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Attorneys for Plaintiffs and Counterclaim Defendants Manwin Licensing International S.A.R.L., a Luxemburg Limited Liability Company (S.A.R.L.), and Digital Playground, Inc., a California Corporation

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

WESTERN DIVISION - ROYBAL FEDERAL BUILDING

MANWIN LICENSING INTERNATIONAL S.A.R.L., a Luxemburg limited liability company (S.A.R.L.); and DIGITAL PLAYGROUND, INC., a California corporation,

Plaintiffs,

v.

ICM REGISTRY, LLC, d/b/a .XXX, a Delaware limited liability corporation; INTERNET CORPORATION FOR ASSIGNED NAMES AND NUMBERS, a California nonprofit public benefit corporation; and DOES 1-10,

Defendants.

AND RELATED COUNTERCLAIM

CASE NO. CV11-9514 PSG (JCGX)
The Honorable Philip S. Gutierrez

DECLARATION OF MICHAEL E. CHAIT IN SUPPORT OF COUNTERCLAIM DEFENDANTS' REPLY IN SUPPORT OF THEIR SPECIAL MOTION TO STRIKE PURSUANT TO CALIFORNIA CODE OF CIVIL PROC. SEC. 425.16 (ANTI-SLAPP)

Courtroom: 880 Roybal Federal Building

Date: February 11, 2013

Time: 1:30 p.m

DECLARATION OF MICHAEL E. CHAIT

I, MICHAEL E. CHAIT, declare:

1. I am an attorney at law duly licensed to practice law in the State of California and before this Court. I am an associate in the law firm of Mitchell Silberberg & Knupp LLP, attorneys of record for Plaintiffs and Counterclaim Defendants Manwin Licensing International S.À.R.L. and Digital Playground, Inc. (collectively, "Manwin"). I have personal knowledge of the following facts and, if called and sworn as a witness, could and would competently testify thereto.

2. I participated in the meet and confer process for Manwin's motion to dismiss and its special motion to strike ICM Registry, LLC's ("ICM") counterclaims and first amended counterclaims.

3. Following the filing of ICM's counterclaims, I was involved in drafting, and sending a meet and confer letter addressing various deficiencies in ICM's counterclaims. We sent that letter to ICM on or about October 17, 2012. The letter identified numerous deficiencies which rendered ICM's counterclaims insufficient, and subject to both a motion to dismiss and a special motion to strike, pursuant to California Code of Civil Procedure section 425.16. The letter explicitly stated that "[e]ach of ICM's California causes of action 'arise from' protected activity, namely speech critical of .XXX and alleged boycotts intended to express Manwin's disapproval of .XXX. This is quintessential protected activity under the anti-SLAPP statute." Attached as Exhibit 1 is a copy of Manwin's October 17, 2012 meet and confer letter.

4. On or about October 31, 2012, ICM sent a letter responding to Manwin's meet and confer letter. Attached as Exhibit 2 is a copy of ICM's October 31, 2012 response letter. The letter does not claim any of the identified speech is not the basis for its state law counterclaims.

5. ICM subsequently filed first amended counterclaims on November 13,

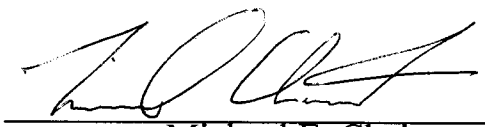
2012.

6. In spite of having the opportunity to remove its allegations regarding Manwin's speech in its first amended counterclaims, ICM continued to assert state law claims expressly based upon Manwin's speech, as set forth in detail in Manwin's special motion to strike.

7. In advance of the filing Manwin's special motion to strike ICM's first amended counterclaims, I telephonically met with ICM's counsel. During that conversation, we specifically discussed that Manwin intended to file a special motion to strike, given that the issues raised in its initial meet and confer letter had not been remedied by the amendment. During that call, ICM's counsel also did not contend that the speech was not part of its state law causes of action.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed this 28th day of January, 2013, at Los Angeles, California.



Michael E. Chait

EXHIBIT 1

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October 17, 2012

VIA E-MAIL ONLY (RSYBERT@GORDONREES.COM)
Richard Sybert
Gordon & Rees LLP
101 W. Broadway, Suite 1600
San Diego, CA 92101

Re: Manwin Licensing International S.a.r.l. v. ICM Registry, LLC et al.
Case No. CV 11-9514-PSG

Dear Mr. Sybert:

We write under Local Rule 7.3 about Manwin's intended: (a) Rule 12 motion to dismiss and/or strike portions of ICM's counterclaims; and (b) SLAPP motion to dismiss ICM's state law counterclaims. We sketch below the intended bases for these motions. Please let us know when you would be available to meet and confer on these motions. We would like if possible to complete our meet and confer by not later than next Tuesday October 24, 2012.

A. Sherman Act Claims

ICM asserts claims under the Sherman Act for alleged anticompetitive agreements in violation of Section 1, monopolization in violation of Section 2, attempted monopolization, and conspiracy to monopolize. These claims all are defective in a variety of respects.

1. Inadequate Market Definition

ICM has failed to allege a single adequately defined market, as required for any Sherman Act claim. As Judge Gutierrez has already properly observed:

> An antitrust plaintiff must identify the markets affected by [a defendant's] alleged antitrust violations. The plaintiff must allege both that a "relevant market" exists and that the defendant has power within that market. A relevant market can be broadly characterized in terms of the cross-elasticity of demand for or reasonable interchangeability of a given set of products or services. A relevant market must encompass the product at issue as well as all economic substitutes for the product. The validity of a relevant market is subject to factual inquiry and proof, but a court may

dismiss allegations of a relevant market if the definition is "facially unsustainable."

