

3. After I graduated from college in 1968, I joined my brother at a radio station. By 1972, we had obtained partial ownership of the station, which we eventually sold to Gannett Company, Inc. We then began buying other radio broadcast properties, first in Cleveland and then in other markets all around the region. In 1984, I obtained my first television license, for a station in Toledo, Ohio. In order to utilize our license, we had to build a facility from scratch, but we were willing to invest the money in order to do it right. After we established that station, we began expanding into other markets in the region. At that time, U.S. federal regulations prevented us from owning more than two stations in a given market, so instead we obtained licenses and established stations in other small and medium-sized markets. Nearly all of our television stations became Fox affiliates; over time, we owned or managed more than 50 television and radio properties, in markets as diverse as Milwaukee, St. Louis, Indianapolis, Los Angeles, Chicago and New York. We developed significant experience operating in regulated markets and conducting business under the terms of a license granted by a regulatory body—in our case, at that time, the United States Federal Communications Commission (“FCC”).

4. In the 1990s, a change in U.S. law caused a shift in the broadcast market, and my investment goals also began to shift. Changed federal regulations allowed for consolidation of broadcast properties, meaning that an entity could now own more than two radio stations in a given market. Because of that change, major companies began buying broadcast properties from owners like me. I was able to take advantage of this demand to sell many of my properties. The profits from those sales presented me with an opportunity to further evolve my business strategy; I decided that it was time to take a more long-term approach that focused on putting my family, and especially my children, in a solid and secure position with reliable income that would continue to grow. I decided that it would be better to diversify into other industries to create

more stability by balancing my investment portfolio and because of the way television and radio was changing.

5. In 1993 my family formed an investment company named Second Generation, and a few years later we formed a second company, called X Gen. Both are diversified family venture funds. Together, Second Generation and X Gen have owned and invested in many diverse businesses in fields including broadcasting, marketing, biomedical devices, manufacturing, real estate, and the Internet.¹

6. Second Generation and X Gen invested in Employ Media, the registry operator for .JOBS, in 2003, and we have owned and operated Employ Media ever since. I am the Chairman and CEO of Employ Media. Everything in this statement is based on my own personal knowledge, understanding and contemporaneous notes that I kept of meetings, unless otherwise stated.

II. Ray Fassett Approaches Me With The Idea For .JOBS

7. I met Ray Fassett when he first approached me with his idea for the .JOBS Top Level Domain (or “TLD”) in 2000. His idea was to establish a TLD that was focused on providing employers and potential job seekers with a specific “place” on the Internet to connect. He explained to me what a TLD was and how ICANN has the authority to give permission to private entities to operate TLDs—in essence, a “license” to run part of the Internet. Through my discussions with Ray, I quickly came to understand that if we were to establish, with ICANN’s

¹ Some of our portfolio companies are listed on our website. Second Generation, The Embrescia Companies, Ltd., available at <http://www.secondgen.com/portfolio.html> (last visited on 21 June 2012), C-135.

permission, a TLD with a name such as .JOBS, it would allow us to create the rules to super-serve a targeted audience on a global scale.

8. Based on his previous experience with job fairs and job search websites, Ray felt that a TLD that helped companies connect with job seekers would be valuable both to those engaged in human resources, in particular those engaged in recruiting, and their employers, and to job seekers. Ray thought it would be a way to help organize and centralize job searching. He explained to me that a TLD called .JOBS would be very intuitive of the content that would be found at websites created within it. Additionally, because many of the most desirable generic website names were unavailable in .COM, which told me that there was market demand for such names, Ray thought that similar names ending in .JOBS could open up many new and potentially innovative possibilities in the future.

9. I recall that Ray and I spent approximately a day and a half discussing all of this. I was not particularly knowledgeable about the Internet, but as we discussed the idea, I began to see that his idea was a natural fit for me based on my experience and background. The Internet, like radio and television, is a means of communication, an opportunity to transmit data. And a TLD like .JOBS, designed to serve a particular audience, was an opportunity to “narrowcast,” which I believed would be valuable. Just like ABC, CBS, and NBC tried to be “all things to all people,” by providing programming that appealed to as broad an audience as possible, .COM was “all things to all people”: any one could put up any content. Cable stations, on the other hand, like The Travel Channel or The Food Network are designed to “narrowcast”—they provide more niche content that appeals to a particular audience. As I thought about Ray’s proposal, it occurred to me that .JOBS would be more like a cable station. It wouldn’t provide everything, but would be designed to appeal to and serve a particular audience of common interest, and to

become the trusted source for that community. Job seekers would be drawn to .JOBS sites because it was very intuitive and as the licensed operator we could establish registration rules different than .COM in order to compete differently towards building a trusted source for a specific purpose. Within days of my initial conversation with Ray, I agreed his idea was worthy of investment: we would apply to create a TLD called .JOBS to super-serve an audience (namely, the international human resource management community), and to serve as the registry operator for the TLD.

10. At the time, ICANN was involved in a first round of new TLD expansion. I learned from Ray that ICANN intended for it to be a limited, trial round, and that ICANN would only select a few applicants. He advised that we should sit out the first round so that we could evaluate the results and maximize our chances of succeeding with our “narrowcast” TLD idea in the next round. At the time, ICANN was planning to launch the next round very shortly after the first. I agreed with Ray’s recommendation, and that he should follow ICANN’s actions and analyze the results of the first round. I agreed to provide the funding needed to submit the application when the time came. Ray would be responsible for drafting the application when the time came and for the day-to-day operation of the TLD if our application was successful.

