

Exhibit 10.2

AMENDED AND RESTATED EMPLOYMENT AGREEMENT BETWEEN

MARTHA STEWART LIVING OMNIMEDIA, INC.

AND MARTHA STEWART

DATED AS OF APRIL 1, 2009

AGREEMENT, dated as of April 1, 2009 (the "Effective Date"), by and between Martha Stewart Living Omnimedia, Inc., a Delaware corporation (the "Company"), and Martha Stewart (the "Founder").

WHEREAS, the Founder is a party to an employment agreement, dated September 17, 2004, as amended (the "Prior Employment Agreement"); and

WHEREAS, the Company recognizes that the Founder's talents and abilities are unique and have been integral to the success of the Company;

WHEREAS, the Company wishes to secure the ongoing services of the Founder pursuant to the terms and conditions set forth herein, and therefore the Founder and the Company intend hereby to enter into a new amended and restated employment agreement as set forth herein;

NOW, THEREFORE, in consideration of the premises and the mutual covenants set forth below, the parties hereby agree as follows:

1. Employment. From and after the Effective Date, the Company hereby agrees to employ the Founder as Chief Editorial and Media Director of the Company, and the Founder hereby accepts such employment, on the terms and conditions set forth below.

2. Term. The Founder's employment by the Company hereunder shall begin on the Effective Date and shall end on March 31, 2012, but subject to earlier termination as provided herein (the "Employment Period").

D. C. Toedt 4/1/13 8:10 PM

Comment [1]: The original, unannotated version of this agreement is available at the SEC's Web site at <http://www.sec.gov/Archives/edgar/data/1091801/000095012309008557/y77091exv10w2.htm>

D. C. Toedt 4/1/13 8:13 PM

Comment [2]: Amended and restated: Amending and restating an agreement is a conventional (and convenient) way of making a lot of changes — without indicating what the original provisions were. (The latter could be a consideration if the company knew it would have to file the amended version with the SEC but could keep the original provisions confidential.)

D. C. Toedt 4/1/13 5:36 PM

Comment [3]: Dated as of: This typically means the agreement wasn't actually signed on the date indicated.

D. C. Toedt 4/1/13 5:39 PM

Comment [4]: Whereas clauses are widely regarded as archaic; the modern approach is to use "Background" recitations — and/or specific representations and warranties.

D. C. Toedt 4/1/13 7:21 PM

Comment [5]: Unique talents: This sounds like something the lawyers drafted to give MSLO's compensation committee political cover if the shareholders ask why Stewart is getting paid what she is.

D. C. Toedt 4/2/13 7:41 AM

Comment [6]: And shall end: Having a stated end date means that the company can fire Stewart, in effect, by simply not extending her contract when the Employment Period comes to an end (although the company has indeed extended, according to news reports).

32 The Employment Period may be extended by mutual  
33 agreement of the Company and the Founder.

D. C. Toedt 3/24/14 10:28 PM

**Comment [7]:** "Extended": There can be a difference between "extending" and "renewing."

34 **3. Position and Duties.** During the Employment Period, the  
35 Founder shall serve as Founder, Chief Editorial and Media Director of  
36 the Company with the following duties, authority and responsibilities:  
37

D. C. Toedt 3/24/14 10:29 PM

**Comment [8]:** "During the Employment Period" – this does not say "During the Term of this Agreement."

38 (i) serving as Founding Editorial Director for all publications of  
39 the Company;

40 (ii) serving as an executive producer for television and radio  
41 productions of the Company; and

42 (iii) subject to the oversight of the Board, serving as the primary  
43 spokesperson for the Company

44 (it being understood, however, that the Principal Executive  
45 Officer, Chief Executive Officer(s) and the Chief Financial Officer of  
46 the Company, rather than the Founder, shall serve as primary  
47 spokespersons for the Company to the financial and investment  
48 community and with respect to business and financial affairs).

49 The Founder shall report directly to the Board.

D. C. Toedt 4/1/13 5:46 PM

**Comment [9]: Primary spokesperson to the financial and investment community:** Could it be that the company doesn't want Stewart talking to bankers or analysts without a chaperone? Or is it that Stewart doesn't want that responsibility?

50 Unless otherwise authorized by the Board, the Founder  
51 shall devote substantially all of her working time, attention and en-  
52 ergies during normal business hours (other than absences due to ill-  
53 ness or vacation) to the performance of her duties for the Company.

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**Comment [10]:** "Substantially all of her working time ... during normal working hours" – does this give Martha Stewart carte blanche to do whatever she wants after 5 p.m.? If so, why? Or is it meant to say that Martha doesn't have to work 14 hours per day? (Is this an ambiguity?)

54 Notwithstanding the above, the Founder shall be permitted,  
55 to the extent such activities do not violate, or substantially in-  
56 terfere with her performance of her duties and responsibilities under  
57 this Agreement, or any other agreement to which she and the  
58 Company are parties,

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**Comment [11]:** "Shall be permitted" – this is a safe harbor provision for Martha Stewart.

59 in all cases except for (iii), as determined by the Principal  
60 Executive Officer and a committee of the Board, to

61 (i) engage in motion picture, television, public speaking  
62 and publishing activities,

63 (ii) appear from time to time in commercials and/or adver-  
64 tisements that do not present a conflict with the Company's inter-  
65 ests with respect to its products or significant business relationships,  
66 in all cases subject to the approval of the Board,

67 (iii) manage her personal, financial and legal affairs (includ-  
68 ing writing her autobiography),

69 (iv) serve on civic or charitable boards or committees

70 (it being expressly understood and agreed that  
71 the Founder's continuing to serve on any such board and/or com-  
72 mittees on which she is serving, or with which she is otherwise asso-  
73 ciated, as of the Effective Date, shall be deemed not to interfere  
74 with her performance of her duties and responsibilities under this  
75 Agreement),

76 (v) serve on boards of other companies and

77 (vi) make personal appearances and lectures,

78 and the Founder shall be entitled to receive and retain all  
79 remuneration received by her from the items listed in clauses

80 (i) through (vi) of this paragraph (including, without limitation, ap-  
81 pearance and speaking fees, book advances, royalties, residuals and  
82 other fees and compensation (including guild and union payments)  
83 payable therewith) outside the performance of her duties hereun-  
84 der.

85 **4. Place of Performance.** During the Employment Period, the lo-  
86 cations of employment of the Founder shall be in New York City,  
87 New York and Bedford, New York and the Founder shall not be re-  
88 quired to relocate her employment to any other location.

89 During the Employment Period, the Company shall provide  
90 the Founder with the same offices and staff that she was provided  
91 with immediately prior to the Effective Date.

92

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**Comment [12]: Continuing to serve:** This is in effect a grandfather (or grandmother?) clause.

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**Comment [13]: "Receive and retain all remuneration":** Without this clause, the company might be able to claim that IT was entitled to get Martha's speaking fees, appearance fees, book royalties, etc.