See Manwin Licensing Intern. S.A.R.L. v. ICM Registry, LLC, No. CV 11-9514 PSG (JCGx), 2012 WL 3962566, *7 (C.D. Cal. Aug. 14, 2012) (internal citations and quotation marks omitted).

ICM has not met this standard, but instead has vaguely and inconsistently alleged the market as being for "online adult entertainment," "search and access to online adult entertainment," or "adult entertainment tube sites." These market allegations are not only imprecise but significantly different. For example, a market for search and access to online adult entertainment would include Bing, Google, Yahoo, and many other large search engines. A market limited to online adult entertainment would presumably not include those companies, but only operators of adult websites. The definition of adult tube sites is particularly uncertain – since many sites include both user-generated free content and other paid content. However, no matter how defined, such a market would presumably be limited to a subset of adult website operators. In many cases, these vague definitions would plainly not include all substitutable products. For example, to the extent there is a workable definition of tube sites, adult content non-tube sites plainly can be substituted for adult content tube sites.

2. Inadequate Allegations of Monopoly or Market Power

For any Sherman Act claim, ICM must adequately allege monopoly or market power. *See, e.g., Manwin Licensing. v. ICM* at *7. In particular, for a Section 2 claim, ICM must allege facts, such as Manwin's particular share of the market and specified barriers to entry, demonstrating that Manwin has monopoly power. *See, e.g., McCabe Hamilton & Renny, Co. v. Matson Terminals, Inc.*, No. 08-00080 JMS/BMK, 2008 U.S. Dist. LEXIS 47428, at *23-29 (D. Haw. June 17, 2008) ("Plaintiff must assert some factual predicate to support its assertion that Defendant enjoys market power in the relevant market."); *Cargill Inc. v. Budine*, CV-F-07-349-LJO-SMS, 2007 U.S. Dist. LEXIS 67526, at *24 (E.D. Cal. Aug. 30, 2007) ("Progressive contends that Cargill purchases 'all' or 'essentially all' or 'much if not all' of the beef blood meal in the West Coast Region. Like the relevant market, market share is a question of fact; however, pursuant to *Twombly*, this Court 'must retain the power to insist upon some specificity in pleading' to ensure allegations are plausible. The allegations are 'labels and conclusions, and a formulaic recitation of the elements of a cause of action' which 'will not do.'"), *quoting Bell Atl. Corp. v. Twombly*, 127 S. Ct. 1955, 1966 (2007); *see also Rick-Mik Enters. v. Equilon Enters.*, LLC, 532 F.3d 963, 972-73 (9th Cir. 2008) (market power insufficiently supported by factual allegations).

ICM has not adequately alleged monopoly or market power for any of the inconsistent and vague markets it has asserted. For example, ICM can hardly contend that Manwin has monopoly power in the search market including Bing, Google, and Yahoo. Nor does ICM allege that Manwin has monopoly power even in the narrower market for adult entertainment sites. Indeed, ICM admits that defendants other than Manwin have the leading adult content web sites. *See* Cross-Complaint, ¶ 17.

3. Inadequate Allegations of Harm to Competition

Any Sherman Act claim requires proof of harm to competition. *See, e.g, Brantley v. NBC Universal, Inc.*, 675 F.3d 1192, 1198 (9th Cir. 2012) ("[P]laintiffs must plead an injury to competition beyond the impact on the plaintiffs themselves."). Mere harm to a single competitor, without harm to competition overall, is insufficient. *Id.* ICM fails to allege such harm. ICM in essence alleges that Manwin has attempted to injure and prevent ***it*** from conducting business. However, ICM is a mere indirect supplier (through registrars) of domain name registrations to adult-content web sites. There is and can be no allegation that even the outright elimination of ICM would harm competition in any search engine or adult website market. Bing, Yahoo, and Google would not be threatened by any absence of ICM. Nor do adult websites need .XXX in order to compete. As ICM vociferously and successfully argued in seeking dismissal of Manwin's affirmative market claims, adult web sites may reside on .com and other TLDs. Having asserted to the Court that adult web sites may fully compete from other TLDs, ICM is now estopped to argue that any alleged restrictions on .XXX would harm competition in any adult website market.

4. Inadequate Allegations of Antitrust Injury or Standing

Any Sherman Act claim requires proof of antitrust injury and antitrust standing. *Glen Holly Entertainment, Inc. v. Tektronix, Inc.*, 352 F. 3d 367, 371 (9th Cir. 2003); *American Ad Mgmt., Inc. v. Gen. Tel. Co. of Cal.*, 190 F.3d 1051, 1055 (9th Cir. 1999) (defining elements of antitrust injury). ICM has not alleged either element. Depending upon the alleged market, ICM is not even a market participant. For example, if the market is adult web sites, ICM is contractually precluded from operating such sites. At best, ICM is contending that it sells domain names to registrars who in turn sell such domain names to the market participants. ICM, as an indirect supplier to those participating in the allegedly harmed market, has neither standing nor cognizable antitrust injury.

5. Other Defects

For its Section 1 claims, ICM has only vaguely and without the requisite detail alleged the purportedly anticompetitive agreements. *See Kendall v. Visa*, 518 F. 3d 1042, 1047-48 (9th Cir. 2008) (requiring, for Section I purposes, detailed allegations of the allegedly improper agreements). Among the insufficient allegations are claims of improper agreements or conspiracies between Manwin and its affiliate Digital Playground. However, as a matter of law, such affiliates cannot engage in actionable antitrust conspiracies or agreements because they are considered a single entity for antitrust purposes. *See, e.g., Copperweld Corp v. Independence Tube Corp.*, 467 U.S. 752 (1984).

For its Section 2 claims, ICM has not adequately alleged the required predatory acts. *Verizon Communications, Inc. v. Trinko*, 540 U.S. 398, 407 (2004) (describing need for predatory acts). Many of the alleged acts are unquestionably not predatory. For example, ICM complains that Manwin aggressively negotiated for better terms and lower prices for .XXX

registry services. Such negotiation is quintessential competitive conduct encouraged by the antitrust laws.

