

1 THOMAS P. LAMBERT (50952)  
tpl@msk.com  
2 JEAN PIERRE NOGUES (84445)  
jpn@msk.com  
3 KEVIN E. GAUT (117352)  
keg@msk.com  
4 MITCHELL SILBERBERG & KNUPP LLP  
11377 West Olympic Boulevard  
5 Los Angeles, CA 90064-1683  
Telephone: (310) 312-2000  
6 Facsimile: (310) 312-3100

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

10 UNITED STATES DISTRICT COURT  
11 CENTRAL DISTRICT OF CALIFORNIA  
12 WESTERN DIVISION - ROYBAL FEDERAL BUILDING

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

16 Plaintiffs,

17 v.

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

22 Defendants.

23  
24 AND RELATED COUNTERCLAIMS  
25  
26  
27

Case No. CV11- 9514 PSG (JCGx)

The Honorable Philip S. Gutierrez

**COUNTERCLAIM DEFENDANTS'  
REPLY IN SUPPORT OF THEIR  
MOTION TO DISMISS FIRST  
AMENDED COUNTERCLAIMS OF  
ICM REGISTRY, LLC, OR, IN THE  
ALTERNATIVE, TO STRIKE  
CERTAIN COUNTERCLAIM  
ALLEGATIONS**

**FRCP Rule 12(b)(6) and 12(f)**

Courtroom: 880 Roybal Federal Building

Date: February 11, 2013

Time: 1:30 p.m.

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

**TABLE OF CONTENTS**

Page(s)

I. INTRODUCTION ..... 1

II. ICM’S SECTION 1 CLAIM FAILS ..... 1

    A. No Market Power or Harm To Competition ..... 1

    B. Nothing Other Than Unilateral Conduct..... 4

    C. No Antitrust Injury Or Damages Standing ..... 6

III. ICM’S SECTION 2 MONOPOLIZATION CLAIM FAILS..... 7

IV. ICM’S CONSPIRACY AND ATTEMPT CLAIMS FAIL ..... 8

V. ICM’S LANHAM ACT CLAIM FAILS ..... 9

VI. ICM’S UNFAIR COMPETITION LAW CLAIM FAILS ..... 11

VII. ICM’S PROSPECTIVE ECONOMIC ADVANTAGE CLAIM FAILS ..... 11

VIII. CONCLUSION ..... 12

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

**TABLE OF AUTHORITIES**

Page(s)

**CASES**

*49er Chevrolet, Inc. v. Gen. Motors Corp.*,  
803 F.2d 1463 (9th Cir. 1986)..... 5

*Am. Ad Mgmt., Inc. v. Gen. Tel. Co.*,  
190 F.3d 1051 (9th Cir. 1999)..... 6

*Apple Inc. v. Psystar Corp.*,  
586 F. Supp. 2d 1190 (N.D. Cal. 2008)..... 2

*Axiom Advisors v. School Innovations and Advocacy*,  
No. 2:05-cv-02395-FCD-PAN, 2006 U.S. Dist. LEXIS 11404 (E.D. Cal.  
Mar. 20, 2006) ..... 8

*Bell Atl. Corp. v. Twombly*,  
550 U.S. 544, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007) ..... 5

*Brown Shoe Co. v. United States*,  
370 U.S. 294, 82 S. Ct. 1502, 8 L. Ed. 2d 510 (1962) ..... 3

*Coastal Abstract Serv., Inc. v. First Am. Title Ins. Co.*,  
173 F.3d 725 (9th Cir. 1999) ..... 9

*Dominick v. Collectors Universe, Inc.*,  
No. 2:12-cv-04782-ODW, 2012 U.S. Dist. LEXIS 179703 (C.D. Cal.  
Dec. 18, 2012) ..... 4

*Famous Horse, Inc. v. 5th Ave. Photo, Inc.*,  
624 F.3d 106 (2d Cir. 2010) ..... 10

*Illinois Brick Co. v. Illinois*,  
431 U.S. 720, 97 S. Ct. 2061, 52 L. Ed. 2d 707 (1977) ..... 7

*In re Late Fee and Over-Limit Fee Litigation*,  
528 F. Supp. 2d 953 (N.D. Cal. 2007)..... 5

*Jack Russell v. Am. Kennel Club*,  
407 F.3d 1027 (9th Cir. 2005)..... 10

*Kendall v. Visa USA, Inc.*,  
518 F.3d 1042 (9th Cir. 2008)..... 5

*LiveUniverse v. MySpace, Inc.*,  
No. CV 06-6994 AHM, 2007 U.S. Dist. LEXIS 43739 (C.D. Cal. June 4,  
2007)..... 2, 4, 5, 7

