

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

17 Plaintiffs,

v.

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

22 Defendants.

23  
 24 AND RELATED COUNTERCLAIM  
 25  
 26

CASE NO. CV11-9514 PSG (JCGx)

The Honorable Philip S. Gutierrez

**COUNTERCLAIM DEFENDANTS'  
 NOTICE OF SPECIAL MOTION  
 AND SPECIAL MOTION TO  
 STRIKE PURSUANT TO  
 CALIFORNIA CODE OF CIVIL  
 PROCEDURE SECTION 425.16  
 (ANTI-SLAPP)**

Courtroom: 880 Roybal Federal  
 Building

Date: February 11, 2013

Time: 1:30 p.m

1 TO THE COURT, ALL PARTIES AND THEIR ATTORNEYS OF  
2 RECORD:

3  
4 PLEASE TAKE NOTICE that on February 11, 2013 at 1:30 p.m., or as soon  
5 thereafter as the matter may be heard in Courtroom 880, located at Roybal Federal  
6 Building, 255 E. Temple Street, Los Angeles, CA 90006, Plaintiffs and  
7 Counterclaim Defendants Manwin Licensing International S.À.R.L. and Digital  
8 Playground, Inc. (collectively “Manwin”) will and hereby do move, pursuant to  
9 California Code of Civil Procedure section 425.16, for an order striking, with  
10 prejudice, ICM Registry, LLC’s (“ICM”) Sixth and Seventh Claims contained in  
11 its First Amended Counterclaims, for unfair competition under California Business  
12 & Professions Code Section 17200, and tortious interference with prospective  
13 economic advantage, respectively. Manwin also will and hereby does, move for an  
14 order, pursuant to California Code of Civil Procedure section 425.16, awarding  
15 Manwin its reasonable attorneys’ fees incurred in bringing this motion.

16 This motion is made on the grounds that ICM’s state law unfair competition  
17 and tortious interference with prospective economic advantage counterclaims arise  
18 from protected activity, and ICM cannot establish a probability that it will prevail  
19 on either counterclaim.

20 This motion is based upon this Notice of Motion; the attached Memorandum  
21 of Points and Authorities; the concurrently filed declaration of Kate Miller; all  
22 pleadings and other records on file in this action; and such further evidence and  
23 arguments as may be presented at or before any hearing on the motion.

24 //

25 //

26 //

27

28

1 In compliance with Local Rule 7-3, counsel for Manwin and ICM have met  
2 and conferred extensively on these matters, including by telephone on November  
3 28, 2012. Despite these efforts, the parties have been unable to resolve their  
4 disputes.

5 DATED: December 7, 2012

6 THOMAS P. LAMBERT  
7 JEAN PIERRE NOGUES  
8 KEVIN E. GAUT  
9 MITCHELL SILBERBERG & KNUPP LLP

10 By: /s/ Jean Pierre Nogues  
11 Jean Pierre Nogues  
12 Attorneys for Plaintiffs and Counterclaim  
13 Defendants  
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**MEMORANDUM OF POINTS AND AUTHORITIES**

**I. INTRODUCTION**

Federal courts rigorously enforce California’s proscriptions against lawsuits seeking to curb public participation (also known as Strategic Lawsuits Against Public Participation or “SLAPP”). *See* Cal. Code Civ. Proc. § 425.16 (California’s anti-SLAPP statute). The state law counterclaims of defendant ICM Registry, LLC (“ICM”) are archetypal examples of such improper use of the judicial system.

Plaintiffs Manwin Licensing International S.À.R.L. and Digital Playground, Inc. (collectively, “Manwin”) among other things run adult-content websites. They have vocally and vigorously opposed ICM’s establishment of the .XXX top level domain as blatantly anticompetitive and injurious to consumers. In November 2011, Manwin filed suit against ICM for violations of the Sherman Act in connection with the establishment of the .XXX top level domain.

ICM now asserts state law counterclaims arising from Manwin’s protected activity in opposing .XXX. For that reason, under California’s anti-SLAPP statute, those counterclaims must be dismissed unless ICM meets its burden to prove through admissible evidence a probability of prevailing on those claims. *See* Cal. Code Civ. Proc. § 425.16. ICM cannot meet that burden.