For its attempted monopolization claim, ICM must adequately allege a dangerous probability of success. *See, e.g., Meridian Project Sys. v. Hardin Constr. Co.*, 404 F. Supp. 2d 1214, 1224 (E.D. Cal. 2005) ("While CMIC does define the relevant market, it provides no facts from which this court can infer that Meridian's conduct created a dangerous probability of it achieving market power. The bare legal conclusion to that effect is insufficient to satisfy even Rule 8(a)'s liberal pleading standard."). As further stated in 2 von Kalinowski, Antitrust Law and Trade Regulation, § 26.01 (2d ed. 2012):

> Market share is the principal measure used by courts to determine if there is a dangerous probability of success in achieving monopoly power. Yet market share alone may not suffice to demonstrate a dangerous probability of success .... Courts typically will find a dangerous probability where the defendant has a market share of 50 percent or more. Defendants with shares less than 30 percent are rarely determined to have a dangerous probability of succeeding. Those with shares between 30 percent and 50 percent will have a dangerous probability of success, if other factors are present.

ICM pleads nothing to meet this "dangerous probability" requirement.

B. Cartwright Act Claims

ICM's Cartwright Act claims generally fail for the same reason as its Sherman Act claims. ICM has not factually and plausibly pleaded the existence of an agreement, combination or conspiracy to restrain trade in a relevant market. *See, e.g., Drum v. San Fernando Valley Bar Assn.*, 182 Cal. App. 4th 247 (2010); *Freeman v. San Diego Assn. of Realtors*, 77 Cal. App. 4th 171 (1999); *Cal. ex rel. Van De Kamp v. Texaco*, 46 Cal. 3d 1147 (1988) (all stating Cartwright Act requirements).

C. Lanham Act Claims

ICM's Lanham Act claims fail for a variety of reasons.

First, Lanham Act claims based on allegedly false statement are subject to Rule 9 of the Federal Rules of Civil Procedure, and so must be pleaded with particularity. *See, e.g., EcoDisc Tech. AG v. DVD Format/Logo Licensing Corp.*, 711 F. Supp. 2d 1074, 1085 (C.D. Cal. 2010); *VIP Prods., LLC v. Kong Co. LLC*, No. CV10-0998-PHX-DGC, 2011 U.S. Dist. LEXIS 3158, 2011 WL 98992 (D. Ariz. Jan. 12, 2011); *RPost Holdings, Inc. v. Trustifi Corp.*, No. CV 11-2118 PSG (SHx), 2011 U.S. Dist. LEXIS 117260, at *8 (Oct. 11, 2011) (Gutierrez, J.). To satisfy Rule 9, ICM must allege the time, place, and specific content of the purported false

representations, as well as the specific persons who made them. *Schreiber Distrib. Co. v. Serv-Well Furniture Co.*, 806 F.2d 1393, 1401 (9th Cir. 1986). ICM has not pleaded these details.

Second, Lanham Act claims must be based on false representations of fact. *Southland Sod Farms v. Stover Seed Co.*, 108 F.3d 1134, 1139 (9th Cir. 1997). Opinions or "puffery" will not suffice. *Id.* at 1145. Furthermore, the plaintiff must "set forth an explanation as to why the statement or omission [of fact] complained of was false and misleading." *In re Epogen & Aranesp Off-Label Mktg. & Sales*, No. MDL 08-1934 PSG (AGRx), 2009 U.S. Dist. LEXIS, at * 14 (C.D. Cal. June 14, 2009) (Gutierrez, J.), *aff'd* 400 Fed. Appx. 255 (9th Cir. 2010), *quoting In re GlenFed, Inc. Sec. Litig.*, 42 F.3d 1541, 1548 (9th Cir. 1994) (*en banc*). ICM has not met these standards. For example, ICM conclusorily alleges that Manwin "denounced" ICM or posted a "libelous" press release (*see* Counterclaim, ¶¶ 37, 44, 89), without specifically pleading that the matters are false representations of fact or, if so, why they were false.

Third, Lanham Act plaintiffs must prove that the allegedly false statements were "made 'by a defendant who is in commercial competition with plaintiff.'" *Digital Envoy, Inc. v. Google, Inc.*, 370 F. Supp. 2d 1025, 1035 (N.D. Cal. 2005), *quoting Coastal Abstract Serv., Inc. v. First Am. Title Ins. Co.*, 173 F.3d 725, 735 (9th Cir. 1999). Moreover, "the statements in issue [must] tend[] to divert business from the plaintiff to the defendant." *Nat'l Servs. Group v. Painting & Decorating Contractors of Am., Inc.*, 2006 U.S. Dist. LEXIS 52205, at **9-10 (C.D. Cal. July 18, 2006). Here, ICM has already conceded that it is not a competitor of Manwin's. *See* Docket No. 29-1 at 13 ("[A]ny purported harm to consumers of websites offering adult content cannot qualify as antitrust injury in this case, because neither ICM nor ICANN competes with Manwin and DP in that market."); Docket No. 35 at 7 Having so asserted, ICM is now barred from making any contrary claim. *Cf. Digital Envoy*, 370 F. Supp. 2d at 1035 ("Google correctly notes that Digital cannot have it both ways -- either the parties are not competitors, in which case Digital cannot maintain its claim under the Lanham Act, or, the parties are competitors, in which case it may be appropriate for the Court to revisit its prior rulings ..."). Moreover, Manwin cannot divert business from ICM. Manwin does not sell domain name registrations. Any diversion would be to other TLDs, such as .com.