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**Comment [14]: Place of Performance:** This can make a difference for state income-tax purposes.

93 **5. Compensation and Related Matters.**

94 **(a) Talent Compensation.** In consideration of her continued  
95 work as a performer  
96 and for making public appearances on behalf of the Com-  
97 pany or for third-parties as required in support of products covered  
98 by Company contracts with third parties consistent with past prac-  
99 tices,

100 and as an author or provider of content consistent with  
101 past practices for the Company’s media properties, publications and  
102 contractual arrangements during the Employment Period,  
103 the Company shall pay the Founder talent compensation  
104 at the rate of not less than Two Million Dollars (\$2,000,000) per year  
105 (the “Talent Compensation”).

106 The Talent Compensation shall be paid in approximately  
107 equal installments in accordance with the Company’s customary  
108 payroll practices and subject to all applicable income and employ-  
109 ment tax withholdings.

110 The Talent Compensation shall be subject to annual review  
111 by the Board and may be increased in the Board’s discretion.

112 If the Talent Compensation is increased by the Board, such  
113 increased Talent Compensation shall then constitute the Talent  
114 Compensation for all purposes under this Agreement.

115 **(b) Annual Bonus.** For each full fiscal year of the Company that  
116 begins and ends during the Employment Period, and for the 2009  
117 fiscal year, the Founder shall be eligible to earn an annual cash bo-  
118 nus (the “Annual Bonus”)

119 in such amount as shall be determined by the Compensa-  
120 tion Committee of the Board (the “Compensation Committee”)  
121 based on the achievement of Company and individual performance  
122 goals as established by the Compensation Committee for each such  
123 fiscal year,

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**Comment [15]:** “Customary payroll practices”: This gives the company flexibility (and is a standard way of phrasing this. NOTE: Employees who are not exempt from the requirements of the Fair Labor Standards Act might have to be paid on a particular schedule.

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**Comment [16]:** “Shall be subject to annual review” – QUESTION: Does this clause entitle Martha to have the board revisit her compensation on an annual basis?

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**Comment [17]: Increased Talent Compensation:** This clause is in essence an upward “ratchet” – note how it ties in with XXXXXXXXX.

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**Comment [18]: Compensation Committee:** In public companies, executive compensation must be determined by a compensation committee consisting of independent members of the board of directors (that is, board members who are not company employees and who meet other independence tests).

124 with a target Annual Bonus equal to One Million Dollars  
125 (\$1,000,000) (the "Target Amount")  
126 and a maximum Annual Bonus equal to 150% of the Target  
127 Amount.

128 The Compensation Committee shall establish objective cri-  
129 teria to be used to determine the extent to which performance goals  
130 have been satisfied.

131 Such Annual Bonus shall be paid in a lump sum no earlier  
132 than January 1st and no later than March 15th of the calendar year  
133 following the calendar year to which such bonus relates.

134 *[Portions omitted]*

135 **(c) Make-whole/retention payment.** In recognition of her ex-  
136 traordinary efforts on behalf of the Company and to maintain her  
137 continued level of involvement during the Employment Period con-  
138 sistent with past practices,

139 the Company shall as soon as practicable following the full  
140 execution of this Agreement (but not later than the date which is  
141 five (5) days following the full execution hereof) pay the Founder a  
142 payment of Three Million Dollars (\$3,000,000);

143 provided, however, that

144 if the Founder terminates this Agreement with-  
145 out Good Reason (defined below)

146 or the Company terminates this Agreement for  
147 Cause (defined below) during the Employment Period,

148 a pro-rata portion of such payment ... shall be subject to  
149 forfeiture and repayment by the Founder upon such terms and con-  
150 ditions as determined by the Compensation Committee in its discre-  
151 tion at the time of such forfeiture.

152 **(d) Automobiles.** During the Employment Period, the Company  
153 shall provide the Founder with automobiles and drivers seven days  
154 per week on a basis no less favorable than in effect immediately pri-  
155 or to the Effective Date to be used in the Founder's sole discretion.

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**Comment [19]: Bonus payment no later than March 15:** Without this provision, Stewart's annual bonus might be subject to heavy additional taxes as "deferred compensation" under [Section 409A](#) of the IRS regulations.

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**Comment [20]: "Golden handcuffs"**

156 (e) **Business, Travel and Entertainment Expenses.** The Compa-  
157 ny shall promptly reimburse the Founder for all business, travel and  
158 entertainment expenses on a basis no less favorable than in effect  
159 immediately prior to the Effective Date and subject to the Compa-  
160 ny's current expense reimbursement policies,

161 including, without limitation, first class transportation or  
162 travel on a private plane of the Company to the extent that such pri-  
163 vate plane is available.

164 The Founder shall pay the SIFL rate for any personal use of  
165 such private plane.

166 (f) **Vacation.** During the Employment Period, the Founder shall  
167 be entitled to six weeks of vacation per year.

168 Vacation not taken during the applicable fiscal year (but  
169 not in excess of three weeks) shall be carried over to the next fol-  
170 lowing fiscal year.

171 (g) **Welfare, Pension and Incentive Benefit Plans.** During the  
172 Employment Period, the Founder (and her eligible spouse and de-  
173 pendents) shall be entitled to participate in all welfare benefit plans  
174 and programs maintained by the Company from time to time for the  
175 benefit of its senior executives,

176 including, without limitation, all medical, hospitalization,  
177 dental, disability, accidental death and dismemberment, travel acci-  
178 dent and life insurance plans, programs and arrangements,

179 on a basis no less favorable than in effect with respect to  
180 the Founder immediately prior to the Effective Date.

181 In addition, during the Employment Period, the Founder  
182 shall be eligible to participate in all pension, retirement, savings and  
183 other employee benefit plans and programs maintained from time  
184 to time by the Company for the benefit of its senior executives,

185 other than any equity-based incentive plans, severance  
186 plans, retention plans and any annual cash incentive plan,

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**Comment [21]:** "The Founder shall pay ..." This is suboptimal drafting, in that it's unclear whom is Stewart supposed to pay. (She's probably supposed to reimburse the company, in which case the document should say so.)

D. C. Toedt 4/2/13 8:20 AM

**Comment [22]: SIFL rate for personal aircraft use:** SIFL stands for Standard Industry Fare Level for non-business use of company-provided aircraft, published by the Department of Transportation. (IRS regulations prohibit companies from taking tax deductions for certain such uses.) See generally [this summary sheet](#) published by the National Business Aviation Association.

D. C. Toedt 4/2/13 8:25 AM

**Comment [23]: Vacation carry-over:** Many companies have a use-it-or-lose-it policy about vacation time, or they allow employees to carry over only a maximum of, say, five days per year. (Stewart gets to carry over three weeks per year.) Generally this is because the law may require a company to pay departing employees for their unused vacation time, and the company doesn't want to have a large accounting charge accumulating on its books to reflect that financial obligation.