*Lucas Auto. Eng'g, Inc. v. Bridgestone/Firestone, Inc.*,  
140 F.3d 1228 (9th Cir. 1998)..... 7

*Monsanto Co. v. Spray-Rite Serv. Corp.*,  
465 U.S. 752, 104 S. Ct. 1464, 79 L. Ed. 2d 775 (1984) ..... 5

1 *Nat’l Servs. Group v. Painting & Decorating Contractors of Am., Inc.*,  
 No. SACV 06-563 CJC (ANx), 2006 U.S. Dist. LEXIS 52205 (C.D. Cal.  
 2 July 18, 2006) ..... 9

3 *Oxycal Labs., Inc. v. Jeffers*,  
 4 909 F. Supp. 719 (S.D. Cal. 1995) ..... 10

5 *Pom Wonderful LLC v. Coca-Cola Co.*,  
 679 F.3d 1170 (9th Cir. 2012)..... 10

6 *R.C. Dick Geothermal Corp. v. Thermogenics, Inc.*,  
 7 890 F.2d 139 (9th Cir. 1989) ..... 6

8 *Rebel Oil Co. v. Atl. Richfield Co.*,  
 51 F.3d 1421 (9th Cir. 1995)..... 4, 7

9 *Smith v. Montoro*,  
 10 648 F.2d 602 (9th Cir. 1981)..... 10

11 *Stein v. United Artists Corp.*,  
 691 F.2d 885 (9th Cir. 1982)..... 7

12 *TrafficSchool.com, Inc. v. Edriver Inc.*,  
 13 653 F.3d 820 (9th Cir. 2011)..... 10

14 *United States v. E. I. Du Pont de Nemours & Co.*,  
 351 U.S. 377, 76 S. Ct. 994, 100 L. Ed. 1264 (1956) ..... 2

15 *Zero Motorcycles, Inc. v. Pirelli Tyre SpA*,  
 16 802 F. Supp. 2d 1078 (N.D. Cal. 2011)..... 9

**OTHER AUTHORITIES**

18 5 J.T. McCarthy, *McCarthy On Trademark and Unfair Competition* (2012)  
 19 § 27:24 ..... 9  
 § 27:97 ..... 10

20 2B-5C P.E. Areeda & H. Hovenkamp, *Antitrust Law:  
 21 An Analysis Of Antitrust Principles And Their Application*,  
 ¶ 531f (2012) ..... 2

22 8 O.J. von Kalinowski, *Antitrust Laws and Trade Regulation*,  
 23 § 161.02, n.38 (2012)..... 7

1 **I. INTRODUCTION**

2 ICM’s Opposition, like its Amended Counterclaims, fails to articulate how  
3 Manwin could ever monopolize any market for “online search and access to adult  
4 entertainment via websites.” The Opposition also repeatedly mischaracterizes the  
5 law governing ICM’s antitrust, Lanham Act and state claims. The Court should  
6 grant Manwin’s Motion.

7 **II. ICM’S SECTION 1 CLAIM FAILS**

8 **A. No Market Power or Harm To Competition**

9 The parties agree that, for its Section 1 Sherman Act claim, ICM must allege  
10 power within an identified market that incorporates all reasonably substitutable  
11 products. ICM now argues that its selected market, “online search and access to  
12 adult entertainment via websites,” does not include giant search engines such as  
13 Google, Yahoo!, and Bing. ICM’s Opposition (ECF Docket No. 80) (“Opp.”) at  
14 7:5-12. ICM so argues even though these search giants obviously fall within the  
15 plain language of ICM’s market definition.

16 Despite the plain language, ICM argues (but never pleads) that its market  
17 should be limited to “tube sites” (and exclude the search giants) for only one  
18 reason: Tube sites<sup>1</sup> allegedly offer search services “not to sell a product but to  
19 amass traffic that can then be marketed and sold to others, namely content  
20 providers and advertisers.” Opp. at 4:16-17. But that is true of most if not all  
21 search sites, and ICM does not allege otherwise. If purported differences in search  
22 sites justify excluding some from its market, ICM must *plead* the exclusion and  
23 facts supporting it.