Fourth, Lanham Act claims must be based on commercial speech that constitutes advertising or promotion. *Coastal Abstract Service, Inc. v. First American Title Insurance Co.*, 173 F.3d 725, 735 (9th Cir. 1999). *See also Boule v. Hutton*, 70 F. Supp. 2d 378, 390 (S.D.N.Y. 1999) (telling reporter in response to interview question that the plaintiff sold fake paintings was not commercial speech even though defendants were competitors); *Edward B. Beharry & Co. v. Bedessee Imports Inc.*, 95 U.S.P.Q.2D (BNA) 1480, 1487 (S.D.N.Y. 2010) (allegedly paying for story stating that competitor's food was found to be "filthy" by inspectors and then sending the story to clients and suggesting they "discuss it" with defendant was not commercial speech). Also, such commercial speech must be directed toward purchasers of the defendant's products. *Avery Dennison Corp. v. Acco Brands, Inc.*, No. CV 99-1877 DT (Mcx), 2000 U.S. Dist. LEXIS 3938, at * (C.D. Cal. Feb. 22, 2000) (letters to companies regarding plaintiff's allegedly infringing products did not seek to solicit consumer purchases). ICM apparently complains in part about a Manwin press release, but does not (and cannot allege) that the press release was directed to Manwin's customers. *See, e.g., Encompass Ins. Co. v. Giampa*, 522 F. Supp. 2d 300,

311 (D. Mass. 2007) (statement in press release regarding ongoing litigation was not a commercial advertisement).

D. Section 17200 Claims

Section 17200 "borrows violations of other laws and treats them as unlawful practices that the unfair competition law makes independently actionable." *Cel-Tech Communications, Inc. v. Los Angeles Cellular Tel. Co.*, 20 Cal. 4th 163, 180 (1999), *quoting State Farm Fire & Casualty Co. v. Superior Court*, 45 Cal. App. 4th 1093 (1996) (internal quotation marks omitted). Thus, where the borrowed violations fail, so does any Section 17200 claims based upon them. Here, then, ICM's Section 17200 claims fail along with its antitrust claims. *See, e.g., Formula One Licensing, B.V. v. Purple Interactive Ltd.*, No. C 00-2222 MMC, U.S. Dist LEXIS 2968 at *12-13 (N.D. Cal. Feb. 6, 2001) ("Where a Plaintiff fails to state an antitrust claim, and where an unfair competition claim is based upon the same allegations, such [unfair competition] claims are properly dismissed."); *People's Choice Wireless, Inc. v. Verizon Wireless*, 131 Cal. App. 4th 656, 668 (2005) (dismissing Section 17200 claim because borrowed antitrust claim failed).

Moreover, under Section 17200, "damages cannot be recovered." *Korea Supply Co. v. Lockheed-Martin Corp.*, 29 Cal. 4th 1134, 1144 (2003). Monetary relief is limited to restitution. *Id.* Here, ICM cannot allege any funds or property acquired by Manwin from ICM, as required to establish restitution. *Id.* Nor may ICM recover punitive damages under Section 17200. *Day v. AT&T Corp.*, 63 Cal. App. 4th 325, 338 (1998) (Section 17200 "does not allow the imposition of a monetary sanction"; "nor is [it] intended to be a punitive provision"). All ICM's alleged monetary remedies thus fail under Section 17200.

E. Interference With Business Advantage

Interference with prospective business advantage requires pleading: (1) an existing economic relationship between the plaintiff and some third party, with the probability of future economic benefit to the plaintiff; (2) the defendant's knowledge of the relationship; (3) intentional acts or conduct on the part of the defendant designed to interfere with or disrupt the relationship, which interfering acts were wrongful by some legal measure other than the fact of interference itself; (4) actual disruption of the relationship; and (5) economic harm to the plaintiff proximately caused by the acts of the defendant. *Korea Supply Co. v. Lockheed Martin Corp.*, 29 Cal. 4th 1134, 1153-1154 (2003). ICM fails adequately to plead these elements.

For example, ICM does not adequately allege any existing economic relationship. Merely stating that some unidentified industry members expressed their intention to register in .XXX is not enough: "An existing relationship is required." *Roth v Rhodes,* 25 Cal. App. 4th 530, 546(1994). Similarly, ICM fails to state any independently wrongful conduct, since its antitrust and other claims fail for the reasons described above. Moreover, because Manwin is no stranger to a relationship between .XXX and potential .XXX registrants who want to do business with Manwin, Manwin cannot be liable for tortious interference. *See Kasperian v. County of Los Angeles,* 38 Cal. App. 4th 242, 266 (1995).

F. SLAPP Motion

We also intend to bring a motion to dismiss ICM's California law claims under the anti-SLAPP statute. That statute applies to conduct in "furtherance of the person's right of petition or free speech" on an issue of "public interest." Cal. Code Civ. Proc. § 425.16(a). Each of ICM's California causes of action "arise from" protected activity, namely speech critical of .XXX and alleged boycotts intended to express Manwin's disapproval of .XXX. This is quintessential protected activity under the anti-SLAPP statute. *See, e.g., Wilcox v. Superior Court*, 27 Cal. App. 4th 809, 821 (1994) (disapproved on other grounds in *Equilon Enterprises v. Consumer Cause, Inc.*, 29 Cal. 4th 53 (2002)) ("Thus if the plaintiff's suit arises out of the defendant's constitutionally protected conduct, such as a peaceful economic boycott the plaintiff should be required to satisfy the statute's requirements."); *Traditional Cat Ass'n, Inc. v. Gilbreath*, 118 Cal. App. 4th 392, 397 (2004) (website's reports and opinions about judicial proceedings were "plainly" an exercise of free speech within the meaning of section 425.16.).

Because the alleged claims meet the SLAPP standard, the burden will shift to ICM to show, by "competent admissible evidence," the ***probability*** it will prevail on the merits. *Steed v. Dep't of Consumer Affairs*, 204 Cal. App. 4th 112, 124 (2012). As explained above, we don't believe ICM will be able to make the required showing.