**II. BACKGROUND**

ICM alleges two California state law counterclaims against Manwin: (1) for violations of California’s Unfair Competition Law, California Business and Professions Code section 17200 *et seq.* (the “UCL”); and (2) for tortious interference with prospective business advantage. *See* First Amended Counterclaims (“CC”) ¶¶ 90-115.

ICM premises both causes of action on three categories of speech or conduct. First, ICM complains that Manwin has engaged in speech vigorously attacking .XXX. Specifically, for example, ICM alleges that “Manwin has

publicly and privately denounced the .XXX TLD in the adult entertainment industry ....” CC ¶ 38. ICM further alleges that “Manwin has ... publish[ed] false statements to third parties via press release that ICANN and ICM have engaged in an illegal scheme to eliminate competitive bidding and market restraints in violation of federal and state unfair competition laws.” CC ¶ 45.

Second, ICM alleges that Manwin has boycotted .XXX by refusing to promote or host content for websites using the .XXX top level domain, or by refusing to deal with adult industry spokesmodels or trade organizations which also contract with .XXX. *See* CC ¶¶ 32, 33, 37, 39-45. ICM’s boycott allegations apparently rely in large part on a December 2, 2011 Manwin press release which reads in full:

In addition to the lawsuit filed on November 16, 2011, Manwin has determined to cease any and all Internet liaisons with the .XXX Top Level Domain.

As of today, Manwin has banned all activities between its brands and internet sites registered with a .XXX TLD.

“We oppose the .XXX domain and all it stands for,” said Fabian Thylmann, Managing Partner of Manwin. “The lawsuit was just the beginning. Through this ban, we hope to make a strong statement against the .XXX domain.”

Manwin will no longer permit content from or advertising for .XXX websites on its Tube sites.



1 In addition, Manwin will not permit its content to be used  
 2 or advertised on .XXX websites. This will prevent ICM  
 3 or .XXX from exploiting the 60 million daily visitors to  
 4 Manwin's network sites.

5  
 6 By permanently blocking the .XXX domain, Manwin  
 7 hopes to send a clear message that it does not support  
 8 ICM or .XXX.

9 Declaration of Kate Miller ("Miller Decl.") ¶ 6, Ex. 1.

10 Third, ICM complains about demands allegedly made by Manwin during  
 11 pre-litigation settlement communications. CC ¶¶ 30, 31, 34, 36, 55(e), 55(f);  
 12 Miller Decl. ¶¶ 2-5. ICM falsely and pejoratively labels these demands "attempt[s]  
 13 to improperly extort concessions from ICM." CC ¶ 30.

### 14 **III. ANTI-SLAPP STANDARDS**

15 California's anti-SLAPP statute summarily disposes of meritless causes of  
 16 action intended "to chill or punish a party's exercise of constitutional rights to free  
 17 speech and to petition the government for redress of grievances." *Paiva v. Nichols*,  
 18 168 Cal. App. 4th 1007, 1015, 85 Cal. Rptr. 3d 838, 846 (2008); Cal. Code Civ.  
 19 Proc. § 425.16(a). The anti-SLAPP statute applies in federal court to state law  
 20 causes of action. *U.S. ex rel. Newsham v. Lockheed Missiles & Space Co., Inc.*,  
 21 190 F.3d 963, 972 (9th Cir. 1999); *see also Cedars-Sinai Med. Ctr. v. Global Excel*  
 22 *Mgmt.*, No. CV 09-3627 PSG, 2009 U.S. Dist. LEXIS 120411, at \*27 (C.D. Cal.  
 23 Dec. 4, 2009) (Gutierrez, J.) ("Federal courts can grant special motions to strike  
 24 pursuant to California's anti-SLAPP statute").

25 The California Legislature has mandated that the anti-SLAPP statute "shall  
 26 be construed broadly." Cal. Code Civ. Proc. § 425.16(a). The statute applies no  
 27 matter what the legal theory of the claim, provided it attacks protected conduct.

1 *See Navellier v. Sletten*, 29 Cal. 4th 82, 93, 124 Cal. Rptr. 2d 530, 539 (2002) (“the  
2 nature or form of the action is not what is critical but rather that it is against a  
3 person who has exercised certain rights”).