24 In fact, ICM cannot plausibly plead a search market that excludes the search  
25 giants. “Whether products are part of the same or different markets under antitrust  
26 law depends on whether *consumers* view those products as reasonable substitutes

27 <sup>1</sup> What ICM means by “tube sites,” and how ICM contends they differ from other  
28 web sites, from “affiliate sites,” or from online search services remains opaque.

1 for one another and would switch among them in response to changes in relative  
 2 prices[.]” *Apple Inc. v. Psystar Corp.*, 586 F. Supp. 2d 1190, 1196 (N.D. Cal.  
 3 2008) (emphasis added). *See also United States v. E. I. Du Pont de Nemours &*  
 4 *Co.*, 351 U.S. 377, 395, 76 S. Ct. 994, 1007, 100 L. Ed. 1264, 1280-1281 (1956)  
 5 (market includes all “commodities reasonably interchangeable by consumers”).

6 Plainly, consumers seeking adult websites can search for them through the  
 7 search giants as easily as through tube sites. In other words, consumers can readily  
 8 substitute one search service for another. ICM does not and cannot argue or allege  
 9 otherwise. Moreover, if tube sites began charging for search services, consumers  
 10 plainly would switch to Google or other free or lower-priced search sites. Again,  
 11 ICM does not and cannot argue or allege otherwise. Because ICM cannot allege  
 12 price inelasticity or lack of substitutability, its search market must – and by its  
 13 plain language clearly does – include not just tube sites but other search sites.<sup>2</sup>

14 ICM obviously has not alleged and cannot allege Manwin’s power in that  
 15 search market. ICM does not allege that Manwin has, and Manwin does not have,  
 16 any significant share of the search market or the power to restrict output or raise  
 17 prices for search services. ICM’s failure to allege any such power in its selected  
 18 online search market *alone* dooms its Section 1 claim.

19 Unable to allege Manwin’s power in its selected online search market, ICM  
 20 attempts to allege that Manwin has power in *another* market – for adult content

---

21  
 22 <sup>2</sup> *LiveUniverse v. MySpace, Inc.*, No. CV 06-6994 AHM (RZx), 2007 U.S. Dist.  
 23 LEXIS 43739 at \* 9-19 (C.D. Cal. June 4, 2007), *aff’d*, 304 Fed. Appx. 554 (9th  
 24 Cir. 2008) does not change this result. *LiveUniverse* held that the market for  
 25 internet social networking sites need not include other web sites. That was  
 26 precisely because the plaintiff had specifically alleged how social networking sites  
 27 were unique from a *consumer* perspective. In particular, such sites offered  
 28 consumers “an unprecedented degree of control over...both the content and  
 structure of networks of friends that they and others create,” while other “internet  
 media sites ... do not possess these organic, interactive qualities.” *Id.* ICM has  
 not made and cannot make any such allegations. *See* 2B-5C P. E. Areeda & H.  
 Hovenkamp, *Antitrust Law: An Analysis Of Antitrust Principles And Their*  
*Application*, ¶ 531f (2012) (“If it is not clear whether a product is interchangeable  
 with others, then some detail about lack of inter-changeability should be given.”).

1 web sites. First Amended Counter Claims (ECF Docket No. 65) (“CC”) ¶¶ 9-10.  
 2 But that argument is precisely the invalid bait and switch Manwin identified in its  
 3 opening brief. Manwin’s Motion To Dismiss (ECF Docket No. 75) (“MM”) at  
 4 1:11-18. ICM cannot satisfy its obligation to plead Manwin’s power in its selected  
 5 *search* market merely by alleging Manwin’s power in an altogether different *adult*  
 6 *website* market. Alleging one market and power in another simply does not  
 7 suffice.

8 Even if ICM could establish power in the search market by alleging power in  
 9 the separate adult website market, ICM does not even adequately allege the latter.  
 10 ICM alleges and argues only that Manwin succeeded in limiting the number of  
 11 .XXX adult websites. CC ¶¶ 54, 59. But as Defendants aggressively and  
 12 successfully argued in their motions to dismiss Manwin’s complaint, the market  
 13 for adult websites is not limited to .XXX and there are no barriers to entry. Adult  
 14 websites may operate on .COM, .NET, or other TLDs, and are easily and  
 15 inexpensively established or expanded. *See, e.g.*, Court’s August 14, 2012 Order  
 16 (ECF Docket No. 40) at 11 (accepting Defendants’ argument that “an adult content  
 17 website registered in the .com TLD is an adequate economic substitute for an adult  
 18 content website registered in the .XXX TLD”). Thus, ICM does not and cannot  
 19 allege that even the outright elimination of .XXX websites would significantly  
 20 affect price or output on the millions of adult websites hosted (or that could be  
 21 created) on other TLDs. Moreover, ICM does not and cannot allege that Manwin  
 22 has a predominate share of any adult website market, admitting for example that  
 23 Manwin has only the *second* leading adult content website. CC ¶ 17.