We look forward to hearing from you.

Sincerely,

Kevin E. Gaut
A Professional Corporation of
MITCHELL SILBERBERG & KNUPP LLP

KEG/jda

EXHIBIT 2

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October 31, 2012

by email keg@msk.com

Mr. Kevin E. Gaut
Mitchell, Silberberg & Knupp
Olympic Boulevard
Los Angeles, California

re: *ICM Registry, LLC v. Manwin et al.*, Case No. CV 11-9514-PSG

Dear Kevin:

As we have discussed, I am responding to your letter dated October 17, 2012 to meet and confer regarding what you identify as bases for your intended Rule 12 and SLAPP motions against ICM's recently-filed counterclaims.

As set forth in some detail below, we do not believe there is any basis for such motions, nor would they satisfy Fed.R.Civ.P. 11. I doubt you will agree, and I have little doubt that you will bring such motions notwithstanding anything I might say. Nevertheless, in order to minimize the disputes, I suggest (1) we file and serve amended counterclaims in response to your letter; (2) you consider and narrow your arguments based on the authorities in mine.

Market Definition

With regard to your assertion that ICM has failed to allege a single adequately defined market as required for a Sherman Act claim, the allegations in our counterclaims are at least as or more specific than those in the Complaint, which the Court has found sufficient. Obviously we would point this out front and center to the Court in any motion practice. For example, I do not believe there was even any discussion of reasonable substitutes in the Complaint.

There is no requirement that a relevant market and power within that market be pled with specificity. *Newcal Indus. v. Ikon Office Solutions*, 513 F.3d 1038, 1044-45 (9th Cir. 2008); *see Cost Management Services, Inc. v. Washington Natural Gas Co.*, 99 F.3d 937, 950 (9th Cir. 1996). Your own Complaint in fact alleged at least two. An antitrust complaint will survive a Rule 12 (b)(6) motion unless it is apparent from the face of the complaint that the alleged market suffers a fatal legal defect. Since the validity of the "relevant market" is typically a factual element rather than a legal element, alleged markets may survive scrutiny under Rule 12(b)(6) subject to factual testing by summary judgment or trial. *See High Technology Careers v. San*

Jose Mercury News, 996 F.2d 987, 990 (9th Cir. 1993) (holding that the market definition depends on "a factual inquiry into the commercial realities' faced by consumers"). As the Court here noted with respect to your own Complaint, claims are unlikely to be dismissed unless they are "facially unsustainable," which we do not believe is the case here.

Any relevant market is dictated by the choices available to consumers who seek to search and access online adult entertainment. A relevant market can be broadly characterized in terms of the cross-elasticity of demand for or reasonable interchangeability of a given set of products or services. *M.A.P. Oil Co., Inc. v. Texaco Inc.*, 691 F.2d 1303, 1306 (9th Cir. 1982). The 9th Circuit considers whether "the product and its substitutes are reasonably interchangeable by consumers for the same purpose," as well as "industry or public recognition of the submarket as a separate economic entity, the product's peculiar characteristics and uses, unique production facilities, distinct customers, distinct prices, sensitivity to price changes, and specialized vendors." *Id.*

As you know, ICM alleges in its counterclaims that the relevant market is "search and access to online adult entertainment." The products or mechanisms in this market consist of tube sites. Reasonable substitutes, if any, would likely consist of thumb-nail gallery posts ("TGPs") and adult affiliate sites, since these perform similar functions to tube sites and were the early predecessor of tube sites. Your argument that Bing, Google, Yahoo or other large search engines are reasonable substitutes and should be considered in the relevant market analysis does not appear well taken. First, these sites do not organize, categorize, compile or host pornographic images on their search pages as the tube sites do. Second, these search engines do not offer the same functionality as tube sites (*i.e.,* freeze image scan through and skip ahead functions). Third, search engines merely direct the user to the content on the internet, while tube sites provide the content in one place.

ICM's market definition is adequately pled to encompass reasonable substitutes, which are readily apparent from the face of the counterclaims. *See, e.g.,* ¶¶ 11-14. An instructive case in this regard is *LiveUniverse, Inc. v. Myspace, Inc.*, 2007 USDistLEXIS 43739 (C.D.Cal. June 4, 2007), in which the Court upheld a broad characterization of the applicable relevant market, "Internet-based social networking in the geographic region of the United States," since it properly identified a market consisting of social networking sites and appropriate substitutes for those sites. Analogous to your criticism here, the *LiveUniverse* defendants argued unsuccessfully that the market for "Internet-based social networking sites" was not a "plausible" market for purposes of the Sherman Act since it failed to account for other kinds of social networking that are interchangeable, such as online dating sites and AOL internet connectivity services.

Here, as in *LiveUniverse*, ICM's market definition is designed to take into account all reasonable substitutes of tube sites such as affiliates or TGPs, but not search engines, the Internet, or any other broad category that is not a reasonable substitute given commercial realities. With the exception of those sites that function like a tube site, such as TGPs and affiliate sites, the primary function of adult content sites is to generate revenue from paying customers. By contrast, the primary function of tube sites is to generate traffic. Thus non-tube sites are not a reasonable substitute for tube sites since their essential purpose is different. Moreover, tube sites have significantly more functions than do non-tube sites when it comes to searching, uploading, viewing, scanning online adult entertainment content.