4 There are two steps to a motion under the anti-SLAPP statute. First, the  
5 moving party must make a *prima facie* showing that the claims at issue “arise  
6 from” protected activity. Second, once the moving party meets that burden, the  
7 responding party must establish through admissible evidence the probability that it  
8 will prevail on its claims. *Steed v. Dep’t of Consumer Affairs*, 204 Cal. App. 4th  
9 112, 119-120, 138 Cal. Rptr. 3d 519, 525 (2012); *see also* Code Civ. Proc.  
10 § 425.16(b)(1).

11 As explained below, Manwin has met its initial burden, and ICM cannot  
12 meet its response burden on the counterclaims at issue.

13 **IV. ICM’S STATE LAW CAUSES OF ACTION ARISE FROM**  
14 **PROTECTED ACTIVITY**

15 **A. Protected Anti-SLAPP Activity**

16 Activity protected under the Anti-SLAPP statute includes:

- 17 • “any written or oral statement or writing made in connection with an  
18 issue under consideration or review by a legislative, executive, or judicial body, or  
19 any other official proceeding authorized by law”;
- 20 • “any written or oral statement or writing made in a place open to the  
21 public or a public forum in connection with an issue of public interest”; or
- 22 • “any other conduct in furtherance of the exercise of the constitutional  
23 right of petition or the constitutional right of free speech in connection with a  
24 public issue or an issue of public interest.” *See* Cal. Code Civ. Proc. § 425.16(e).

25 The Anti-SLAPP statute applies even if the cause of action only *in part*  
26 challenges such protected activities. *See, e.g., Salma v. Capon*, 161 Cal. App. 4th  
27 1275, 1287, 74 Cal. Rptr. 3d 873, 883 (2008) (“A mixed cause of action is subject

1 to section 425.16 if at least one of the underlying acts is protected conduct, unless  
2 the allegations of protected conduct are merely incidental to the unprotected  
3 activity.”); *Fox Searchlight Pictures, Inc. v. Paladino*, 89 Cal. App. 4th 294, 308,  
4 106 Cal. Rptr. 2d 906, 918 (2001) (“a plaintiff cannot frustrate the purpose of the  
5 SLAPP statute [by] combining allegations of protected and non-protected activity  
6 under the label of one ‘cause of action’”).

7 **B. Manwin’s Challenged Activity is Protected**

8 Under these standards, both of ICM’s counterclaims are subject to the anti-  
9 SLAPP statute because they are based in large part on three forms of protected  
10 alleged Manwin speech or conduct.

11 **1. Manwin’s Speech is Protected Activity**

12 Public speech on a matter of public interest is protected activity under the  
13 anti-SLAPP statute. Code Civ. Proc. § 425.16(e)(3); *Summit Bank v. Rogers*, 206  
14 Cal. App. 4th 669, 693, 142 Cal. Rptr. 3d 40, 57 (2012) (holding posting on  
15 internet “rants and raves” board to be protected activity). Even private speech  
16 about a matter of public interest is protected. Code Civ. Proc. § 425.16(e)(4);  
17 *Terry v. Davis Community Church*, 131 Cal. App. 4th 1534, 1546, 33 Cal. Rptr. 3d  
18 145, 153 (2005) (“subdivision (e)(4) applies to private communications concerning  
19 issues of public interest.”).<sup>1</sup>

20 Manwin’s speech about and criticizing .XXX is plainly about a matter of  
21 public interest. *See Cross v. Cooper*, 197 Cal. App. 4th 357, 372, 127 Cal. Rptr. 3d  
22 903, 912 (2011) (“[C]ourts have broadly construed ‘public interest’. . . . [T]he  
23 issue need not be ‘significant’ to be protected by the anti-SLAPP statute—it is  
24

25 <sup>1</sup> Statements Mawnin made in a press release announcing Manwin’s filing of this  
26 case, as alleged in paragraphs 45 and 84 of the first amended counterclaims, are  
27 also protected under the Anti-SLAPP statute for the independent reason that they  
28 relate to the litigation. *See, e.g.,* Code Civ. Proc. § 425.16(e)(2), *Pistoresi v.*  
*Madera Irrigation Dist.*, No. CV-F-08-843-LJO-DLB, 2008 U.S. Dist. LEXIS  
99164, at \*31 (E.D. Cal. Nov. 25, 2008) (cause of action for defamation regarding  
assertions in press release pertaining to lawsuit “arises from” protected activity).