24 In other words, ICM at worst alleges only Manwin’s power to affect the  
 25 number of .XXX websites, not any power to affect output or price in the adult  
 26 website market as whole. For the same reason, ICM at worst alleges harm to *it*  
 27 *and to .XXX*, not the required harm to competition in the adult website market as a  
 28 whole, much less harm in the only relevant *search* market. *See, e.g., Brown Shoe*

1 *Co. v. United States*, 370 U.S. 294, 344, 82 S. Ct. 1502, 1521, 8 L. Ed. 2d 510, 533  
 2 (1962) (Sherman Act protects “competition[] not competitors”); *see also* MM at  
 3 7:2-11. *LiveUniverse*, upon which ICM heavily relies, reinforces the point. There,  
 4 the plaintiff alleged that defendant MySpace violated antitrust law by erasing and  
 5 blocking from the MySpace website any references or links to plaintiff’s  
 6 competing website. The Court properly concluded that this showed only harm to  
 7 the plaintiff, not to website competition, because “Internet aficionados easily move  
 8 from one website to another in seconds.” 2007 U.S. Dist. LEXIS 43739 at \* 12.  
 9 The same is true here. The lack of any .XXX websites, or of links or ads for them  
 10 on Manwin’s websites, would still leave consumers with millions of adult websites  
 11 reachable through a simple click.

12 Moreover, market power ultimately requires not just the ability to restrict  
 13 output but also to raise prices. *See Rebel Oil Co. v. Atl. Richfield Co.*, 51 F.3d  
 14 1421, 1434 (9th Cir. 1995) (market power requires “evidence of restricted output  
 15 **and** supracompetitive prices”) (emphasis added); *Dominick v. Collectors Universe,*  
 16 *Inc.*, No. 2:12-cv-04782-ODW, 2012 U.S. Dist. LEXIS 179703 at \* 10 (C.D. Cal.  
 17 Dec. 18, 2012) (same). Here, ICM does not allege any price increases in either the  
 18 relevant search or the irrelevant adult website markets. Instead, ICM admits the  
 19 contrary: Many affiliate and tube sites offer **free** – the lowest possible price –  
 20 content and services. CC ¶¶ 11-12. Those allegations are inconsistent with  
 21 Manwin power in any search or adult website market.

22 ICM’s failure to allege a properly defined market in which Manwin has  
 23 power and has harmed competition alone dooms ICM’s Section 1 claim. But that  
 24 claim also fails for the other independent reasons described below.

### 25 **B. Nothing Other Than Unilateral Conduct**

26 ICM does not adequately allege any actionable Section 1 **agreements** as  
 27 opposed to permissible unilateral refusals to deal. *See* MM at 9:6-10:23. Again,  
 28 *LiveUniverse* aptly makes the point, finding that defendant MySpace had a perfect



1 right to bar and remove from its website references to plaintiff’s competing  
 2 websites. That was because “[a] company generally has a right to deal, or refuse to  
 3 deal, with whomever it likes,” 2007 U.S. Dist. LEXIS 43739 at \* 36, *citing*  
 4 *Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752, 761, 104 S. Ct. 1464, 1469,  
 5 79 L. Ed. 2d 775, 783 (1984). In essence, ICM alleges the same here: That  
 6 Manwin has refused to allow on its websites ads or links for .XXX. Manwin has a  
 7 perfect right to do that. Indeed, ICM premises its claims in part on the very  
 8 conduct *LiveUniverse* found permissible: Manwin’s removal of .XXX content  
 9 from Manwin’s own websites. *See* CC ¶ 33.<sup>3</sup>