III. ICANN Approves the .JOBS TLD

A. Employ Media Applies for the .JOBS TLD

11. Despite ICANN’s plans, the next round of TLD applications did not open for some time. In May 2003, when it appeared that the application process would begin in the near future, we formed Employ Media (with Second Generation and X Gen as the majority owners) to file the application and serve as registry operator.

12. Before launching the application round, ICANN decided that the round would only be open to sponsored TLDs or “sTLDs.” It is my understanding that an sTLD is created for a particular community, and the registry operator for the sTLD, working with a sponsoring organization, is delegated the authority to create policies to serve that community. Obviously, neither Ray nor I thought this would pose a problem. We’d always intended that our TLD would be directed at a specific audience and purpose, what ICANN was calling a broad yet defined community. In order to be successful at tailoring our content, we felt it was best to have the flexibility to develop policy for the TLD, which would have been harder with a generic, unsponsored TLD. So ICANN’s decision to launch a round for sTLDs fit right into our original plans for .JOBS.

13. The only addition we would need to make to our plan was that we would have to engage with a sponsor that would help us develop policy consistent with our vision and the needs of our targeted community. After researching appropriate organizations, Ray approached the Society for Human Resource Management (“SHRM”). We both felt that SHRM, as the largest human-resource-focused institution in the world, was a natural fit as a sponsoring organization. We knew that the community for .JOBS would be very robust and dynamic, global in scope, but of common and shared interests. Given SHRM’s diverse membership, which overlapped significantly with our community, and SHRM’s years of experience representing lots of different interests within that community (including the interests of human resource personnel working for large companies, small companies, public companies, private companies, vendors, etc.), we felt they would be an excellent choice to represent our community. Ray and I agreed that he would take the lead in working with SHRM to develop our business relationship and our application for the sTLD, including the Charter.

14. At the outset, I recall there was significant discussion with SHRM as to whether we would start with both <companyname> and <non-companyname> domains. SHRM urged us to start slowly. Accordingly, we decided that the best way to launch the TLD was to start with <companyname> domains and later expand into other types. To me, the approach was similar to our approach in attracting advertisers to new television and radio stations. When we launched a new station, we would approach big advertising agencies that represented lots of clients. Once they were buying ads on the new station, a broader community of advertisers would follow. Similarly, when launching .JOBS, we planned that we would convince big companies to register for a website—such as ATT.jobs, Nissan.jobs, LockheedMartin.jobs (all of which are currently registered)—and this would lead to others within the community following suit. Additionally, when our registrants started advertising their .JOBS websites, they would be advertising our TLD to the broader general public. Once there was more awareness of our TLD among employers and job seekers, we would have a better basis from which to expand to allow registration of geographic, occupational, and industry names.

15. Moreover, we wanted to ensure that .JOBS was a trusted, valued source for jobs-related content on the Internet. Starting with <companyname> domains would maximize the likelihood that all of the sites functioning in the TLD were actually being used to provide legitimate, current job listings, which would make the TLD more useful. Although we knew this approach could take more time and require more effort than an unlimited launch, we thought it would be a better way to create a solid TLD in the long run—similar to how I had run my other businesses.

16. In December 2003, ICANN began accepting applications for new sTLDs. Ray began working to finalize the .JOBS application. He also had the assistance of Brian Johnson

(one of the lawyers who provided outside counsel to Employ Media, who later joined Employ Media as General Counsel). During this time, I spoke frequently with Ray and Brian, but I delegated the responsibility for drafting the application to them. As a general matter, it was always our plan to design the application to be as flexible as possible. The application included the Charter, which was drafted primarily by Ray and Brian, with input from SHRM. We wanted to super-serve the community the best way we could, and also run a viable business, and we wanted to leave open as many options to do that as we could. We thought that made the most sense because we were trying to predict the future in a way—envisioning future demand for a product that did not quite yet exist. We submitted our application in March 2004.

B. ICANN Approves the .JOBS Application

1. Approval of application

17. After an initial review of our application, ICANN contacted us at the end of August 2004 and indicated that they wanted to have a discussion regarding the evaluation of our application. We learned at that time that they were having similar discussions with almost all of the applicants. Because I prefer to do business face-to-face where possible, I contacted Kurt Pritz, ICANN's Senior Vice President for Stakeholder Relations. I told him that I would be in Los Angeles visiting my daughter, and we arranged to meet while I was there. So on September 15, 2004, I (along with Brian Johnson) had lunch with Kurt and John Jeffrey, ICANN's General Counsel, at a restaurant near ICANN's offices. I was very pleased with how the meeting went. John Jeffrey told me that they liked our application because ICANN needed new ways of thinking. He told me ICANN needed to promote competition with .COM. They indicated that they understood that we wanted to be innovators, to find new ways of serving our community.

18. We didn't discuss specifics about our application at that meeting, and I was not deeply involved in any of the follow-up to the evaluation questions. Ray and Brian worked closely with ICANN staff, including Kurt, and the ICANN evaluators to resolve any remaining issues with our application. Ray and Brian never came back to me to say that ICANN had asked us to change our Charter or add any restrictions on how we could use our TLD to serve the community. After ICANN was satisfied with the information we had provided, our application was approved by the ICANN Board in December 2004.²

2. Registry Agreement Negotiations and Approval

19. Once the Board approved our application, they directed ICANN staff to negotiate with us regarding the terms of our registry agreement.³ In February 2005, because there had been little or no progress in those negotiations, I traveled with Ray and Brian to Los Angeles for another meeting with Kurt and John to move the process along. We could tell, based on the questions that Kurt and John asked us, that the main focus of the meeting from ICANN's standpoint was the amount of the fee that we would pay them for each registration in our TLD. There was no discussion of how domain names would be used in .JOBS, what names would exist, or what content would or could be published at a .JOBS website. It would be up to us and our sponsoring organization, not ICANN, to decide how to serve our community.