Monopoly or Market Power

With regard to your assertion that ICM has not submitted the required facts such as market share and specified barriers to entry to demonstrate monopoly power, as you know, the plaintiff in a Section 2 monopolization claim must establish possession of monopoly power by the defendant in a relevant market. *MetroNet Servs. Corp. v. Qwest Corp.*, 383 F.3d 1124, 1130 (9th Cir. 2004). Monopoly power can be pled directly by showing the power to set prices or exclude competition, or indirectly, by showing defendant's large percentage of market share. *See Tops Markets.*, 142 F.3d at 98; *Discover Fin. Servs. v. Visa U.S.A. Inc.*, 598 F.Supp.2d 394, 404 (S.D.N.Y 2008). "Market share and monopoly power are not the same thing; the former is merely evidence of the latter." *In re Payment Card Interchange Fee and Merchant Antitrust Discount Antitrust Litigation*, 562 F.Supp.2d 392, 400 (E.D.N.Y. 2008). A plaintiff need not necessarily quantify market share with precision but may merely assert some facts in support of its assertions of market power that suggest those assertions are plausible. *Korea Kumho Petrochemical v. Flexsys Am. LP*, 2008 USDistLEXIS 68559, * 28 (N.D.Cal. Mar. 11, 2008).

Here, ICM has sufficiently pled facts sufficient to show Manwin's market power over search and access to online adult entertainment. *See Cargill Inc. v. Budine*, 2007 USDistLEXIS 67526, at * 24 (E.D.Cal. Aug. 30, 2007) (plaintiff must assert facts in support of its conclusions in order to satisfy the "plausibility" requirement). Moreover, as with the relevant market, analysis of market power is a question of fact better left to the trier of fact. *See generally, id.* at *24. We also have no doubt that discovery will support these allegations further, in particular with respect to Manwin's motivation and acquisitions of significant companies and market, *e.g.*, Digital Playground, Reality Kings, and imminently, I understand, Streamate as well as other companies that Manwin is exploring.

Harm to Competition

With regard to your assertion that ICM has merely pled harm to itself and not to competition, allegations that defendants harmed competition in the relevant market are adequate allegations of antitrust injury. *Verisign*, 611 F.3d at 502. In *Brantley v. NBC Universal, Inc.*, 675 F.3d 1192, 1198 (9th Cir. 2012) *citing United States v. Brown*, 936 F.2d 1042, 1045 (9th Cir. 1991), for example, the court noted that a horizontal agreement that allocates a market between competitors and "restrict[s] each company's ability to compete for the other's [business]" may injure competition.

That of course is precisely the type of conduct alleged in ICM's counter-claim. Manwin operates several tube sites, which compete for the traffic once concentrated in the affiliate sites. ICM alleges that Manwin and certain third party affiliates have agreed not to compete for each other's business outside the .COM TLD, in other words a horizontal agreement in which competitors have allocated a market among themselves and agreed not to compete by engaging in commerce in .XXX. In agreeing to confine their competitive activities solely to the sphere of .COM, Manwin and its competitors have engaged in horizontal agreements in restraint of trade which are injurious to competition.

Antitrust Injury or Standing

With regard to your assertion that ICM has not sufficiently alleged antitrust injury or standing, again, as with market definition (see discussion *supra*), it is also self-evident that if the Court has found Manwin has antitrust standing as against ICM, *ipso facto* ICM will have antitrust standing against Manwin. Parties do not change markets, industries, or commercial reality depending on their side of a pleading.

With regard to your citation to *Glen Holly Entm't Inc. v. Tektronix Inc.*, 352 F.3d 367, 371 (9th Cir. 2003), most cases in the Ninth Circuit do not construe "market participant" so narrowly as you claim. In *American Ad Mgmt., Inc. v. General Tel. Co.*, 190 F.3d 1051, 1057-1058 (9th Cir. 1999), the court stated that "market participant" for purposes of determining antitrust injury is not limited to a "consumer or competitor." The court noted the Supreme Court has never imposed such a limitation but has instead held that antitrust laws are not so limited. *Id.* While consumers and competitors are most likely to suffer antitrust injury, there are situations in which other market participants can suffer antitrust injury. *See id.* at 1057, citing Areeda & Hoven-kamp, *Antitrust Law* (1995 & 1998 Supp.). Courts routinely recognize the antitrust claims of market participants other than consumers or competitors. *Id.* The Court in *American Ad Mgmt* noted that while a number of Ninth Circuit opinions do use the phrase "competitor or consumers" as a rough gloss on the on the market participant test, those cases usually concern parties who are clearly not participants of any kind in the restrained market. *Id* at 1058.

Here, ICM is a dealer or supplier of the products used in the relevant market. That is sufficient and falls within the definition of market participant as set forth in *American Ad Mgmt,* since ICM alleges antitrust injury to itself in the form of horizontal agreements between Manwin and third party affiliates.

As for antitrust injury, the counterclaims allege precisely the harm to competition that the Court treated and found sufficient in its recent Order on the defendants' Rule 12 motion. Manwin has engaged in the accused behaviors to reduce and eliminate competition to its dominance in the relevant online adult entertainment markets.

Anticompetitive Agreements

With regard to your assertion that agreements between Manwin and its affiliate Digital Playground cannot support a Section 1 claim since Manwin and Digital Playground are considered a single entity for antitrust purposes, we disagree. If the acquisition of a wholly-owned subsidiary is in furtherance of the improper purpose, Section 1 claims will lie. *See Northern Securities Co. v. United States*, 193 U.S. 197, (1904). Here, ICM has so alleged. Further, ICM has also alleged conspiracy between Manwin and other parties, namely related companies, affiliates, brands and third party affiliates that are unlikely to be wholly-owned subsidiaries but have nonetheless agreed to a group boycott of .XXX.