10 After *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 127 S. Ct. 1955, 167 L. Ed.  
 11 2d 929 (2007), to establish that Manwin has engaged in more than permissible  
 12 unilateral setting of terms or refusals to deal, ICM must plead “enough factual  
 13 matter” to raise “plausible grounds to infer an agreement.” *Kendall v. Visa USA,*  
 14 *Inc.*, 518 F.3d 1042, 1047 (9th Cir. 2008). Pleading “ultimate facts” or  
 15 “conclusions,” like “conspiracy” or “agreement,” is not enough. *Id.* Instead, ICM  
 16 must plead “evidentiary facts” such as “a specific time, place, or person involved  
 17 in the alleged conspiracies.” *Id.* Stated otherwise, “a conclusory allegation of  
 18 agreement” is not enough unless “supported by concrete allegations about the  
 19 content and circumstances of any actual agreement.” *In re Late Fee and Over-*  
 20 *Limit Fee Litigation*, 528 F. Supp. 2d 953, 962 (N.D. Cal. 2007). This detail is  
 21 required not only to make sure the conduct is more than unilateral, but also to  
 22 “[g]ive a defendant seeking to respond to allegations of a conspiracy an idea of  
 23 where to begin.” *Kendall*, 518 F.2d at 1047. That is particularly important “where  
 24 the defendants are [like Manwin] large institutions with hundreds of employees  
 25 entering into contracts and agreements daily.” *Id.*

26 <sup>3</sup> Section 1 not only permits a party to “unilaterally determin[e] the parties with  
 27 whom it will deal” but also to unilaterally determine “the *terms* on which it will  
 28 transact business.” *49er Chevrolet, Inc. v. Gen. Motors Corp.*, 803 F.2d 1463, 1468  
 (9th Cir. 1986) (emphasis added).

1 While ICM pleads numerous conclusions about boycott agreements, it never  
2 provides the requisite detail – in particular about time, place or person. Indeed, in  
3 many cases ICM does not specify the parties at all, alleging for example Manwin’s  
4 purported agreements with wholly unidentified “third parties,” “webmasters,” and  
5 “spokes models.” CC ¶¶ 43, 55. And in any event, the purported agreements  
6 concern the irrelevant adult website market not the relevant search market.

7 **C. No Antitrust Injury Or Damages Standing**

8 ICM’s standing argument suffers from its prevalent bait and switch. ICM  
9 alleges a market for online search, but claims standing due to lost sales of supplies  
10 (domain names) to an adult website market. CC ¶ 59. Obviously, alleged damage  
11 in one market does not prove antitrust injury or standing in another. ICM’s failure  
12 to plead injury or damage in the relevant *online search market* alone precludes its  
13 claims.

14 But ICM cannot prove antitrust injury or standing to assert damages even in  
15 the irrelevant adult website market. Direct injury is required. *See* MM at 7:19-8:7.  
16 In *R.C. Dick Geothermal Corp. v. Thermogenics, Inc.*, 890 F.2d 139, 148 (9th Cir.  
17 1989) (*en banc*), the plaintiff lacked standing to assert antitrust violations in the  
18 market for geothermal power where it merely leased the real property needed to  
19 generate that power (and lost rent because of the alleged anticompetitive behavior).  
20 Here, ICM is in exactly the same situation – it merely leases or licenses the right to  
21 use domain names to those who operate in the adult websites market.<sup>4</sup>

22 Moreover, even if ICM actually sold adult website services rather than just  
23 providing domain names, it still would lack damages standing. *See* MM at 8:9-14.  
24 ICM only claims as damages lost sales of domain names. CC ¶ 59. But ICM does  
25 not sell those names directly to web site operators; rather, it admittedly sells them

26 <sup>4</sup> *Am. Ad Mgmt., Inc. v. Gen. Tel. Co.*, 190 F.3d 1051, 1055-58 (9th Cir. 1999) does  
27 not change that conclusion. It merely held that a broker, engaged in the direct sale  
28 of the telephone listing service at issue, had antitrust standing. The plaintiff was  
not (like ICM) a mere supplier to those selling the affected product.

1 only *indirectly* through registrars. Under the *Illinois Brick Co. v. Illinois*, 431 U.S.  
2 720, 97 S. Ct. 2061, 52 L. Ed. 2d 707 (1977) doctrine, only the *direct* sellers (here  
3 the registrars), not the indirect seller (ICM), may assert damage claims for lost  
4 domain name sales. MM at 8:8-15. This restriction precludes duplicative damage  
5 recovery. *See, e.g., Stein v. United Artists Corp.*, 691 F.2d 885, 895 (9th Cir.  
6 1982) (doctrine “prevent[s] possibly duplicate recoveries”); 8 O.J. von Kalinowski,  
7 *Antitrust Laws and Trade Regulation*, § 161.02, n.38 (2012) (explaining doctrine’s  
8 rationale). The Court must thus at minimum strike ICM’s damage claims.