² ICANN Special Meeting of the Board of Directors Minutes, 13 Dec. 2004, *available at* <http://www.icann.org/en/groups/board/documents/minutes-13dec04-en.htm>, C-12.

³ *Id.*

20. By the end of March 2005, we had finalized the terms of the registry agreement for .JOBS. The agreement was approved by the ICANN Board in April.⁴ As expected, the agreement specifically delegated to Employ Media the authority to develop further policies that allowed the TLD to serve the community, consistent with our Charter.

21. We launched the .JOBS TLD at the SHRM annual conference in June 2005. I spoke briefly at the opening ceremonies to announce the launch. I informed the SHRM members in attendance that .JOBS would be a dynamic, trusted, and valuable space on the Internet—a platform that would allow human resource practitioners to connect with potential job seekers. .JOBS has had a booth at every SHRM annual conference since.

IV. .JOBS Expansion

22. In mid-2007, we began discussions with SHRM regarding the expansion of the .JOBS TLD beyond <companyname> domains. Our decision to expand was driven in part by our concern that the TLD, and the sites, were less valuable as a utility because potential users (*i.e.*, job seekers) would attempt to visit other .JOBS sites (such as nursing.jobs or seattle.jobs) and find that they didn't exist. Additionally, in the summer of 2007, SHRM published a report that noted the increasing importance of niche job boards.⁵ It was clear to me that the time had come to begin our expansion to allow registration of geographic, occupational, and industry names—to serve our community in a trusted way in conjunction with the existing

⁴ 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-17.

⁵ Society for Human Resource Management, 2007 Advances in E-Recruiting: Leveraging the .jobs Domain at 3, June 2007, *available at* http://www.goto.jobs/advances_07.pdf, C-24.

<companyname>.jobs format. We felt the additional formats would make the .JOBS TLD even more valuable if done in a way that served needs of the community. We continued to discuss expansion with SHRM for some time, throughout most of 2008, until SHRM was fully on board with the fact that it was time to expand, and that such expansion would benefit the community and therefore be consistent with the Charter.

23. Both SHRM and Employ Media believed that it was within their authority to expand the .JOBS domain. ICANN had delegated that authority to Employ Media in the registry agreement. Even so, we did discuss the question with Craig Schwartz, ICANN's Chief gTLD Registry Liaison (our main ICANN point of contact now that we were operating the registry), before we began any expansion efforts. Craig was interested in doing a site visit to learn more about our TLD, so he came to Cleveland in February 2009. We discussed a number of matters with him, including ICANN's role—which Craig said would be not to get involved with our delegated policy authority or the day-to-day operation of the TLD—and also the fact that we were planning to expand, and that we were excited about the prospect. Nothing came up in the meeting to suggest that we should not proceed with our expansion plans

24. SHRM was not, of course, going to tell us how to expand (although they certainly would have stopped any expansion that they did not think would serve the needs of the community). We began to explore expansion options. As before, we approached major fee-based job boards. In February 2009, around the same time as our meeting with Craig, we

reached out to CareerBuilder, HotJobs, Monster, and others.⁶ We told them that we were planning to expand, and invited them to make proposals for that expansion. We also spoke publicly about our plans to expand, hoping that it would bring us new ideas.⁷

25. Frankly, we were somewhat disappointed by the response from the fee-based job boards. Those that I spoke with were ambivalent about expansion and uninterested in working with us on developing any innovative ideas. We did, however, get a proposal from DirectEmployers Association, a non-profit human resources consortium of leading global employers, “formed to improve labor market efficiency through the sharing of best practices, research and the development of technology.”⁸ Ray and I had been in contact with DirectEmployers before, so we were interested when they approached us in late March 2009. I was a bit concerned that they were a small organization, but they had an impressive list of members, and some of their members were very big names (including AT&T, IBM, Boeing, and McDonalds). And they had a plan that made sense and that would provide obvious benefits to the community. Plus, I met with DirectEmployers’ Executive Director, Bill Warren, who impressed me with his directness, and I appreciated that DirectEmployers, as a non-profit, was working for the good of their members and not to simply make a quick buck. In fact, DirectEmployers is an organization that is simply a collection of employers who have agreed to

⁶ See, e.g., Email from Tom Embrescia to Gary Rubin, 24 Feb. 2009, C-27; Letter from Tom Embrescia to Jeff Kinder, 2 Mar. 2009, C-31.

⁷ 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.

⁸ DirectEmployers About, available at <http://www.directemployers.org/about> (last visited 21 June 2012), C-131.

work together to develop new practices and technologies that benefit all of them. DirectEmployers was (and still is) a consortium owned by its members; it was not a new middleman, offering services to employers and human resource professionals, but was rather comprised of human resource professionals, on behalf of themselves, their employers, and employers everywhere, seeking to improve labor market efficiency in ways that will help employers and job seekers. It was clear that DirectEmployers was serious about helping to change online recruiting for the better.

26. DirectEmployers' proposal was for a series of websites in the format of <occupation>.jobs, <industry>.jobs, <city>.jobs, <state>.jobs, and so on, with each site providing job listings related to the domain name. Any employer could post their job listings to a relevant site for free. Thus, for example, a job seeker could visit the site LosAngeles.jobs and browse job openings in Los Angeles, or accounting.jobs and browse for accounting jobs. DirectEmployers was proposing that each job posting would lead directly to the site of the company posting the job. This type of functionality was interesting to us because it was a way to ensure that the sites would be trusted, an objective that remained important to us.