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**Comment [24]:** "For the benefit of its senior executives": This language is ambiguous, but customary; I don't remember ever hearing that it caused a problem.

187 on a basis no less favorable than in effect immediately pri-  
188 or to the Effective Date.

189 **(h) Security Expenses.** During the Employment Period, the  
190 Company shall pay or promptly reimburse the Founder for (1) all in-  
191 stallation and maintenance costs and monitoring fees relating to se-  
192 curity at the Founder's residences and (2) all expenses relating to  
193 personal security services for the Founder.

194 **(i) Telephone and Internet Access.** During the Employment Pe-  
195 riod, the Company shall pay or promptly reimburse the Founder for  
196 customary telephone, computer usage and internet access at her  
197 homes for business use.

198 **(j) New Programming.** For any original network, cable or syn-  
199 dicated show of the Company (other than "The Martha Stewart  
200 Show") produced after the Effective Date and in which the Founder  
201 is the on-air talent ("New Programming"), the Founder shall be enti-  
202 tled to receive an amount equal to the fair market value of her tal-  
203 ent services, as mutually agreed to by the Founder and the Board,  
204 or, if the Founder and the Board are unable to agree upon  
205 such fair market value, by an independent expert selected by mutual  
206 agreement between the Founder and the Board

207 (it being understood that any determination of fair market  
208 value shall take into account the Founder's rights to residual pay-  
209 ments pursuant to the next sentence).

210 Any payments in respect of New Programming shall be  
211 paid in the calendar year following the calendar year of production.

212 In addition, with respect to any re-run or re-packaging of  
213 any New Programming (each, a "Re-run"), the Founder shall receive  
214 an amount equal to ten percent (10%) of the Adjusted Gross Reve-  
215 nues, which shall be paid no later than the end of the calendar year  
216 in which the Adjusted Gross Revenues are determined.

217 “Adjusted Gross Revenues” means gross revenues of the  
218 Company from any Re-run minus the sum of (i) production costs,  
219 (ii) marketing costs and (iii) distribution costs;  
220 provided that if such Re-run includes programming other  
221 than New Programming, the portion of Adjusted Gross Revenues  
222 which is attributable to New Programming shall be determined on a  
223 fair and equitable basis approved by the Founder.

224 **(k) Equity Awards.** The Board shall in its sole discretion make  
225 an annual grant of stock options to Founder.

226 **6. Termination.** The Founder’s employment hereunder may be  
227 terminated during the Employment Period under the following cir-  
228 cumstances:

229 **(a) Death.** The Founder’s employment hereunder shall termi-  
230 nate upon her death.

231 **(b) Disability.** The Company shall have the right to terminate  
232 the Founder’s employment as a result of the Founder’s Disability (as  
233 defined below) as determined by a physician selected by the Found-  
234 er, and reasonably acceptable to the Company.

235 “Disability” shall mean (i) the Founder’s inability to engage  
236 in any substantial gainful activity by reason of any medically deter-  
237 minable physical or mental impairment that can be expected to re-  
238 sult in death or can be expected to last for a continuous period of  
239 not less than twelve (12) months;

240 (ii) the Founder is, by reason of any medically determina-  
241 ble physical or mental impairment that can be expected to result in  
242 death or can be expected to last for a continuous period of not less  
243 than twelve (12) months, receiving income replacement benefits for  
244 a period of not less than three (3) months under an accident and  
245 health plan covering the Founder; or

246 (iii) the Founder is determined to be totally disabled by the  
247 Social Security Administration.



248 (c) Cause. The Company shall have the right to terminate the  
249 Founder's employment for "Cause." For purposes of this Agreement,  
250 the Company shall have "Cause" to terminate the Founder's em-  
251 ployment only upon the Founder's:

252 (i) willful gross misconduct or conviction of a felony after the  
253 Effective Date that, in either case, results in material and demon-  
254 strable damage to the business or reputation of the Company; or

255 (ii) willful and continued failure to perform her duties hereun-  
256 der

257 (other than such failure resulting from legal necessity or  
258 after the issuance of a Notice of Termination by the Founder for  
259 Good Reason)

260 within ten business days after the Company delivers to her  
261 a written demand for performance that specifically identifies the ac-  
262 tions to be performed.

263 For purposes of this Section 6(c), no act or failure to act by  
264 the Founder shall be considered "willful" if such act is done by the  
265 Founder in the good faith belief that such act is or was to be benefi-  
266 cial to the Company or one or more of its businesses,

267 or such failure to act is due to the Founder's good faith be-  
268 lief that such action would be materially harmful to the Company or  
269 one of its businesses.

270 Cause shall not exist unless and until the Company has de-  
271 livered to the Founder a copy of a resolution duly adopted by a ma-  
272 jority of the Board (excluding the Founder for purposes of determin-  
273 ing such majority)

274 at a meeting of the Board called and held for such purpose  
275 after reasonable (but in no event less than thirty days') notice to the  
276 Founder

277 and an opportunity for the Founder, together with her  
278 counsel, to be heard before the Board,

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**Comment [25]:** "Cause": The definition of "cause" is often intensely scrutinized by executives' counsel when negotiating employment agreements, because termination *without* cause usually entitles the executive to significant severance pay.

D. C. Toedt 3/24/14 10:45 PM

**Comment [26]:** "Good faith belief": Good faith almost always raises fact issues that typically must be tried, as opposed to being decided on summary judgment.

Some contracts of this kind also state that "cause" does not exist if the executive takes an action in reliance on advice of *the company's* general counsel or of the company's outside counsel.

279 finding that in the good faith opinion of the Board that  
280 “Cause” exists, and specifying the particulars thereof in detail.

281 This Section 6(c) shall not prevent the Founder from chal-  
282 lenging in any court of competent jurisdiction the Board’s determi-  
283 nation that Cause exists or that the Founder has failed to cure any  
284 act (or failure to act) that purportedly formed the basis for the  
285 Board’s determination.

286 **(d) Good Reason.** The Founder may terminate her employ-  
287 ment for “Good Reason” after giving the Company detailed written  
288 notice thereof, if the Company shall have failed to cure the event or  
289 circumstance constituting “Good Reason” within ten business days  
290 after receiving such notice.

291 Good Reason shall mean the occurrence of any of the fol-  
292 lowing without the written consent of the Founder:

293 (i) the assignment to the Founder of duties materially incon-  
294 sistent with this Agreement or a material change in her titles or au-  
295 thority;

296 (ii) any failure by the Company to comply with Section 5 hereof  
297 in any material way;

298 (iii) the requirement of the Founder to relocate to locations  
299 other than those provided in Section 4 hereof;

300 (iv) the failure of the Company to comply with and satisfy Sec-  
301 tion 12(a) of this Agreement; or

302 (v) any material breach of this Agreement by the Company.