9 Finally, ICM argues that Manwin must lack standing if ICM does. That  
10 hardly follows. The parties assert distinct claims in different markets where they  
11 play different roles. However, precisely because Manwin is an indirect purchaser  
12 (it would purchase .XXX registration services from a registrar, not directly from  
13 ICM), Manwin does not seek damages. *Illinois Brick* addresses concerns about  
14 duplicative damage recovery, and so does *not* bar claims (like Manwin’s) for  
15 injunctive relief. *See, e.g., Lucas Auto. Eng’g, Inc. v. Bridgestone/Firestone, Inc.*,  
16 140 F.3d 1228, 1235 (9th Cir. 1998) (Tashima, J., concurring). But *Illinois Brick*  
17 *does* bar damages claims like ICM’s. *Id.* at 1234.

### 18 **III. ICM’S SECTION 2 MONOPOLIZATION CLAIM FAILS**

19 For its Section 2 monopolization claim, ICM must allege facts  
20 demonstrating not just *some* market power but outright *monopoly*, *i.e.*, more than  
21 50% of market share in a market with significant barriers to entry and to  
22 expansion. *See, e.g., Rebel Oil*, 51 F.3d at 1433 (plaintiff must show “dominant  
23 market share” and that “new rivals are barred from entering the market and ...  
24 existing competitors lack the capacity to expand their output”); *accord*  
25 *LiveUniverse*, 2007 U.S. Dist. LEXIS 49739 at \*23; *see also* MM at 4:1-13. ICM  
26 does not even try to argue that it has adequately alleged Manwin’s monopoly share  
27 of the online search (or any other) market with serious barriers to entry or  
28 expansion. ICM’s monopolization claim fails for that reason alone. ICM’s

1 monopolization claim also founders for other independently sufficient reasons.  
2 Just like ICM's Section 1 claim, its monopolization claim requires (but lacks)  
3 adequate allegations of antitrust injury and harm to competition. Also, none of the  
4 conduct alleged by ICM constitutes the requisite Section 2 predatory activity.<sup>5</sup>

5 **IV. ICM'S CONSPIRACY AND ATTEMPT CLAIMS FAIL**

6 These claims fail for the same reasons discussed above. ICM does not and  
7 cannot allege the required market power, harm to competition, or antitrust injury in  
8 the relevant search market, or plead with adequate particularity the agreements  
9 required for a conspiracy claim. It also does not plead any facts establishing the  
10 dangerous probability of monopoly power required for an attempt claim. *See* MM  
11 at 14:5-22. ICM does argue that to meet the "dangerous probability" standard, it  
12 need not plead particular market share, but admits that it must otherwise plead  
13 specific facts such as barriers to entry and limited competitors.<sup>6</sup> *Opp.* at 18:2-15.  
14 ICM pleads no such facts, and instead argues that it has shown dangerous  
15 probability by alleging that Manwin is one of the few adult web site operators  
16 "conducting significant operations in both free and subscription-based websites."  
17 *Id.* at 18:26-27. How that creates a dangerous probability of monopolization in the  
18 relevant online search market is unexplained and inexplicable.

19

20

21 <sup>5</sup> ICM alleges only the following purportedly predatory activity: (1) *Unsuccessful*  
22 *negotiations*: ICM never explains how Manwin's unsuccessful purported attempts  
23 to negotiate lower prices or better terms from ICM as a supplier of .XXX services  
24 could possibly be predatory. Vigorous price or term negotiations between buyer  
25 and seller are pro-competitive not anti-competitive. (2) *Trade association plans*:  
26 ICM cites no authority that unrealized plans for a trade association are predatory.  
27 (3) *Alleged disparaging statements*: ICM admits these are not predatory. *Opp.* at  
28 17:5-7. (4) *This lawsuit*: ICM nowhere alleges the sham exception to *Noerr-*  
*Pennington*. (5) *Alleged boycott agreements*: These are not predatory for the same  
reason they are not actionable under Section 1. They are inadequately alleged,  
concern a market other than "online search," and have not harmed competition.