27. DirectEmployers' goals dovetailed with our own. A lot of big companies felt they had lost control of their own jobs—they had to pay to post their job listings on the big fee-based job boards, and then were stuck with this middleman during the recruitment process. Members of DirectEmployers wanted a site where any employer could post, so long as the job listing is valid.

A. The Shared Domain Beta is Launched

28. In August 2009, after further conversations with SHRM and DirectEmployers, the “shared domain beta” was launched—a test of DirectEmployers' proposal, using several hundred

names, to see if the community and job seekers would use them. During the operation of the shared domain beta, I spoke regularly with Ray and Bill Warren, who both reported on the success of the test. They were evaluating the beta based on measurements including the number of visitors to pages in the beta, the number of visitors who viewed employers' sites after clicking on a link in the beta, and how the search engines like Google were reacting to the new sites for relevancy.

29. The beta quickly became public knowledge, in part because of our efforts to promote it.⁹ I was aware that there was outcry among certain fee-based job boards who viewed the expansion as undesirable competition. This didn't worry me at first. I did, however, get concerned when ICANN told us that it would be conducting a compliance review.

V. ICANN Approves the .JOBS Expansion

A. Compliance Review

30. In November 2009, ICANN informed us that they would be conducting a compliance review. It has always been important to me that we operate in an honest, legitimate manner, and that we not violate any rules—both as a matter of principle, and as a matter of preserving a reputation that I've established over many years of hard work. ICANN told us that

⁹ March 2009 Announcement, *available at* <http://www.goto.jobs/rules.asp>, (last visited 3 Aug. 2012), C-130; 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; 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.ere.net/2009/11/10/a-universe-or-jobs-job-boards-is-set-to-launch/>, C-40.

it was receiving complaints about the shared domain beta. Since SHRM had already informed me of this, I figured the complaints were coming from the same source. This gave me reason to believe that ICANN's reaction was a result of pressure from certain fee-based job boards who were complaining about the beta,¹⁰ and I continued to believe that we were within our authority.

31. Because I took it very seriously, I called Kurt Pritz (ICANN's Vice President of Stakeholder Relations) and asked to meet with him. Once again, I was going to be in Los Angeles to visit my daughter for Thanksgiving. We agreed to meet, and on November 24, 2009, I met and had lunch with Kurt Pritz and John Jeffrey at the ICANN offices.

32. At our meeting, I explained exactly what the beta was for. I talked with them about what we had done with the beta and why. I told them who DirectEmployers was, and I explained that the reason DirectEmployers' model was so good was that any business with jobs to offer could share the domain names—for example, every business in New York could post their openings on NewYork.jobs. The beta was available online and visible to anyone.¹¹ I stated that I realized that Appendix S to our registry agreement had some inconsistent language. John responded that any inconsistent language could be amended. John 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.

¹⁰ Email from John Zappe to Michele Jourdan, 28 Oct. 2009, C-36.

¹¹ John Zappe, Tens of Thousands' of New Dot-Jobs Boards Coming, Ere.net, 29 Oct. 2009, *available at* <http://www.ere.net/2009/10/29/tens-of-thousands-of-new-dot-jobs-boards-coming>, C-38.

He stated that we had the authority to grow and expand our TLD as long as our sponsoring organization approved and as long as .JOBS was serving its community.

33. 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 promised to help with whatever was needed from ICANN to accomplish our plans.

34. I was very relieved, and I reported to Ray and Brian that Kurt and John were not looking to bog us down or prevent us from expanding but in fact would assist us with what we wanted to accomplish, including, if necessary, amending our contract.

35. A few weeks later, in December 2009, David Giza (ICANN's Director of Contract Compliance), William McKelligot (an ICANN Contract Compliance Auditor), and Samantha Eisner (an ICANN attorney) came to our offices in Cleveland. I met with them, along with Ray, Brian, and several others from Employ Media. We discussed the same issues I had discussed with Kurt and John, in addition to some issues regarding data escrow. David Giza was reassuring just as Kurt and John had been a few weeks back. After we discussed the beta, I recall David saying that he didn't see it as a big issue.

36. Given the meetings we had had with ICANN officials, you can imagine my surprise when ICANN later required us to take down the beta.¹² ICANN informed us that once we took down the beta, we would be in compliance and could then proceed to get approval to expand the beta. The process ICANN wanted us to use to get their approval was different than what I expected it to be, but I was willing to do as ICANN instructed. Similarly, when ICANN

¹² Letter from David Giza to Ray Fasset, 5 Feb. 2010) C-49.

eventually informed us that a Policy Development Process (“PDP”), Registry Services Evaluation Process (“RSEP”), and amendments to the registry agreement would be necessary before we could implement the expansion,¹³ SHRM (and my staff) disagreed, but I persuaded them that we should do what we could to avoid escalating the dispute by doing what ICANN was requesting.

B. PDP

37. In February 2010, SHRM created a PDP Council (the group of community members to be established by SHRM to review and approve or deny our proposal) composed of people who were already familiar with and already understood the beta, and who could evaluate it more quickly without having to spend time getting up to speed. A PDP Council was appointed on that basis, and that Council met and approved our proposal to allow registration and use of <non-companyname> domains. We were elated with the Council’s vote. Gary Rubin informed me, however, that concerns had been raised about DirectEmployers’ involvement in the PDP. Hence, SHRM decided to do another PDP because it wanted to be certain that the PDP did not have even the appearance of lacking neutrality. So in March 2009 SHRM reconstituted the Council and restarted the PDP. I wasn’t pleased by this, but had to accept what SHRM wanted to do, and also did not want there to be any questions about the functioning of our policy development process.