303 The Founder’s continued employment shall not constitute  
304 consent to, or a waiver of rights with respect to, any act or failure to  
305 act constituting Good Reason hereunder.

306 (e) Without Cause. The Company shall have the right to termi-  
307 nate the Founder’s employment hereunder without Cause by  
308 providing the Founder with a Notice of Termination.

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**Comment [27]:** “Good faith opinion”: See the comment above concern-  
ing the need to litigate good faith.

D. C. Toedt 3/24/14 10:48 PM

**Comment [28]:** “Good Reason”: This is another standard deal structure,  
allowing the executive to quit and get severance (a “golden parachute”) in  
certain events.

309 (f) Without Good Reason. The Founder shall have the right to  
310 terminate her employment hereunder without Good Reason by  
311 providing the Company with a Notice of Termination.

312 **7. Termination Procedure.**

313 **(a) Notice of Termination.** Any termination of the Founder’s  
314 employment by the Company or by the Founder during the Em-  
315 ployment Period (other than pursuant to Section 6(a)) shall be  
316 communicated by written Notice of Termination to the other party.

317 For purposes of this Agreement, a “Notice of Termination”  
318 shall mean a notice indicating the specific termination provision in  
319 this Agreement relied upon and setting forth in reasonable detail the  
320 facts and circumstances claimed to provide a basis for termination  
321 of the Founder’s employment under that provision.

322 **(b) Date of Termination.** “Date of Termination” shall mean

323 (i) if the Founder’s employment is terminated by her  
324 death, the date of her death,

325 (ii) if the Founder’s employment is terminated pursuant to  
326 Section 6(b), thirty (30) days after the date of receipt of the Notice  
327 of Termination (provided that the Founder does not return to the  
328 substantial performance of her duties on a full-time basis during  
329 such thirty (30) day period), and

330 (iii) if the Founder’s employment is terminated for any  
331 other reason, the date on which a Notice of Termination is given or  
332 any later date (within thirty (30) days after the giving of such notice)  
333 set forth in such Notice of Termination.

334 **8. Compensation upon Termination or During Disability.** In the  
335 event the Founder is disabled or her employment terminates during  
336 the Employment Period, the Company shall provide the Founder  
337 with the payments and benefits set forth below.

338 The Founder acknowledges and agrees that the payments  
339 set forth in this Section 8 constitute liquidated damages for termina-  
340 tion of her employment during the Employment Period.

D. C. Toedt 3/24/14 10:49 PM

**Comment [29]:** “Compensation upon Termination”: This is often inten-  
sively-negotiated.

341 (a) **Termination by Company without Cause or by Founder for**  
342 **Good Reason.** If the Founder's employment is terminated by the  
343 Company without Cause (other than Disability) or by the Founder for  
344 Good Reason, subject in all respects to the application of Section  
345 20(b) below:

346 (i) the Company shall pay to the Founder, on or before the  
347 Date of Termination, a lump sum payment equal to the sum of  
348 (A) Talent Compensation and accrued vacation pay through the Date  
349 of Termination, (B) three million dollars (\$3,000,000), and (C) the  
350 higher of (1) \$5,000,000 or (2) three times the highest Annual Bonus  
351 paid with respect to any fiscal year beginning during the Employ-  
352 ment Period;

353 (ii) the Company shall continue to provide the Founder and her  
354 eligible spouse and dependents for a period equal to the greater of  
355 (A) the remaining term of the Employment Period, or (B) three years  
356 following the Date of Termination, the medical, hospitalization, den-  
357 tal and life insurance programs provided for in Section 5(g), as if she  
358 had remained employed;

359 provided, that if the Founder, her spouse or her eligible  
360 dependents cannot continue to participate in the Company pro-  
361 grams providing such benefits, the Company shall arrange to provide  
362 the Founder and her spouse and dependents with the economic  
363 equivalent of the benefits they otherwise would have been entitled  
364 to receive under such plans and programs;

365 and provided, further, that such benefits shall terminate  
366 on the date or dates the Founder becomes eligible to receive equiva-  
367 lent coverage and benefits under the plans and programs of a sub-  
368 sequent employer at an equivalent cost to the Founder (such cover-  
369 age and benefits to be determined on a coverage-by-coverage, or  
370 benefit-by-benefit, basis);

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**Comment [30]:** By law, companies usually MUST pay accrued wages or salary (and, usually vacation pay), even if termination is for cause.

D. C. Toedt 3/24/14 10:50 PM

**Comment [31]:** Continuation of health insurance is a frequently-negotiated issue. COBRA insurance must be offered, but the employee might have to pay for it.

371 (iii) the Company shall, consistent with past practice, reim-  
372 burse the Founder pursuant to Section 5(e) for business expenses  
373 incurred but not paid prior to such termination of employment;

374 (iv) until the third anniversary of the Date of Termination, the  
375 Company shall continue to provide the Founder with (A) the benefits  
376 set forth in Section 5(d) hereof and (B) an office and an assistant in  
377 each of New York, New York and Westport, Connecticut; and

378 (v) the Founder shall be entitled to any other rights, compen-  
379 sation and/or benefits as may be due to the Founder in accordance  
380 with the terms and provisions of any agreements, plans or programs  
381 of the Company (other than any severance-based plan or program).

382 The payments and benefits provided for as subclause  
383 (A) of clause (i) above and in clause (iii) above are hereinafter re-  
384 ferred to as the "Accrued Obligations."

385 To the extent any of the benefits provided for in clauses  
386 (ii) — (v) above are taxable to the Founder, and except as permitted  
387 by Section 409A (as defined in Section 20(a) below), any right to re-  
388 imbursement or in-kind benefits will not be subject to liquidation or  
389 exchange for another benefit, the amount of expenses eligible for  
390 reimbursement, or in-kind benefits,

391 provided during any taxable year it will not affect the ex-  
392 penses eligible for reimbursement in a later taxable year, and any  
393 payments for reimbursements will be paid on or before the last day  
394 of the taxable year following the taxable year in which the expense  
395 was incurred.

396 **(b) Cause or by Founder without Good Reason.** If the Found-  
397 er's employment is terminated by the Company for Cause or by the  
398 Founder other than for Good Reason, then the Company shall pro-  
399 vide the Founder with her Accrued Obligations and shall have no fur-  
400 ther obligation to the Founder hereunder.

401 **(c) Disability.** During any period that the Founder fails to per-  
402 form her duties hereunder as a result of Disability, the Founder shall

D. C. Toedt 3/24/14 10:51 PM

**Comment [32]:** Reimbursement of expenses incurred is also usually re-  
quired by law.

D. C. Toedt 3/24/14 10:53 PM

**Comment [33]:** "Section 409A" refers to a potentially-troublesome pro-  
vision of the [U.S.] Internal Revenue Code imposing severe tax penalties  
on attempts to defer compensation and the taxes that would otherwise be  
due on deferred comp.