26

27

28

28

1 **V. ICM’S LANHAM ACT CLAIM FAILS**

2 ICM argues that its Lanham Act claim asserts trade libel or product  
3 disparagement, not false advertising, and thus need not allege false commercial  
4 speech. But all non-trademark claims under the Lanham Act, whether labeled false  
5 advertising (false claims about your own products), or instead trade libel or product  
6 disparagement (false claims about another’s products), require proof of false  
7 commercial speech. *See Coastal Abstract Serv., Inc. v. First Am. Title Ins. Co.*,  
8 173 F.3d 725, 730-35 (9th Cir. 1999) (trade disparagement case; discussing need  
9 for false commercial speech); *Zero Motorcycles, Inc. v. Pirelli Tyre SpA*, 802 F.  
10 Supp. 2d 1078, 1087 (N.D. Cal. 2011) (Lanham Act false advertising and product  
11 disparagement have the “same elements”); 5 J.T. McCarthy, *McCarthy On*  
12 *Trademark and Unfair Competition* § 27:24 (2012) (listing required elements of  
13 “false advertising and product disparagement” claims); *Nat’l Servs. Group v.*  
14 *Painting & Decorating Contractors of Am., Inc.*, No. SACV 06-563 CJC (ANx),  
15 2006 U.S. Dist. LEXIS 52205 at \* 6-7 (C.D. Cal. July 18, 2006) (same).<sup>7</sup>

16 And ICM plainly fails to allege speech that is either false or commercial.  
17 First, as Manwin’s motion established, commercial speech must propose a  
18 commercial transaction for the speaker’s own economic interest. MM at 15:15-  
19 16:6. Manwin cited several cases holding that a press release like Manwin’s,  
20 which describes litigation (and does not propose a commercial transaction) and  
21 which addresses .XXX concerns of admittedly broad public interest (not just  
22 Manwin’s own interests), simply cannot meet these tests. *Id.* at 16:19-17:1. ICM  
23  
24  
25

26 <sup>7</sup> ICM misleadingly argues that it need only plead the time, place, and content of  
27 the purported false representations. *Opp.* at 20:22-28. None of the cases it cites  
28 are Lanham Act cases. For a Lanham Act claim, ICM must also allege the  
requisite false commercial speech.

1 cannot and does not even attempt to rebut these authorities. Its Lanham Act claim  
2 thus founders on this requirement alone, and the Court need go no further.<sup>8</sup>

3 ICM’s Lanham Act claim also must be dismissed for three other  
4 independently sufficient reasons. First, actionable commercial speech must be  
5 directed by one competitor to another. Manwin cited numerous authorities  
6 establishing that ICM and Manwin are not competitors within the meaning of the  
7 Lanham Act commercial speech requirement. *Id.* at 17:3-25; *see also 5 McCarthy*  
8 *On Trademark and Unfair Competition* § 27:97 (“Lanham Act § 43(a) cannot be  
9 used to stifle criticism of a company’s goods or services by another who is not a  
10 competitor.”). ICM cannot and does not even attempt to rebut these authorities.<sup>9</sup>

11 Second, Manwin established that its press release describing Manwin’s  
12 views about litigation cannot constitute the requisite material false statement of

---

13 <sup>8</sup> ICM argues that Lanham Act claims are not limited to “typical advertising  
14 campaigns.” *See Opp.* at 21:4-13. That may be true, but they are limited to  
15 commercial speech, which Manwin’s was not. ICM also argues that commercial  
16 speech need only be “primarily motivated by commercial concerns.” *Id.* at 22:1-  
17 11. But as one case cited by ICM (*Oxycal Labs., Inc. v. Jeffers*, 909 F. Supp. 719,  
18 723-26 (S.D. Cal. 1995)) confirms, even in cases of “hybrid” speech containing  
19 both commercial and non-commercial messages, courts look to whether the  
20 “central message” proposes commercial transactions for the speaker’s economic  
21 benefit. Where that central message is not “solely related to the economic interests  
22 of [Defendant] or its audience” (*id.* at 724), the speech is noncommercial. As  
23 Manwin’s authorities hold, its press release about a lawsuit does not meet any such  
24 test. MM at 16:19-17:2, 19:15-20:2.