38. Employ Media had no involvement in the operation or deliberations of the PDP Council; it was run entirely by SHRM. Ray and I participated by phone in a portion of one

¹³ *Id.*; Letter from Kurt Pritz to Tom Embrescia, 2 Mar. 2010, C-56.

Council meeting in order to present our plans and answer any questions, just as anyone else who had proposed a policy change would be entitled to do. Additionally, we answered questions posed to us later by the Council, and prepared a White Paper describing our expansion plans.¹⁴

39. In our communications with the Council, we described the beta, and made clear that we were intending to accept proposals in an open Request for Proposals. I remember saying that we were asking them to approve the expansion to new names, but that we didn't know for sure how those names were going to be used—we wanted them, and the rest of the community, to come to us with ideas for how to use them. We told the Council that we'd already seen the beta from DirectEmployers and determined that it was beneficial to the community, so if DirectEmployers submitted a similar proposal, we'd seriously consider accepting it.¹⁵ But what we wanted was to get the best bids possible. DirectEmployers' general proposal was already out there, so competing bidders had an idea of what they were likely competing against. We wanted bidders to come in with proposals which blew the beta out of the water. But that didn't happen. The DirectEmployers proposal was far and away the best proposal we received following our RFP.

40. We were very pleased when the Council recommended that our proposal should be approved—it reaffirmed what we had believed all along, that an expansion to allow registration of <non-companyname> domains, including geographic, industry, and occupational names, and to allow the distribution of job listings from any interested employers across the

¹⁴ Employ Media (.jobs) White Paper, Apr. 2010, C-64.

¹⁵ *Id.*

relevant domain names, would serve our community. The SHRM Executive Committee approved the PDP result, agreeing that the expansion of .JOBS would benefit the community.¹⁶

C. ICANN Approves Amendments to the Registry Agreement

41. During the PDP Council's deliberations, Ray worked with ICANN to draft a request to submit to ICANN's Registry Services Evaluation Process ("RSEP")—the next step ICANN required for our expansion after the PDP. I know that Ray coordinated very closely with Craig Schwartz in that process, and that Craig helped him design the RSEP request to ensure that it would accomplish what we needed. I also know that we wanted the RSEP request to be broad, to allow us as much flexibility as possible in expanding, and I know that Ray discussed all of this thoroughly with Craig.

42. Once we received the approval from the PDP and the SHRM Executive Committee, Ray worked with Craig to finalize and submit the RSEP request. The final RSEP request included the results of the survey conducted by the PDP (concluding that providing free job postings in new .JOBS classifications, particularly those in the format of <geography>.<profession>.jobs and <profession>.jobs, was generally viewed as a positive addition to the toolset for HR generalists and employment/recruitment professionals), and also referred to the PDP Council's meeting minutes (which, like the survey, specifically discussed expansion to domain names using geographic, occupational, and industry terms, and the posting of multiple, third-party job listings on those names—in other words, job boards). ICANN

¹⁶ Society for Human Resource Management, Expansion of 'Dot-Jobs' Approved, 10 June 2010, available at <http://www.shrm.org/about/news/Pages/ExpansionDotJobs.aspx>, C-86.

quickly approved the RSEP itself,¹⁷ but the final step required by ICANN was the amendments to the registry agreement. Ray Fassett and Brian Johnson coordinated with Craig Schwartz to draft the amendments. Once again, the amendments were designed to provide flexibility, rather than create limitations.¹⁸

43. The proposed amendments to the <companyname> restriction in the registry agreement were posted on ICANN's website for public comments. By that time, the opposition to our expansion had become more organized, and a variety of entities cooperated to submit anti-expansion comments.¹⁹ Of course, none of this was a surprise because ICANN and SHRM had been hearing from fee-based job board operators for months.²⁰

44. The ICANN Board considered the amendments to our registry agreements during their meeting on August 5, 2010. Their decision was made after review of the public comments, with full knowledge that some fee-based job boards objected to our expansion because they

¹⁷RSEP of Employ Media, 9 June 2010, C-84; Email from ICANN Registry Request Service to Ray Fassett, 6 Aug. 2010, C-93A.

¹⁸ Amendment No. 1 to .JOBS Registry Agreement, 12 Mar. 2010, *available at* <http://www.icann.org/en/about/agreements/registries/jobs/registry-agreement-amendment-1-12mar10-en.htm>, C-58; Amendment No. 2 to .JOBS Registry Agreement, 6 Aug. 2010, *available at* <http://www.icann.org/en/about/agreements/registries/jobs/registry-agreement-amendment-2-06aug10-en.htm>, C-99; Amendment No. 3 to .JOBS Registry Agreement, 15 Sept. 2010, *available at* <http://www.icann.org/en/about/agreements/registries/jobs/registry-agreement-amendment-3-15sep10-en.htm>, C-102.

¹⁹ See 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/pdfvZhVOaTGGo.pdf>, C-91.