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Predatory Conduct

With regard to your assertion that ICM has not adequately alleged the required predatory acts necessary to support such a Section 2 claim, and that Manwin's actions do not violate the Sherman Act since the Act "does not restrict the long recognized right of a trader or manufacturer engaged in an entirely private business, freely to exercise his own independent discretion as to parties with whom he will deal," again we must respectfully demur. Group boycotts, or concerted refusals by traders to deal with other traders, have long been held to be within the forbidden category. *Klor's v. Broadway-Hale Stores*, 359 U.S. 207, 212 (1959). The allegations in the counterclaims disclose such a boycott, and a wide combination consisting of Manwin, brands (i.e. content providers), third party affiliates and others. The counterclaims also allege the same suppression of competition and predatory campaign the Court has already found sufficient in its recent Order on defendants' Rule 12 motion.

Probability of Success Under Section 2

With regard to your assertion that ICM must adequately allege a dangerous probability of success to support its attempted monopolization claim, and must or should do so by looking at market share, I believe you misread applicable antitrust law. It is not necessary that plaintiffs use or allege market share to have adequately pled that defendants have a dangerous probability of success for such a claim. *Axiom Advisers and Consultants, Inc., v. School Innovations and Advocacy, Inc.*, 2006 USDistLEXIS 11404 * 19-20 (E.D.Cal Mar. 20, 2006) *citing Rolite, Inc. v. Wheelabrator Environmental Systems, Inc.*, 958 F.Supp. 992, 1000 (E.D.Pa. 1997). Although "market share" may be the most significant factor in determining monopoly power, it is not exclusive. *Id.* Indeed, the Ninth Circuit has cautioned courts to "be wary of the numbers game of market percentage when considering attempt-to-monopolize claims." *Rebel Oil v. Atlantic Richfield Co.*, 51 F.3d 1421, 1438 (9th Cir. 1995), citing *Dimmitt Agri Indus., Inc. v. CPC Int'l, Inc.*, 679 F.2d 516, 533 (5th Cir. 1982). Instead, the Ninth Circuit has instructed courts to analyze "market share, entry barriers, and the capacity of existing competitors to expand output" when considering market power for attempted monopolization claims. *Id.*

The plaintiff in an attempted monopolization case must plead its claim, but need not plead its evidence, which is what you seem to be demanding we do. *Momento, Inc. v. Seccion Amarilla USA*, 2009 U.S. Dist. LEXIS 85295 * 12-13 (N.D.Cal. Sep. 16, 2009), citing *Tele Atlas N.V. v. NAVTEO Corp.*, 397 F.Supp.2d 1184 (N.D. Cal. 2005). Further, in alleging attempted monopoly, there is a low threshold of sufficiency because antitrust cases are fact-intensive and discovery is needed. *Id.*, citing *Covad Communications Co. v. BellSouth Corp.*, 299 F.3d 1272, 1279 (11th Cir. 2002).

Here, as stated above, ICM has pled facts indicating that Manwin had power over the relevant market through acquiring the assets of several tube sites in the relevant market. In addition, Manwin is a multi-market firm in the adult entertainment industry owning and licensing a large amount of adult entertainment content through its relationship with Brazzers, Digital Playground and Playboy that would allow it to engage in improper "tying" arrangements. These factors and other fairly suggest that Manwin has a dangerous probability of obtaining a monopoly in the relevant market.

Cartwright Act Claims

With regard to your assertion that ICM's Cartwright Act claims generally fail for the same reason as its Sherman Act claims, our responses are similar.

Lanham Act Claim

Your letter challenges ICM's sixth counterclaim for unfair competition under Section 43(a) of the Lanham Act, 15 U.S.C. § 1125(a), on the following grounds: (1) it is not pled with particularity under FRCP Rule 9; (2) it is not based on false representations of fact; (3) ICM and Manwin are not commercial competitors; and (4) the statements underlying this counterclaim do not constitute commercial speech—i.e., advertising or promotion. Each item is addressed below.

As a preface, of course you are aware that courts have held generally that Rule 9(b) does not apply to claims for libel and slander. *See, e.g., Kennedy Funding, Inc. v. Chapman*, 2010 U.S. Dist. LEXIS 116038, 2010 WL 4509805, at *5 (N.D.Cal., November 1, 2010); *N'Genuity Enterprises Co. v. Pierre Foods, Inc.*, 2009 USDistLEXIS 81779, 2009 WL 2905722, at * 14 (D.Ariz. Sept. 9, 2009); *U.S. ex rel. Putnam v. Eastern Idaho Regional Medical Center*, 2008 USDistLEXIS 78186, 2008 WL 4498812, at *1 (D.Ida. October 3, 2008). As such, therefore, your assertion that this counterclaim must be pled with more particularity under Rule 9(b), appears unsupported. The cases you cite deal with false advertising, which is a different cause of action with different elements. ICM's unfair competition claim is not predicated on false statements made in advertising, and therefore these pleading requirements do not apply.

There is no requirement that a Lanham Act claimant be in commercial competition with the accused party. Rather, a claimant need only believe that it is likely to be injured. *Traffic-School.com, Inc. v. Edriver Inc.*, 653 F.3d 820, 825 (9th Cir. 2011). Indeed, Lanham Act suits "can be brought by any person 'who believes that he or she is or is likely to be damaged by' the use of . . . a false description or representation." *POM Wonderful LLC v. Coca-Cola Co.*, 679 F.3d 1170, 1175 (9th Cir. 2012). The "dispositive question" as to a party's standing to maintain an action under Section 43(a) is whether the party "has a reasonable interest to be protected." *Smith v. Montoro*, 648 F.2d 602, 608 (9th Cir. 1981); *accord, Famous Horse Inc. v. 5th Ave. Photo Inc.*, 624 F.3d 106, 112-113 (2d Cir. 2010).

