Agreement, and that the BGC had declined to reverse those approvals, Employ Media proceeded to allocate various names applied for through the RFP.

88. Employ Media received multiple proposals in response to the RFP, several of which it has implemented or is in the process of implementing. The best and most

⁵² Bylaws, Art. IV, § 2(2) (Reconsideration), C-Exh. 1.

comprehensive proposal it received was from DirectEmployers for an expanded version of the beta test: a network of multiple domain names organized by geography and industry, to be called the “.JOBS Universe.” Employ Media thus accepted the proposal, and in January 2011, Direct Employers launched the .JOBS Universe. The .JOBS Universe **allows employers from all over the world to list jobs for free.** The listings are vetted to keep the domain free of scams, duplicate job listings, and old or expired jobs, and all postings automatically appear in the appropriate city, state, country, and occupational website within .JOBS. Clicking on the job posting takes a job seeker directly to the information about that job on the employer’s website.

89. Within just a few months, over 90,000 employers, including some of the largest companies in the world (such as IBM, AT&T, Hyatt, Deloitte, and many more), listed jobs on the .JOBS Universe.

G. ICANN Wrongfully Alleges Breach of the .JOBS Registry Agreement

90. The record is clear that registration of <non-companyname> domain names serves the needs of the .JOBS community, and the ICANN Board itself approved the amendment of the .JOBS Registry Agreement in order to allow such registrations. Following that amendment, there can be no doubt that the registration of <non-companyname> domain names fully complies with the .JOBS Registry Agreement. Nonetheless, on 27 February 2011, ICANN staff informed Employ Media that it was in breach of the Registry Agreement for allowing such registrations.⁵³ Notwithstanding ICANN’s obligation to act openly and transparently, and in strict compliance with its own Articles and Bylaws, ICANN staff decided, without consulting Employ Media, the ICANN community, or the ICANN Board, that it could reverse the ICANN Board’s prior public approvals. There is little doubt that ICANN staff’s action resulted from anti-competitive pressure from the Coalition and other well-financed, well-connected entities, intent on eliminating free-market competition posed by the .JOBS Universe.

⁵³ Letter from John O. Jeffrey, General Counsel & Secretary, ICANN, to Brian Johnson, General Counsel, and Ray Fassett, EVP, Operations & Policy, Employ Media LLC, 27 Feb. 2011, *available at* <http://icann.org/en/correspondence/burnette-to-johnson-fassett-27feb11-en.pdf> (last visited 29 Apr. 2011), C-Exh. 10.

91. On its face, ICANN's Notice of Breach is a confusing document, especially when viewed in light of the circumstances preceding its issuance. ICANN appears to make two complaints: (1) that the restrictions for requesting registrations are insufficient; and (2) that the registration of <non-companyname> domain names violates the "spirit and intent" of the .JOBS Registry Agreement because it does not serve the needs of the .JOBS community.

92. These complaints are not only unfounded, but truly inexplicable considering ICANN's previous direct cooperation and express approval at every step in the expansion of the .JOBS sTLD. ICANN's first complaint is utterly baseless: as described above, the restrictions for requesting registration of a .JOBS second-level domain have remained unchanged from those described in Employ Media's .JOBS Application and Registry Agreement, approved by ICANN, and implemented since the .JOBS sTLD went live in 2005. For example, ICANN staff disingenuously complain now that because SHRM's membership requirements are too lax, just about anyone can register in the .JOBS sTLD simply by joining SHRM. But SHRM's membership policies have not changed (aside from an increase in membership fees) since the time Employ Media submitted its .JOBS Application. ICANN executed the .JOBS Registry Agreement with full knowledge of SHRM's membership policies and, indeed, with full knowledge that applicants for a .JOBS second-level domain need not even be SHRM members, but need only be engaged in human resource management and supportive of the Code of Ethics. Therefore, ICANN cannot now claim that those policies breach the Registry Agreement. ICANN's attempt to invoke SHRM's membership policies as a basis for terminating the Registry Agreement is a particularly egregious example of ICANN staff's arbitrary and capricious conduct.

93. Setting aside ICANN's transparent attempt to manufacture some basis—any basis—for terminating the Registry Agreement, it is clear from the history of the dispute, and especially the pressure from the Coalition, that ICANN's true concern is its second complaint: the registration of <non-companyname> domain names. Given the fact that such registrations are not only in the interests of the .JOBS community but have been **explicitly approved by ICANN's own Board**, there is no justification for ICANN staff's claim that such registrations constitute a breach of the Registry Agreement.