²⁰ See, e.g., Email from Craig Schwartz to Ray Fassett, 9 Apr. 2010, C-72 (ERE is "kicking up quite a storm"); Email from Craig Schwartz to John Zappe, 10 June 2010, C-85; Open Letter from Gerry Crispin to the PDP Council, 8 Apr. 2010, *available at* <http://policy.jobs/board/index.php?PHPSESSID=1c09a42144c4dce6dc04e7950ded8f1b&topic=68.0>, C-68; Letter from John H. Graham IV to Laurence O'Neil, 1 Apr. 2010, C-63.

feared the additional competition.²¹ We had operated the beta in full view of the world and we had been open and candid with ICANN throughout the contract compliance review, in dealing with the PDP, in drafting the RSEP, and in amending our registry agreement. The Board's decision was made in the context of all of these discussions. So when the Board approved the amendments to the registry agreement, we knew that we had done everything ICANN had instructed and that we could proceed with our expansion, including, potentially, job boards as provided in the shared beta.²²

VI. ICANN's BGC Reaffirms the Board's Approval

A. Employ Media Announces a Request for Proposals

45. Following ICANN's approval and execution of the amendments to the registry agreement, we announced that we were accepting proposals for ways to expand. I also made the rounds with Monster and others, once again inviting them to come to us with ideas. Monster submitted to us a formal Expression of Interest to participate in the RFP but then later informed us they would rather fight us. As the RFP process unfolded, the conversations were downright hostile: they wanted my business dead.²³

46. We were hoping that we'd get lots of new ideas. From my perspective, the more, the better. I'd have loved to see proposals for social media sites in .JOBS, or for ideas we'd

²¹ See ICANN Special Meeting of the Board of Directors Minutes, 5 Aug. 2010, *available at* <http://www.icann.org/en/groups/board/documents/minutes-05aug10-en.htm>, C-97, (Board Member George Sadowsky "noted that Employ Media now wants to create categories that would compete with job boards like monster.com, and those operators are now complaining.")

²² ICANN Special Meeting of the Board, Adopted Board Resolutions, 5 Aug. 2010, *available at* <http://www.icann.org/en/groups/board/documents/resolutions-05aug10-en.htm>, C-94.

²³ E-mail from Mark Stoeber to Tom Embrescia, 16 Sept. 2010, 2010), C-103.

never even considered or heard of before. We received a fair amount of interest, and we received about a dozen or so proposals. None of them came close to matching the scope and utility of the DirectEmployers' proposal, but several were nonetheless worthwhile. We were in the process of selecting several of the proposals when various fee-based job board operators intervened with ICANN. They were clearly taking their opposition to a higher level of intensity.

B. Coalition Pressures ICANN to Reconsider

47. In late August 2010, several fee-based job board operators, now calling themselves the ".JOBS Charter Compliance Coalition,"²⁴ asked the ICANN Board to reconsider its approval of our expansion. I remember that I expressed my frustration in a meeting with Kurt Pritz in Los Angeles the following October and in a phone call with both John Jeffrey and Kurt in November of 2010. I asked John why this was happening. I reminded him that there was no new information, that everything had been public knowledge long before the Board made its decision and that he specifically knew exactly what we were doing and had known for some time. John told me that ICANN Board members were being inundated by the Coalition and that the Coalition was gearing up to sue us. He also asked us to delay the launch of any proposals we'd selected in the RFP. John positioned this as his request from ICANN's Board Governance Committee (the "BGC"). He acknowledged that ICANN staff had no authority to stop us from

²⁴ Of course, by choosing this name, our detractors were trying to cloud the issue and make it harder for us to argue against them—the same way political fundraising organizations in the US give themselves names that are designed so that no one can possibly be against their stated purpose, such as "Putting America First" or "Parents for a Brighter Future," but that don't tell you anything about the organization's actual mission, goals, or policy beliefs. The Coalition was not really concerned with whether or not Employ Media was in compliance with the .JOBS Charter—since it was abundantly clear that we were—but was only interested in shutting down our expansion as a new competitive threat.

expanding .JOBS because ICANN had already executed the amendments to our registry agreement, but he was asking us to do him a favor. He said ICANN's processes would look bad if the Board Governance Committee decided that the Board's decision should be revisited if they'd already amended the registry agreement and we'd already allowed registration of the names pursuant to that decision.

48. By this time, I knew that Ray, Brian, SHRM, DirectEmployers, and many of the members of DirectEmployers were becoming frustrated with ICANN. Because we had the right to proceed with the RFP, they were of the opinion that we should do so. But I wanted to continue cooperating with ICANN. At the time, given our previous relationship and conversations with Kurt and John, I knew that ICANN in fact had no objections to our expansion, so if delaying would help ICANN avoid conflict and save face with the job boards pressuring them, I was willing to wait a bit longer.

49. During the same conversation, on November 19, 2010, John Jeffrey told us that the only issue holding up the BGC's decision was the self-managed class of names—that is, the idea that all the names operated by DirectEmployers would be registered to us, as they had been in the beta. I remember asking John 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. I told John that if the self-managed class really was the only issue holding up the BGC, then we could just agree not to 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 that we'd just register the names to DirectEmployers rather than registering them to ourselves. By this time, we had made ICANN aware that DirectEmployers was one of the selected applicants.

Having DirectEmployers become the registrant instead of us would be a simple change for them to make to their proposal and it would have absolutely no impact on what the expansion was about, so I told John that we'd proceed that way if it would help the BGC make its decision. 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.

50. It was an uncomfortable position for me to be in. The BGC asked us to self-impose a stay that was holding up our business expansion efforts. I even stated to John that selected RFP applicants were getting deal fatigue because of all the delay by ICANN, which is what the Coalition wanted. Now, three months into the BGC review, John was informing me that Coalition lobbying efforts to ICANN Board members were holding up the BGC from making a decision.