25 <sup>9</sup> ICM argues that Lanham Act *standing* may not be limited to competitors. *Opp.*  
26 at 22:13-23:12. But ICM is wrong. *See Jack Russell v. Am. Kennel Club*, 407 F.3d  
27 1027, 1037 (9th Cir. 2005) (“[F]or [Lanham Act false statement] standing ..., a  
28 plaintiff must show [among other things] that the injury is ‘competitive,’ or  
harmful to the plaintiff’s ability to compete with the defendant.”). None of ICM’s  
cases hold otherwise. *TrafficSchool.com, Inc. v. Edriver Inc.*, 653 F.3d 820, 825-  
28 28 (9th Cir. 2011) expressly restates the *Jack Russell* standing test and then  
explains that, for standing, a **competitor** must prove likely injury. *Pom Wonderful*  
*LLC v. Coca-Cola Co.*, 679 F.3d 1170, 1175 (9th Cir. 2012) makes the same point  
in passing. *Smith v. Montoro*, 648 F.2d 602, 604-08 (9th Cir. 1981) is a reverse  
passing off case involving a claim for infringement of an unregistered mark.  
Standing for such claims, unlike false statement claims, is not limited to  
competitors. *See Jack Russell*, 407 F.3d at 1037. Finally, *Famous Horse, Inc. v.*  
*5th Ave. Photo, Inc.*, 624 F.3d 106, 111 (2d Cir. 2010) contrasts the Second Circuit  
standard with the Ninth Circuit’s “categorical [Lanham Act standing] approach”  
which “require[s] the commercial plaintiff bringing an unfair competition claim to  
be in competition with the alleged false advertiser.”

1 fact. As Manwin showed (and ICM does not rebut or address) press releases about  
2 lawsuits are generally opinion which cannot deceive or be material to reasonable  
3 consumers. *See* MM at 18:2-20:2.<sup>10</sup> Third, *Noerr-Pennington* bars claims based  
4 not only on this lawsuit but press releases about this lawsuit. *See id.* at 13:23-26.

5 **VI. ICM'S UNFAIR COMPETITION LAW CLAIM FAILS**

6 ICM agrees that its UCL claim falls if its other claims fall. *Opp.* at 23:14-  
7 19. ICM also now agrees that any UCL claims must be limited to injunctive relief.  
8 *Id.* at 23:19-23. However, the Counterclaims expressly seek damages, punitive  
9 damages and attorneys' fees on "all" ICM's counterclaims, so at minimum such  
10 requests must be stricken for the UCL claim. *See* CC at 27:1-23, ¶¶ 101-102.

11 **VII. ICM'S PROSPECTIVE ECONOMIC ADVANTAGE CLAIM FAILS**

12 ICM's IPEA claim admittedly requires all the following: (1) independently  
13 wrongful conduct; (2) that disrupts specific and existing (not future) economic  
14 relationships with identified persons and having the probability of future economic  
15 gain; and (3) defendant's specific knowledge of and intent to disrupt these  
16 relationships. MM at 21:8-23:16; *Opp.* at 23:25-24:2. ICM fails all three prongs.

17 *First*, the only alleged independently wrongful conduct is Lanham and  
18 Sherman Act violations which, for the reasons specified above, fail and so cannot  
19 support an IPEA claim. *Second*, ICM does not and cannot deny that most of its  
20 allegations concern purported interference with future (not existing) undefined  
21 relationships with many unidentified third persons such as spokesmodels or  
22 potential .XXX registrants. These allegations do not meet the second test.

23 *Third*, ICM argues that it has sufficient existing relationships with only two  
24 among the many alleged but unidentified third persons – Really Useful and Reality  
25 Kings. But ICM does not deny that Manwin can only be liable for interfering with

26 <sup>10</sup> ICM argues at length that Rule 9 does not apply to Lanham Act libel claims.  
27 *Opp.* at 19:10-21:3. It does. *See* MM at 15:9-13. To argue otherwise, ICM cites  
28 only non-Lanham Act cases. In any event, ICM has failed to allege the required  
elements under any pleading standard.

1 relationships of strangers and not with relationships of Reality Kings, a company it  
2 owns. MM at 23:20-27. As for Really Useful, ICM does not adequately allege  
3 that Manwin knew about and intended to disrupt a relationship with that company.  
4 ICM at best alleges only that Manwin knew generally that ICM was selling .XXX  
5 domain names, not that ICM had any particular sales or other relationship with  
6 Really Useful which Manwin specifically intended to disrupt. CC ¶¶ 97, 109-112.

7 The Court must thus dismiss the IPEA claim in its entirety, or at minimum  
8 strike the claim to the extent based on inadequately alleged purported relationships.

9 **VIII. CONCLUSION**

10 For the reasons stated above, the Court should grant Manwin’s Motion.

11 DATED: January 28, 2013

THOMAS P. LAMBERT  
JEAN PIERRE NOGUES  
KEVIN E. GAUT  
MITCHELL SILBERBERG & KNUPP LLP

12  
13  
14 By: /s/ Kevin E. Gaut  
15 Kevin E. Gaut  
16 Attorneys for Counterdefendants  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27