403 continue to receive her full Talent Compensation set forth in Section  
404 5(a) until her employment is terminated pursuant to Section 6(b).

405 In the event the Founder's employment is terminated for  
406 Disability pursuant to Section 6(b), the Company shall provide the  
407 Founder with the excess, if any, of her full Talent Compensation over  
408 the amount of any long-term disability benefits that she receives  
409 under the Company's welfare benefit plans and programs providing  
410 'disability pay' within the meaning of Treasury Regulation Sec-  
411 tion 31.3121(v)(2)-1(b)(4)(iv)(C), payable in accordance with the  
412 normal payroll practices of the Company, for the remainder of the  
413 Employment Period and shall have no further obligations to the  
414 Founder hereunder.

415 **(d) Death.** If the Founder's employment is terminated by her  
416 death, the Company shall provide to the Founder's beneficiary, legal  
417 representatives or estate, as the case may be, the Founder's full Tal-  
418 ent Compensation (less any long-term disability benefits paid to the  
419 Founder under the Company's welfare benefit plans and programs  
420 providing 'disability pay' within the meaning of Treasury Regulation  
421 Section 31.3121(v)(2)-1(b)(4)(iv)(C)), payable in accordance with the  
422 normal payroll practices of the Company, for a period equal to the  
423 remaining term of the Employment Period and shall have no further  
424 obligations hereunder.

425 **(e) Mitigation.** The Founder shall not be required to mitigate  
426 damages with respect to the termination of her employment under  
427 this Agreement by seeking other employment or otherwise,  
428 and there shall be no offset against amounts due the  
429 Founder under this Agreement on account of subsequent employ-  
430 ment except as specifically provided in this Section 8.

431 Additionally, amounts owed to the Founder under this  
432 Agreement shall not be offset by any claims the Company may have  
433 against the Founder, and the Company's obligation to make the  
434 payments provided for in this Agreement, and otherwise to perform

D. C. Toedt 3/24/14 10:55 PM

**Comment [34]:** This could end up being a generous death benefit.

D. C. Toedt 3/24/14 10:56 PM

**Comment [35]:** So if Martha gets fired without cause, she gets her full severance, whether or not she seeks other work.

435 its obligations hereunder, shall not be affected by any other circum-  
436 stances, including, without limitation, any counterclaim, recoup-  
437 ment, defense or other right which the Company may have against  
438 the Founder or others.

**9. Confidential Information; Noncompetition; Nonsolicitation; Nondisparagement.**

439 **(a) Confidential Information.** Except as may be required or ap-  
440 propriate in connection with her carrying out her duties under this  
441 Agreement,

442 the Founder shall not, without the prior written consent of  
443 the Company or as may otherwise be required by law or any legal  
444 process, or as is necessary in connection with any adversarial pro-  
445 ceeding against the Company

446 (in which case the Founder shall cooperate with the Com-  
447 pany in obtaining a protective order at the Company's expense  
448 against disclosure by a court of competent jurisdiction),

449 communicate, to anyone

450 other than the Company and those designated by the  
451 Company or on behalf of the Company in the furtherance of its busi-  
452 ness or to perform her duties hereunder,

453 any trade secrets, confidential information, knowledge or  
454 data relating to the Company, its affiliates or any businesses or in-  
455 vestments of the Company or its affiliates,

456 obtained by the Founder during the Founder's employ-  
457 ment by the Company and MSLO LLC

458 that is not generally available public knowledge (other  
459 than by acts by the Founder in violation of this Agreement.)

460 **(b) Noncompetition.** During the Employment Period and until  
461 the 12-month anniversary of the Founder's Date of Termination if  
462 the Founder's employment is terminated by the Company for Cause  
463 or the Founder terminates employment without Good Reason, the

D. C. Toedt 4/1/14 6:46 AM

**Comment [36]:** Non-competes are tightly regulated in Texas. (California doesn't allow post-employment non-competes at all, and in fact prohibits them.)

464 Founder shall not engage in or become associated with any Compet-  
465 itive Activity.

466 For purposes of this Section 9(b), a “Competitive Activity”  
467 shall mean any business or other endeavor

468 that engages in any country in which the Company has

469 significant business operations to a significant degree

470 in a business that directly competes with all or any sub-

471 stantial part of any of the Company’s businesses of

472 (i) producing television and other video programs,

473 (ii) designing, developing, licensing, promoting and selling

474 merchandise through catalogs, direct marketing, Internet commerce

475 and retail stores of the product categories in which the Company so

476 participates using the Founder’s name, likeness, image, or voice to

477 promote or market any such product or service,

478 (iii) the creation, publication or distribution of regular or

479 special issues of magazines, and

480 (iv) any other business in which the Company is engaged

481 during the term of this Agreement (the activities described in claus-

482 es (i) through (iv), in each case determined as of the date of the ac-

483 tion alleged to be Competitive Activity, (the “Businesses”);

484 provided, that, a Competitive Activity shall not include

485 (i) any speaking engagement to the extent such speaking engage-

486 ment does not promote or endorse a product or service which is

487 competitive with any product or service of the Company,

488 (ii) the writing of any book or article relating to subjects

489 other than the Businesses (e.g., nonfiction relating to the Founder’s

490 career or general business advice) or

491 (iii) the television, video or music business so long as such

492 activity does not relate to the Businesses.

493 The Founder shall be considered to have become “associ-

494 ated with a Competitive Activity” if she becomes involved as an

495 owner, employee, officer, director, independent contractor, agent,

D. C. Toedt 4/1/14 6:47 AM

**Comment [37]:** “In any country in which the Company has significant business operations” – query whether this is a reasonable geographic scope, as is generally required for enforceability in U.S. jurisdictions.

D. C. Toedt 4/1/14 6:49 AM

**Comment [38]:** All these “provided’s” in a long paragraph are really hard to read (and, IMHO, reflect seriously-lazy and –selfish drafters).



496 partner, advisor, or in any other capacity calling for the rendition of  
497 the Founder's personal services, with any individual, partnership,  
498 corporation or other organization that is engaged in a Competitive  
499 Activity and her involvement relates to a significant extent to the  
500 Competitive Activity of such entity;

501 provided, however, that the Founder shall not be prohibit-  
502 ed from

503 (a) owning less than one percent (1%) of any publicly trad-  
504 ed corporation, whether or not such corporation is in competition  
505 with the Company or

506 (b) serving as a director of a corporation or other entity  
507 the primary business of which is not a Competitive Activity.

508 If, at any time, the provisions of this Section 9(b) shall be  
509 determined to be invalid or unenforceable, by reason of being vague  
510 or unreasonable as to area, duration or scope of activity, this Sec-  
511 tion 9(b) shall be considered divisible and shall become and be im-  
512 mediately amended to only such area, duration and scope of activity

513 as shall be determined to be reasonable and enforceable by the  
514 court or other body having jurisdiction over the matter; and the  
515 Founder agrees that this Section 9(b) as so amended shall be valid  
516 and binding as though any invalid or unenforceable provision had  
517 not been included herein.