51. John was only able to tell me what issue was holding up the BGC's deliberations concerning the Reconsideration Request, but not why the self-managed class was an issue. John was recommending that I remove this issue from the Coalition's heavy handed lobbying efforts, which would have the effect of freeing up the BGC. I took John's advice to remove the self-managed class of names. In return, John stated his belief that this would result in a favorable BGC decision for us in Cartagena, Colombia, where the BGC would vote on the Reconsideration Request as part of regularly scheduled ICANN meetings. So I agreed. Different than the beta, DirectEmployers would be the registrant. This is what we agreed to. I asked John if this would be enough for the BGC that we could remove the self-imposed stay they had asked us for earlier without causing harm with them now. John advised that removing the self-imposed stay before the BGC made a decision would have caused a "bad result" for us. So I agreed to maintain the

self-imposed stay and agreed to remove the self-managed class based upon John's advice to me that these actions would result in a favorable decision for us by the BGC.

52. John also tried to persuade us to meet with the Coalition. I told him that we'd spoken repeatedly with the fee-based job board operators, and practically begged them to work with us, but that their position was that it was easier to kill us than to work with us or to compete. Put simply, they didn't want us to exist. Rather than potentially compete against each other in an RFP process, they shared the common interest of stopping any RFP process at all and joined hands towards this shared objective. I knew first hand their individual and collective attitude was to just kill us rather than have to compete for the names in an RFP and this is what I explained to John. As a compromise, I offered to John that we would be willing to meet with the business representatives of the Coalition—no lawyers from either side—but John later informed us they turned this down. Given their position, there really wasn't room to compromise.

53. In addition, John recommended I travel to Cartagena, Colombia for the next ICANN Board meeting on December 9, 2010, to present my position in person to the BGC. John stated the Coalition lawyers were bombarding the BGC "with paper" and a short in-person meeting by me "to make my pitch" would go a long way with the BGC to understand our side. Since both John and Kurt felt this would be the best approach for me to take given the actions of the Coalition, I agreed to meet in person with the BGC in Cartagena.

54. In Cartagena, just before I made my presentation, I was sitting with John and Ray outside the BGC meeting room. I told John that the opposition only cared about stopping others from competing against them. John responded that he agreed. I remember John said, in effect that lobbyists can always spend money to slow things down. John told us to just tell our story to the BGC, and we'd be fine. When I made my presentation to the BGC, I did just what John

instructed. I told them that we had a simple Charter by design, it was very broad to provide business flexibility, and that nothing we were doing was in contradiction of the Charter. I reiterated that we wanted to be a trusted, valued source for jobs-related material online, and I explained how our expansion, with the approval of our sponsoring organization, was designed to be consistent with that goal. I also described the beta, and noted that no one else had responded to our RFP with a proposal that was as broad or as impressive as the one from DirectEmployers. The expansion was allowing employers to list their own jobs and have job seekers directly contact the employers' own employment sites to apply. I explained I had kept SHRM informed every step of the way as I felt it was my responsibility to do as the entity ICANN delegated policymaking to. I told them they could rest assured that SHRM acts independently from us and were not going to risk their own reputation for us but instead act in the interests of the community. I made clear to the BGC my opinion that the Coalition was concerned only about their own economics, and not the interests of the .JOBS community, and motivated purely to prevent new competition they knew would occur as a result of the .JOBS expansion.

55. I noted that we had cooperated with the BGC in every way, including their request for us to answer certain questions, and that SHRM did the same.²⁵ I know that SHRM told the BGC, as they had told ICANN all along, that they approved of the expansion and felt that it benefitted the community.²⁶

²⁵ Email from Gary Rubin to Samatha Eisner, 12 Nov. 2010, C-110.

²⁶ *Id.*

C. BGC Affirms Board's Approval of .JOBS Expansion

56. The BGC decided to reject the Coalition's Reconsideration Request on the same day that we made our presentation.²⁷ While I had left Cartagena shortly after the meeting with the BGC, Ray stayed through the rest of the week. I remember that Ray reported to us that he'd had reassuring conversations with ICANN staff, including John Jeffrey, Amy Stathos and Craig Schwartz, after the ICANN Board voted to accept the BGC recommendation. Conversations like this made it clear that we shouldn't have had any further problems in implementing our expansion. Ray explained to me later that he'd told Craig that we would discuss all accepted proposals with ICANN before implementing them to avoid any future conflicts, but that a discussion about our selection of the DirectEmployers proposal would not be necessary since ICANN was already very familiar with it. Craig reportedly came back to him later in the day saying that Ray's idea about discussing proposals with ICANN wasn't necessary, and agreed that ICANN was already fully aware of the DirectEmployers proposal. By this point, there was no question in my mind that ICANN had fully approved our expansion: we had completed all the steps they had required and more; and ICANN had approved us after each of those steps. I was convinced by ICANN's own actions and words they would no longer provide the Coalition with a venue for the same or similar arguments to delay our business expansion.