94. As noted above, SHRM's PDP Council approved the proposal to allow registration of <non-companyname> domain names. Notably, under the Registry Agreement, SHRM is the entity to which ICANN and Employ Media specifically delegated such a decision. SHRM determined, after a thorough review by the PDP Council, that the proposal served the .JOBS community's needs. The ICANN Board then approved the plan, and ICANN's own BGC reviewed that approval and determined that the Board had been given all material information. Employ Media has properly followed all of ICANN's processes in order to ensure that the expansion of the .JOBS sTLD complies with the .JOBS Registry Agreement; and, having completed those processes, was fully entitled to begin registration of <non-companyname> domain names, including those in the .JOBS Universe. Thus, ICANN staff has no basis to attempt to overturn the results of ICANN's processes and the ICANN Board's approval by claiming that registration of such names constitutes a breach of the amended Registry Agreement. Nor is there any basis to threaten termination of the **entire** Registry Agreement based on the new category of names available for registration, especially when Employ Media has been offering registration of <companyname> domain names for more than five years without a single complaint.

95. In the Notice of Breach, ICANN staff identify two ways in which they claim that Employ Media's registration of <non-companyname> domain names might not serve the needs of the .JOBS community: (1) the new names are used to advertise job openings for multiple employers; and (2) a large number of names are registered to one entity (DirectEmployers). Notably, ICANN staff fail to specify **how** or **why** it believes these practices do not serve the needs of the .JOBS community. Nothing in the .JOBS Registry Agreement prevents posting of job openings for multiple employers, and nothing in the .JOBS Registry Agreement—or any agreement for any TLD—limits the number of domain names an entity may register. ICANN staff also do not provide any justification for raising these issues so late in the game, when it has been abundantly clear to ICANN since the beta test in August 2009 that Employ Media intended to allow the use of <non-companyname> domain names to advertise job openings for multiple employers and that a single entity might register for a multitude of domain names. Indeed, ICANN staff's Notice of Breach is unjustifiable given that the ICANN Board approved the

.JOBS sTLD expansion knowing that the new <non-companyname> domain names would be used in exactly the method to which ICANN staff are now objecting.⁵⁴

96. Moreover, it is clear that ICANN, which has a limited, technical mission, should not decide what is and what is not in the interest of a particular sponsored community. In approving Employ Media's .JOBS Application, ICANN determined that SHRM was an appropriate sponsoring organization, and thereafter delegated to SHRM the authority to make and approve policy, and delegated to Employ Media the authority to implement such policy. Thus, once SHRM concluded that a policy serves the needs of the .JOBS community, there was no reason for ICANN to attempt to change that decision. SHRM, not ICANN, is the appropriate body to determine what serves the needs of the .JOBS community. In issuing the Notice of Breach, ICANN has overreached and overstepped its limited role of technical coordination of Internet standards by attempting to block community policies in an effort to protect undeserving third-parties—who need no such protection—from competition. Notably, ICANN's own Bylaws explicitly require ICANN to **promote** competition, not stifle it.⁵⁵

97. Further, ICANN has not interfered with or questioned the policies established by the registry operators or sponsoring organizations of other sTLDs, despite the fact that the policies for the .JOBS sTLD are quite similar to the policies for other sTLDs.

98. Employ Media presented the above-described objections to ICANN, and engaged in the contractually-required Cooperative Engagement process. Despite these efforts, Employ Media and ICANN have been unable to resolve the dispute. Accordingly, Employ Media is forced to submit this Request for Arbitration—to ensure its very survival.

⁵⁴ Additionally, ICANN's concern that DirectEmployers is a "single entity" that has registered for multiple names is misplaced, given that DirectEmployers is in fact an association of multiple employers, and the names for which DirectEmployers is registered serve as a platform on which any employer can list job openings—such a platform is clearly in the interests of the .JOBS community, regardless whether the names are registered to one entity.

⁵⁵ Bylaws, Art. I, Sec. 2(6) (Core Values), C-Exh. 1.

V. SUMMARY OF BREACHES BY ICANN AND RELIEF REQUESTED

99. ICANN staff's Notice of Breach is unfounded and also impermissibly vague. ICANN staff fail to identify any domain names violating either the .JOBS Charter or any other existing .JOBS community policies, nor do they specifically inform Employ Media how to cure the alleged breach. Indeed, because Employ Media has committed no material breach of the .JOBS Registry Agreement, ICANN staff cannot identify such specific breaches or suggest specific cures.