518 (c) **Nonsolicitation.** During the Employment Period, and for  
519 12 months after the Founder's Date of Termination if the Founder's  
520 employment is terminated by the Company for Cause or the Found-  
521 er terminates employment without Good Reason, the Founder will  
522 not, directly or indirectly,

523 (1) solicit for employment by other than the Company any  
524 person (other than any personal secretary or assistant hired to work  
525 directly for the Founder) employed by the Company or its affiliated  
526 companies as of the Date of Termination,

D. C. Toedt 4/1/14 6:50 AM

**Comment [39]:** "Immediately amended": This is known as a "blue-pencil" clause; in some jurisdictions, courts are not allowed to honor such clauses.

D. C. Toedt 4/1/14 6:52 AM

**Comment [40]:** Nonsolicitation obligations are fairly conventional – and to be distinguished from the no-hire / no-solicit agreement between a bunch of Silicon Valley companies such as Apple, Google, Pixar, and others.

527 (2) solicit for employment by other than the Company any  
528 person known by the Founder (after reasonable inquiry) to be em-  
529 ployed at the time by the Company or its affiliated companies as of  
530 the date of the solicitation or

531 (3) solicit any customer or other person with a business re-  
532 lationship with the Company or any of its affiliated companies to  
533 terminate, curtail or otherwise limit such business relationship.

534 **(d) Non-disparagement.** During the Employment Term and for  
535 two (2) years thereafter,

536 (i) neither the Founder, nor anyone acting on behalf of the  
537 Founder, shall make or publish any disparaging or derogatory state-  
538 ment (whether written or oral) regarding the Company or any of its  
539 affiliated companies or businesses, or the current directors or cur-  
540 rent executive vice presidents and above of any of them, in any pub-  
541 lic communication, or in any non-public communication with any  
542 member of the media or with any other person which may be rea-  
543 sonably expected to be publicly disseminated to the press or the  
544 media, and

545 (ii) neither the Company nor any of its affiliated companies  
546 or businesses or their affiliates, current directors or current execu-  
547 tive vice presidents and above, nor anyone authorized by the Com-  
548 pany to speak on behalf of the Company, shall make or publish any  
549 disparaging or derogatory statement (whether written or oral) re-  
550 garding the Founder in any public communication, or in any non-  
551 public communication with any member of the media or with any  
552 other person which may be reasonably expected to be publicly dis-  
553 seminated to the press or the media.

554 **(e) Injunctive Relief.** In the event of a breach or threatened  
555 breach of this Section 9, the Founder agrees that the Company shall  
556 be entitled to injunctive relief in a court of appropriate jurisdiction  
557 to remedy any such breach or threatened breach, the Founder ac-  
558 knowledging that damages would be inadequate and insufficient.

D. C. Toedt 4/1/14 6:53 AM

**Comment [41]:** Non-disparagement: What about deposition testimony?

D. C. Toedt 4/1/14 6:53 AM

**Comment [42]:** Injunctive relief: Query whether this can constitutional-ly apply to the "Non-disparagement" clause.

559 **10. Indemnification.**

560 (a) **General.** The Company agrees that if the Founder is made a  
561 party or is threatened to be made a party to any action, suit or pro-  
562 ceeding, whether civil, criminal, administrative or investigative (a  
563 "Proceeding"),

564 by reason of the fact that the Founder is or was a trustee,  
565 director, officer or employee of the Company, MSLO LLC, or any  
566 predecessor to MSLO LLC (including any sole proprietorship owned  
567 by the Founder) or any of their affiliates

568 or is or was serving at the request of the Company, MSLO  
569 LLC, any predecessor to MSLO LLC (including any proprietorship  
570 owned by the Founder), or any of their affiliates as a trustee, direc-  
571 tor, officer, member, employee or agent of another corporation or a  
572 partnership, joint venture, limited liability company, trust or other  
573 enterprise, including, without limitation, service with respect to em-  
574 ployee benefit plans,

575 whether or not the basis of such Proceeding is alleged ac-  
576 tion in an official capacity as a trustee, director, officer, member,  
577 employee or agent while serving as a trustee, director, officer,  
578 member, employee or agent,

579 the Founder shall be indemnified and held harmless by the  
580 Company to the fullest extent authorized by Delaware law, as the  
581 same exists or may hereafter be amended, against all Expenses in-  
582 curred or suffered by the Founder in connection therewith.

583 Such indemnification and this Section 10(a) shall continue  
584 as to the Founder even if the Founder has ceased to be an officer,  
585 director, trustee or agent, or is no longer employed by the Company  
586 and shall inure to the benefit of her heirs, executors and  
587 administrators or upon any termination of this Agreement.

588 In addition, the Company shall indemnify and hold harm-  
589 less the Founder in connection with any claim for indemnification

590 under clause (bb) of paragraph 11(a) of the Production Agreement  
591 (as defined in the Prior Employment Agreement).

592 **(b) Expenses.** As used in this Agreement, the term “Expenses”  
593 shall include, without limitation, damages, losses, judgments, liabili-  
594 ties, fines, penalties, excise taxes, settlements, and costs, attorneys’  
595 fees, accountants’ fees, and disbursements and costs of attachment  
596 or similar bonds, investigations, and any expenses of establishing a  
597 right to indemnification under this Agreement.

598 **(c) Enforcement.** If a claim or request under this Section 10 is  
599 not paid by the Company or on its behalf, within thirty (30) days af-  
600 ter a written claim or request has been received by the Company,  
601 the Founder may at any time thereafter bring suit against  
602 the Company to recover the unpaid amount of the claim or request  
603 and if successful in whole or in part, the Founder shall be  
604 entitled to be paid also the expenses of prosecuting such suit. All ob-  
605 ligations for indemnification hereunder shall be subject to, and paid  
606 in accordance with, applicable Delaware law.

607 **(d) Partial Indemnification.** If the Founder is entitled under  
608 any provision of this Agreement to indemnification by the Company  
609 for some or a portion of any Expenses, but not, however, for the to-  
610 tal amount thereof, the Company shall nevertheless indemnify the  
611 Founder for the portion of such Expenses to which the Founder is  
612 entitled.

613 **(e) Advance of Expenses.** Expenses incurred by the Founder in  
614 connection with any Proceeding shall be paid by the Company in ad-  
615 vance upon request of the Founder that the Company pay such Ex-  
616 penses,

617 but only in the event that the Founder shall have delivered  
618 in writing to the Company

619 (i) an undertaking to reimburse the Company for Expenses  
620 with respect to which the Founder is not entitled to indemnification  
621 and (ii) a statement of her good faith belief that the standard of

D. C. Toedt 4/1/14 6:56 AM

**Comment [43]:** Advances of expenses can be very important to executives – they might not have the cash to pay their lawyers (who likely will be expensive). That’s especially true if the government were to freeze the executive’s bank account and other assets.