57. Following the BGC's recommendation and the Board's decision, we announced publicly some of the applicants we selected from the RFP process that had concluded months

²⁷ ICANN Meeting of the Board Governance Committee Minutes, 9 Dec. 2010, *available at* <http://www.icann.org/en/groups/board/documents/minutes-bgc-1-09dec10-en.htm>, C-112.

prior, particularly our selection of the DirectEmployers' proposal for the .JOBS Universe. As with the beta, the .JOBS Universe was a series of websites, using geographic, occupational, and industrial terms, where employers could list their job openings, for free. Job seekers could search those sites and find links that would take them directly to the employers' websites. The only substantial difference between the beta and the .JOBS Universe was the size and the fact it would not be a self-managed class; while the beta had been only a few hundred sites with the domains registered to Employ Media, the .JOBS Universe was close to 40,000 sites with the domains registered to DirectEmployers—functioning as a global platform to allow all employers to post jobs for free and ensure that job seekers find relevant, current job listings. But even that could not have been a surprise, given my promise during the BGC review to not operate a self-managed class and the fact that ICANN was aware of DirectEmployers' announcement during the beta that it would ultimately be using tens of thousands of names.²⁸

58. Nonetheless, the Coalition issued a complaint to ICANN compliance, repeating many of the same arguments during the SHRM PDP, the RSEP process, and the BGC Reconsideration Request. ICANN compliance again sent us and SHRM questions, many of these questions the same as we had answered before. We again cooperated with ICANN by responding.

²⁸ Letter from David Giza to Ray Fassett, 5 Feb. 2010, C-49.

VII. ICANN Publicly Issues a Notice of Breach Despite Previous Instructions and Assurances

59. Given everything that had occurred, I was shocked when ICANN compliance issued a public notice of breach in February 2011. I recall it was a Sunday evening when I received an unexpected call from my General Counsel, Brian Johnson, that ICANN was publishing a breach notice on their website that very same evening. I happened to be at a dinner engagement at the time and had to step out of the room to field Brian's call. Brian was not able to tell me what ICANN's breach notice was about since he had not yet been provided a copy. Brian also explained to me that ICANN told him that it would be buried on ICANN's website and no one would see it. Nonetheless, I knew I would have to get a hold of SHRM immediately to make sure they were aware since ICANN was making the notice public. This was a very frantic Sunday evening trying to get hold of my own internal people and those from SHRM and DirectEmployers to try to forewarn them and prepare. We were not able to raise everyone that evening. Meanwhile, I certainly believed ICANN's actions had something to do with the ongoing pressure they were getting from the Coalition and sure enough the following Monday morning, the Coalition had their press release polished and ready to go.²⁹ By mid-day, ERE.net was predictably already publicizing it.

²⁹ 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.prnewswire.com/news-releases/jobs-charter-compliance-coalition-applauds-icanns-delivery-of-firm-breach-notice-to-employ-media-llc-regarding-improper-jobs-expansion-117073708.html>, C-126.

60. Beyond the surprise nature of ICANN's action to purposefully catch us off guard, I was taken aback by the tone and language of their allegations. Clearly, it was aimed to publicly shame us and our partners, SHRM and DirectEmployers, into taking down the .JOBS Universe of sites. I told John Jeffrey as much, and I was even more shocked and disappointed when he tried to claim that ICANN didn't know that we'd selected DirectEmployers to launch a platform of thousands of names. I reminded him that he'd seen our RFP,³⁰ which explicitly stated that we'd evaluate proposals based, in part, on the quantity of domain names requested. I informed him that the reason DirectEmployers received so many names was that none of the other responses we received could compete with the DirectEmployers proposal's breadth. I reminded him Employ Media had acquiesced to ICANN's various and changing instructions to us to conduct a PDP, submit an RSEP Request, and amend our registry agreement. I reminded him further that we'd taken these measures even though Craig Schwartz said in 2009 that he didn't see any major problems with our expansion and David Giza of ICANN said, after compliance review had been initiated, that he didn't see any major problems with our expansion and that we could work things out with ICANN. We complied with everything ICANN instructed—and in so doing, delayed the launch of our RFP results. I reminded him of his own previous statements, such as when we had met in Los Angeles in November 2009, when he and Kurt Pritz reassured me that our expansion was what Employ Media should be doing, that ICANN would help us work out any compliance issues. I reminded him of his own reassurance to Ray, in their

³⁰ Employ Media .JOBS RFP Round 1 Application Form at 6.7.2, 26 Aug. 2010, *available at* <http://rfp.jobs/JOBS-RFP-Round%201-Application-Form.pdf>, C-101.

conversation after the BGC's vote, that the Charter was broad. I told John that I was totally confused by the change in his position. I was, quite simply, incredulous that ICANN would even attempt to claim that we were doing something other than what we had their explicit approval to do.

61. Moreover, I was personally affronted by their approach in the breach letter and their dealings with us since. My name and my reputation for conducting my operations in an open, fair, and proper manner, in order to build a solid, lasting, valuable business, are very important to me. We had done everything ICANN had instructed us to do and cooperated with them at every step, only to have the rug pulled out from under us when they reversed course—and yet they were claiming that we were behaving speciously and improperly. Even during our attempt at cooperative engagement, I didn't feel that ICANN staff were honestly engaging with us—as much as we tried to cooperate, the only conclusion I could draw was that ICANN wanted us to stop the expansion so that they wouldn't have to defend it to the Coalition and suffer the Coalition's wrath (or eventual lawsuit). I've never been one to engage in litigation of any kind, and I am far from happy that we ended up in these proceedings, but I saw no other choice. I had to protect our business, even if I didn't have the same resources as Monster and some of the other members of the Coalition.

IX. Availability and Certification

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

63. My identification photo is reproduced below:



64. I certify under penalty of perjury under the laws of the State of California that the

foregoing is true and correct.

(Signature)

(Title and Relationship to the Parties)

(Address)

(Date)

[Handwritten Signature]
Chairman Employ Media
3029 Prospect Ave, Cleveland Ohio 44115
08.03.12

STATE OF Ohio)

) ss.:

COUNTY OF Cuyahoga)

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

WITNESS my hand and official seal.

Signature



(Seal)

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