100. Not only was ICANN staff's Notice of Breach deficient on a substantive level, it was procedurally deficient as well: ICANN staff acted unilaterally to reverse a previous Board resolution. Moreover, while the ICANN Board properly made its decision after public notice and comment, and the Board's decision was then ratified by the BGC after additional public submissions, ICANN staff completely disregarded those processes in sending the Notice of Breach in utter disrespect for Employ Media's vested rights.

101. Thus, ICANN staff's attempt to terminate the agreement is itself a breach of, *inter alia*:

- Article VI, Section 1 of the .JOBS Registry Agreement, which provides that ICANN may only terminate the agreement for "fundamental and material breach;"
- Article III, Section 2(a) of the .JOBS Registry Agreement which provides that "[c]onsistent with ICANN's expressed mission and core values, ICANN shall operate in an open and transparent manner;" and
- Article III, Section 2(b) of the .JOBS. Registry Agreement, which provides that "ICANN shall not apply standards, policies, procedures or practices arbitrarily, unjustifiably, or inequitably and shall not single out Registry Operator for disparate treatment unless justified by substantial and reasonable cause."

102. Section 5.2 of the .JOBS Registry Agreement provides that, because "irreparable damage could occur if any of the provisions of this Agreement is not performed in accordance

with its specific terms,” the parties are “entitled to seek from the arbitrators specific performance of the terms of this Agreement (in addition to any other remedy to which each party is entitled).”

103. Accordingly, and reserving its rights to amend the relief requested herein, Employ Media seeks, at a minimum:

- (1) A declaration that there is no basis for ICANN to modify or terminate, in whole or in part, the .JOBS Registry Agreement;
- (2) A declaration that Employ Media has not breached the .JOBS Registry Agreement, either as alleged in the 27 February 2011 Notice of Breach or in any other material respect;
- (3) A declaration that Employ Media is accordingly entitled to continue operating the .JOBS sTLD pursuant to that Agreement, as amended on 15 September 2010;
- (4) A declaration that ICANN has breached the .JOBS Registry Agreement by preventing Employ Media from exercising the authority that ICANN delegated to it in the .JOBS Registry Agreement;
- (5) A declaration that ICANN has breached the .JOBS Registry Agreement and violated its Articles of Incorporation and Bylaws by, *inter alia*, failing to operate in an open and transparent manner and failing to treat Employ Media in a non-discriminatory manner;
- (6) An award for an amount of damages to be quantified over the course of the arbitration based on the above;
- (7) An award of costs and reasonable attorneys’ fees; and
- (8) Such other relief the Tribunal may deem appropriate.

VI. REQUEST FOR STAY

104. Article VI of the .JOBS Registry Agreement provides that:

[i]n the 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 is rendered, **and that request shall have the effect of staying the termination** until the

decision or until the arbitration panel has granted an ICANN request for lifting of the stay.

105. In accordance with this provision, Employ Media hereby requests a stay of ICANN's termination of the .JOBS Registry Agreement for the duration of these proceedings.

VII. THE AGREEMENT TO ARBITRATE

106. The parties have consented to resolve their disputes by arbitration. Section 5.1(b) of the .JOBS Registry Agreement provides that:

Disputes arising under or in connection with this Agreement, including requests for specific performance, shall be resolved through binding arbitration conducted as provided in this Section 5.1(b) pursuant to the rules of the International Court of Arbitration of the International Chamber of Commerce ("ICC"). The arbitration shall be conducted in the English language and shall occur in Los Angeles County, California, USA, only following the failure to resolve the dispute pursuant to cooperative engagement discussions as set forth in Section 5.1(a) above. There shall be three arbitrators: each party shall choose one arbitrator and, if the two arbitrators are not able to agree on a third arbitrator, the third shall be chosen by the ICC.

107. Employ Media and ICANN have engaged in the Cooperative Engagement required under Section 5.1(a) of the Registry Agreement, but have been unable to resolve their dispute. Accordingly, all prerequisites for the filing of this Request for Arbitration are satisfied.

VIII. ARBITRATOR SELECTION BY EMPLOY MEDIA

108. In accordance with Article 5.1(b) and Article 8 of the ICC Rules of Arbitration, Employ Media hereby selects M. Scott Donahey to serve as Claimant's party-appointed arbitrator, and invites Respondent to nominate a second arbitrator in its Answer to this Request, and in any event within 30 days from the filing of this Request.

109. Mr. Donahey's contact details are as follows:

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Respectfully submitted,

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