D. C. Toedt 4/1/14 6:59 AM

**Comment [44]:** “Undertaking to reimburse the Company”: This is often required by corporate law as a condition of the Company’s being obligated to advance expenses even if the executive might turn out not to be entitled to defense and indemnity. (As a practical matter, if the executive isn’t entitled to indemnity, s/he might not have the assets with which to reimburse the company.)

622 conduct necessary for indemnification by the Company has been  
623 met.

624 **(f) Notice of Claim.** The Founder shall give to the Company no-  
625 tice of any claim made against her for which indemnification will or  
626 could be sought under this Agreement.

627 In addition, the Founder shall give the Company such in-  
628 formation and cooperation as it may reasonably require and as shall  
629 be within the Founder's power

630 and at such times and places as are convenient for the  
631 Founder.

632 **(g) Defense of Claim.** With respect to any Proceeding as to  
633 which the Founder notifies the Company of the commencement  
634 thereof:

635 (i) The Company will be entitled to participate therein at its  
636 own expense;

637 (ii) Except as otherwise provided below, to the extent that it  
638 may wish, the Company will be entitled to assume the defense  
639 thereof, with counsel reasonably satisfactory to the Founder,  
640 which in the Company's sole discretion may be regular  
641 counsel to the Company

642 and may be counsel to other officers and directors of the  
643 Company or any subsidiary.

644 The Founder also shall have the right to employ her own  
645 counsel in such action, suit or proceeding if she reasonably con-  
646 cludes that failure to do so would involve a conflict of interest be-  
647 tween the Company and the Founder, and under such circumstances  
648 the fees and expenses of such counsel shall be at the expense of the  
649 Company.

650 (iii) The Company shall not be liable to indemnify the Founder  
651 under this Agreement for any amounts paid in settlement of any ac-  
652 tion or claim effected without its written consent.

D. C. Toedt 4/1/14 7:00 AM

Comment [45]: Well, well ....

D. C. Toedt 4/1/14 7:00 AM

Comment [46]: The Company might have its own interests to protect.

D. C. Toedt 4/1/14 7:01 AM

Comment [47]: This tries to get out in front of later claims of conflict of interest.

D. C. Toedt 4/1/14 7:01 AM

Comment [48]: This is fairly typical of defense clauses.

653 The Company shall not settle any action or claim in any  
654 manner which would impose any penalty that would not be paid di-  
655 rectly or indirectly by the Company or limitation on the Founder  
656 without the Founder's written consent.

657 Neither the Company nor the Founder will unreasonably  
658 withhold or delay their consent to any proposed settlement.

659 **(h) Non-Exclusivity.** The right to indemnification and the pay-  
660 ment of expenses incurred in defending a Proceeding in advance of  
661 its final disposition conferred in this Section 10 shall not be exclusive  
662 of any other right which the Founder may have or hereafter may ac-  
663 quire under any statute or certificate of incorporation or by-laws of  
664 the Company or any subsidiary, agreement, vote of shareholders or  
665 disinterested directors or trustees or otherwise.

666 **(i) Timing of Reimbursements or Expenses.** To the extent re-  
667 quired under Section 409A (as defined in Section 20(a) below), any  
668 reimbursements or expenses provided under this Section 10 shall be  
669 subject to the limitations on payment and reimbursement of taxable  
670 expenses set forth in Section 8(a).

671 **11. Legal Fees and Expenses.** If any contest or dispute shall arise  
672 between the Company and the Founder regarding any provision of  
673 this Agreement, the Company shall reimburse the Founder for all le-  
674 gal fees and expenses reasonably incurred by the Founder in con-  
675 nection with such contest or dispute,

676 but only if the Founder prevails to a substantial extent  
677 with respect to the Founder's claims brought and pursued in con-  
678 nection with such contest or dispute.

679 Such reimbursement shall be made as soon as practicable  
680 following the resolution of such contest or dispute (whether or not  
681 appealed) to the extent the Company receives written evidence of  
682 such fees and expenses.

D. C. Toedt 4/1/14 7:02 AM

**Comment [49]:** Ah, the Internal Revenue Code's rules on taxation of de-  
ferred compensation raises its ugly head again ....

D. C. Toedt 4/1/14 7:02 AM

**Comment [50]:** This is a one-way reimbursement provision.

D. C. Toedt 4/1/14 7:04 AM

**Comment [51]:** Query: Is this weaker than the usual "prevailing party"?

683 In addition to the foregoing, the Company shall reimburse  
684 the Founder for all reasonable legal fees and expenses incurred in  
685 connection with the negotiation and execution of this Agreement.

686 To the extent required under Section 409A (as defined in  
687 Section 20(a) below), any reimbursements or expenses provided un-  
688 der this Section 11 shall be subject to the limitations on payment  
689 and reimbursement of taxable expenses set forth in Section 8(a).

690 **12. Successors; Binding Agreement.**

691 **(a) Company's Successors.** No rights or obligations of the  
692 Company under this Agreement may be assigned or transferred,  
693 except that the Company shall require any successor  
694 (whether direct or indirect, by purchase, merger, consolidation or  
695 otherwise) to all or substantially all of the business and/or assets of  
696 the Company to expressly assume and agree to perform this Agree-  
697 ment in the same manner and to the same extent that the Company  
698 would be required to perform it if no such succession had taken  
699 place.

700 As used in this Agreement, "Company" shall include any  
701 successor to its business and/or assets (by merger, purchase or oth-  
702 erwise) which executes and delivers the agreement provided for in  
703 this Section 12 or which otherwise becomes bound by all the terms  
704 and provisions of this Agreement by operation of law.

705 **(b) Founder's Successors.** No rights or obligations of the  
706 Founder under this Agreement may be assigned or transferred by  
707 the Founder  
708 other than her rights to payments or benefits hereunder,  
709 which may be transferred only by will or the laws of descent and dis-  
710 tribution.

711 Upon the Founder's death, this Agreement and all rights of  
712 the Founder hereunder shall inure to the benefit of and be enforce-  
713 able by the Founder's beneficiary or beneficiaries, personal or legal

D. C. Toedt 4/1/14 7:05 AM

**Comment [52]:** This gives Martha Stewart's lawyers an incentive to do a really, really, REALLY good job negotiating – because the Company is paying the bills ....

D. C. Toedt 4/1/14 7:06 AM

**Comment [53]:** Note the difference in wording here from the usual assignment-consent requirement.

D. C. Toedt 4/1/14 7:07 AM

**Comment [54]:** Good thinking – plan for death, etc.

714 representatives, or estate, to the extent any such person succeeds  
715 to the Founder's interests under this Agreement.