Thus, ICM would and does have standing to bring a Lanham Act counterclaim against the plaintiffs, regardless of whether it is in direct competition with them. Moreover, ICM and plaintiffs do compete, if not directly, because the .XXX TLD is geared towards the adult entertainment industry and those who seek to host their adult entertainment content online. Manwin is the licensor of Youporn.com, an online adult entertainment content website. Digital Playground produces adult entertainment content. Therefore, there is commercial overlap between ICM's business and that of Plaintiffs. Indeed, Plaintiffs' statements that ICM has committed unlawful, anti-competitive conduct, and their boycott of ICM, create a basis for ICM to reasonably believe that its business and interests will be damaged.

With regard to your assertion that ICM does not allege that the Manwin press release in question was directed to Manwin's customers, "the Lanham Act reaches more than the typical advertising campaign." *Oxycal Lab. v. Jeffers*, 909 F.Supp. 719, 723 (S.D.Cal. 1995), citing

Semco, Inc. v. Amcast, Inc., 52 F.3d 108, 112 (6th Cir. 1995) (article written for trade magazine may be classified as commercial promotion); *Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60 (1983) (mailing of informational pamphlets by non-profit organization can be classified as commercial speech); *Birthright v. Birthright, Inc.*, 827 F.Supp. 1114, 1138 (D.N.J. 1993) (nonprofit fundraising letters can be commercial advertising); *National Artists Mgmt. Co. v. Weaving*, 769 F. Supp. 1224, 1234-36 (S.D.N.Y. 1991) (former employee's "bad-mouthing" of employer can fit into category of commercial advertising)). "[T]he gravamen of commercial speech is whether it is primarily motivated by commercial concerns. *United States v. Edge Broadcasting Co.*, 509 U.S. 418, 426 (1993); *Oxycal Lab., supra,* 909 F.Supp. at 720-21, 725. We believe that test is easily satisfied here. Indeed, but for its commercial motivation, Manwin had no reason to issue the accused press release in the first place.

Cal. B&P Code Section 17200

Your letter challenges ICM's seventh counterclaim for unfair competition under Cal. B&P Code Section 17200 on the same grounds as the federal Sherman Act claims. As set forth above, we believe those grounds fail. And while you are correct that damages, other than restitution, are not recoverable for a Section 17200 claim, ICM is not claiming any. ICM seeks only injunctive relief to restrain Plaintiffs' acts of unfair competition, *see* Counterclaims, ¶¶ 100, 101, which is fully recoverable under the statute. Cal. B&P Code § 17203; *Kwikset Corp. v. Superior Court*, 51 Cal.4th 310, 337 (2011). Further, and in any event, ICM may well have a claim for restitution to the extent plaintiffs earned profits from their acts of unfair competition. *See Fletcher v. Security Pac. Nat'l Bank*, 23 Cal. 3d 442, 451.

Interference with Business Advantage

Your letter claims that ICM's eighth counterclaim, for tortious interference with prospective economic advantage does not adequately plead any existing economic relationship or independently wrongful conduct. This is incorrect. Such a cause of action under California law requires pleading: (1) an existing economic relationship between plaintiff and a third party; (2) defendant's knowledge of that relationship; (3) intentional acts or conduct on the part of the defendant designed to interfere with or disrupt the relationship; (4) actual disruption of the relationship; and (5) economic harm to the plaintiff. *Korea Supply Co. v. Lockheed Martin Corp.*, 29 Cal.4th 1134, 1153-54 (2003).

Here, your analysis simply ignores the many specific facts ICM has pleaded in support of this claim, including: (1) ICM offered advanced registration of .XXX domain names in exchange for a registration fee; (2) members of the adult entertainment industry, such as Really Useful, Ltd., expressed their intention to enter into and did enter into agreements with ICM for such registrations during the reservation period; (3) under its contracts with Really Useful, ICM was to receive a series of payments, which were deferred because of Plaintiffs' boycott of .XXX registrants; (4) Really Useful intended to enter into additional premium name contracts with ICM for other domains but decided not to do so because of Plaintiffs' boycott, which caused decreased revenue to Really Useful; (5) Plaintiffs knew about ICM's registration offering through various publications; (6) Plaintiffs knew about adult entertainment industry members' intention to obtain registrations through direct contact with these potential registrants and

through various online publications/announcements; and (7) Plaintiffs' actions did disrupt ICM's relationships with these prospective registrants who decided to forego registration, resulting in economic harm to ICM or in the case of Really Useful, delayed payment under its registration agreement with ICM. Counterclaims, ¶¶ 104-112.

As to any "independently wrongful conduct," this is irrelevant because ICM's antitrust claims are sufficiently pled.

I do not understand your statement that "because Manwin is no stranger to a relationship between .XXX and potential .XXX registrants who want to do business with Manwin, Manwin cannot be liable for tortious interference. *See Kasperian v. County of Los Angeles*, 38 Cal.App.4th 242, 266 (1995)." *Kasperian* involved allegations of tortious interference predicated on a conspiracy between a third party and the defendant to breach or interfere with the third party's contract with the plaintiff. These are not the facts of our counterclaim.

Anti-SLAPP Motion

With regard to your threat to bring a motion to dismiss ICM's counterclaims under California's anti-SLAPP statute, plaintiffs cannot establish that (1) their boycott was intended "to achieve political ends"; or that (2) the libelous press statement about this lawsuit was mere "reporting" or "opinion" about the proceedings. The allegations are that the challenged boycott was economic and commercial in nature, not incidental to political motivation. Further, the accused press release on its face does not merely "report" or opine on the proceedings in this lawsuit, but purports instead to present Plaintiffs' allegations as conclusive fact. Hence, the challenged statements are not protected activity under Cal. Code. Civ. Proc. § 425.16(a).

As I stated at the beginning of this letter, in order to minimize the disputes, I suggest (1) we file and serve amended counterclaims in response to your letter; (2) you consider and narrow your arguments based on the authorities in mine.

Thank you for your attention to these matters.

Yours truly,

GORDON & REES LLP

by Richard P. Sybert

cc: Jeff LeVee