716 If the Founder should die following her Date of Termina-  
717 tion while any amounts would still be payable to her hereunder if  
718 she had continued to live, all such amounts unless otherwise provid-  
719 ed herein shall be paid in accordance with the terms of this Agree-  
720 ment to such person or persons so appointed in writing by the  
721 Founder, or otherwise to her legal representatives or estate.

722 **13. Notice.** For the purposes of this Agreement, notices, demands  
723 and all other communications provided for in this Agreement shall  
724 be in writing and shall be deemed to have been duly given when de-  
725 livered either personally or by United States certified or registered  
726 mail, return receipt requested, postage prepaid, addressed as fol-  
727 lows:

728 If to the Founder:

729 At her residence address most recently filed with the Company.

730 If to the Company:

731 Martha Stewart Living Omnimedia, Inc.

732 11 West 42nd Street

733 New York, NY 10036

734 Attention: General Counsel

735 Tel: (212) 827-8000

736 Fax: (212) 827-8188

737 or to such other address as any party may have furnished to the  
738 others in writing in accordance herewith, except that notices of  
739 change of address shall be effective only upon receipt.

740 **14. Miscellaneous.** No provisions of this Agreement may be  
741 amended, modified, or waived unless such amendment or modifica-  
742 tion is agreed to in writing signed by the Founder and by a duly au-  
743 thorized officer of the Company, and such waiver is set forth in writ-  
744 ing and signed by the party to be charged.

D. C. Toedt 4/1/14 7:08 AM

**Comment [55]:** Notice address: This is a good way to do it for employ-  
ees or other individuals, whose addresses can change from time to time.

D. C. Toedt 4/1/14 7:08 AM

**Comment [56]:** Note the wording – it does NOT require “notice” of an  
address change.

D. C. Toedt 4/1/14 7:09 AM

**Comment [57]:** Writing requirement: Will that always be enforceable?



745 No waiver by either party hereto at any time of any breach  
746 by the other party hereto of any condition or provision of this  
747 Agreement to be performed by such other party shall be deemed a  
748 waiver of similar or dissimilar provisions or conditions at the same or  
749 at any prior or subsequent time.

750 No agreements or representations, oral or otherwise, ex-  
751 press or implied, with respect to the subject matter hereof have  
752 been made by either party that are not set forth expressly in this  
753 Agreement.

754 The respective rights and obligations of the parties here-  
755 under of this Agreement shall survive the Founder's termination of  
756 employment and the termination of this Agreement to the extent  
757 necessary for the intended preservation of such rights and obliga-  
758 tions.

759 Except as otherwise provided in Section 10 hereof with re-  
760 spect to indemnification under Delaware law, the validity, interpre-  
761 tation, construction and performance of this Agreement shall be  
762 governed by the laws of the State of New York without regard to its  
763 conflicts of law principles.

764 **15. Validity.** The invalidity or unenforceability of any provision or  
765 provisions of this Agreement shall not affect the validity or enforce-  
766 ability of any other provision of this Agreement, which shall remain  
767 in full force and effect.

768 **16. Counterparts.** This Agreement may be executed in one or  
769 more counterparts, each of which shall be deemed to be an original  
770 but all of which together will constitute one and the same instru-  
771 ment.

772 **17. Entire Agreement.** This Agreement, the Intellectual Property  
773 License Agreement and Preservation Agreement, dated as of Octo-  
774 ber 22, 1999, and the Intangible Asset License Agreement, dated  
775 June 13, 2008, as amended, set forth the entire agreement of the  
776 parties hereto in respect of the subject matter contained herein and

D. C. Toedt 4/1/14 7:10 AM

**Comment [58]:** This is an unusual way of doing an entire-agreement provision – and it overlaps with the actual entire-agreement clause below.

D. C. Toedt 4/1/14 7:09 AM

**Deleted:** which

778 supersede all prior agreements, promises, covenants, arrangements,  
779 communications, representations or warranties, whether oral or  
780 written, by any officer, employee or representative of any party  
781 hereto in respect of such subject matter including, without limita-  
782 tion, the Prior Employment Agreement.

783 The parties agree that the Prior Employment Agreement  
784 has been terminated effective as of 11.59 PM on the day immediate-  
785 ly preceding the Effective Date.

786 **18. Withholding.** All payments hereunder shall be subject to any  
787 required withholding of Federal, state and local taxes pursuant to  
788 any applicable law or regulation.

789 **19. Section Headings.** The section headings in this Employment  
790 Agreement are for convenience of reference only, and they form no  
791 part of this Agreement and shall not affect its interpretation.

792 **20. Section 409A.**

793 (a) The intent of the parties is that payments and benefits un-  
794 der this Agreement comply with Section 409A of the Internal Reve-  
795 nue Code of 1986, as amended, and the guidance issued thereunder  
796 (“Section 409A”) and, accordingly, to the maximum extent permit-  
797 ted, all provisions of this Agreement shall be construed in a manner  
798 consistent with the requirements for avoiding taxes or penalties un-  
799 der Section 409A. Founder is hereby advised to seek independent  
800 advice from her tax advisor(s) with respect to any payments or ben-  
801 efits under this Agreement. Notwithstanding the foregoing, the  
802 Company does not guarantee the tax treatment of any payments or  
803 benefits provided under this Agreement, whether pursuant to the  
804 Code, federal, state, local or foreign tax laws and regulations.

805 (b) If the Executive is deemed on the date of termination of her  
806 “separation from service” with the Company to be a “specified em-  
807 ployee”, each within the meaning of Section 409A(a)(2)(B) of the  
808 Code, then with regard to any payment or the providing of any ben-  
809 efit under this Agreement, and any other payment or the provision

D. C. Toedt 4/1/14 7:11 AM

**Comment [59]:** It might have been better to put this in a separate para-  
graph for easier skimming.

810 of any other benefit that is required to be delayed in compliance  
811 with Section 409A(a)(2)(B) of the Code, such payment or benefit  
812 shall not be made or provided prior to the earlier of (i) the expiration  
813 of the six-month period measured from the date of the Founder's  
814 separation from service, or (ii) the date of the Founder's death, if  
815 and to the extent such six-month delay is required to comply with  
816 Section 409A(a)(2)(B) of the Code. In such event, on or promptly af-  
817 ter the first business day following the six-month-delay period, all  
818 payments delayed pursuant to this Section 20 (whether they would  
819 have otherwise been payable in a single sum or in installments in the  
820 absence of such delay) shall be paid or reimbursed to the Executive  
821 in a lump sum, and any remaining payments and benefits due under  
822 this Agreement shall be paid or provided in accordance with the  
823 normal payment dates specified for them herein.

824 (c) If under this Agreement, an amount is to be paid in install-  
825 ments, each installment shall be treated as a separate payment for  
826 purposes of Treasury Regulation Section 1.409A-2(b)(2)(iii).

827 **IN WITNESS WHEREOF**, the parties hereto have executed this  
828 Agreement on this 9<sup>th</sup> day of April, 2009.