1 enough that it is one in which the public takes an interest.”) (internal citations and  
2 quotation marks omitted). Indeed, ICM expressly conceded that the “public  
3 interest” requirement is satisfied. ICM *itself* brought an anti-SLAPP motion  
4 challenging state court claims asserted against ICM by Manwin in its original  
5 complaint. *See, e.g.*, ICM’s Special Motion to Strike, ECF No. 21-1. In that  
6 motion and the declarations filed in support of it, ICM expressly admits that issues  
7 concerning the .XXX TLD meet the anti-SLAPP “public interest” standard. *Id.* at  
8 19:19-21:4 (section titled “The .XXX sTLD is an Issue of Public Interest.”); *see*  
9 *also id.* 9:15-17 (“The public interest in the creation of the .XXX domain has been  
10 overwhelming, and the public’s fascination with the launch of ICM’s .XXX sTLD  
11 far exceeds that of any other sTLD.”); *id.* at 20:15-18 (“[B]oth the broader adult  
12 entertainment community and the general public have taken an interest in the  
13 unique .XXX domain and have made ICM’s conduct in creating this venue for  
14 responsible erotic speech an issue of global significance.”); Declaration of Stuart  
15 Lawley, ECF No. 22 (noting “intense public interest” in .XXX approval process);  
16 *id.* at ¶ 38 (estimating the number of articles written about ICM and the launch of  
17 .XXX “to number into the thousands”).

## 18                   2.     **Manwin’s Boycott Is Protected Activity**

19             Boycotts are protected under the anti-SLAPP statute as “other conduct in  
20 furtherance of the exercise of the constitutional right of petition or the  
21 constitutional right of free speech in connection with a public issue or an issue of  
22 public interest.” Code Civ. Proc. § 425.16(e)(4); *see also, e.g., Wilcox v. Superior*  
23 *Court*, 27 Cal. App. 4th 809, 821, 33 Cal. Rptr. 2d 446, 453 (1994) (“[T]he  
24 definition of an ‘act in furtherance of’ a person’s First Amendment rights is not  
25 limited to oral and written statements. Thus if the plaintiff’s suit arises out of the  
26 defendant’s constitutionally protected conduct, *such as a peaceful economic*  
27 *boycott* the plaintiff should be required to satisfy the statute’s requirements.”)

(internal citations omitted) (emphasis added), *disapproved on other grounds*, *Equilon Enters. v. Consumer Cause, Inc.*, 29 Cal. 4th 53, 68 n.5, 124 Cal. Rptr. 2d 507, 519 n.5 (2002); *Overhill Farms, Inc. v. Lopez*, 190 Cal. App. 4th 1248, 1255-1259, 119 Cal. Rptr. 3d 127, 135-37 (2010) (claims relating to distribution of flyer calling for boycott arose from protected activity); *Fashion 21 v. Coalition for Humane Immigrant Rights of Los Angeles*, 117 Cal. App. 4th 1138, 1143-1145, 12 Cal. Rptr. 3d 493, 496-97 (2004) (claims relating to “call for nationwide boycott” arose from protected activity).

Here, ICM alleges that Manwin’s purported boycott arises out of a matter of public interest, its vocal opposition to the .XXX TLD. CC ¶¶ 38, 45, 84. That activity is thus protected within the holding of these authorities.

### 3. Manwin’s Pre-Litigation Demands Are Protected Activity

“Although litigation may not have commenced, if a statement concern[s] the subject of the dispute and is made in anticipation of litigation contemplated in good faith and under serious consideration, then the statement may be petitioning activity protected by section 425.16.” *Neville v. Chudacoff*, 160 Cal. App. 4th 1255, 1268, 73 Cal. Rptr. 3d 383, 394 (2008) (internal citations and quotation marks omitted); *see also* Code Civ. Proc. §§ 425.16(e)(1), (e)(2); *Rohde v. Wolf*, 154 Cal. App. 4th 28, 37, 64 Cal. Rptr. 3d 348, 355 (2007) (voicemail messages were protected activity where “the spectre of litigation loomed over all communications between the parties at that time”); *Blanchard v. DIRECTV, Inc.*, 123 Cal. App. 4th 903, 918, 20 Cal. Rptr. 3d 38, 395 (2004) (case arises from protected activity premised on “demand letter, sent in advance of, or to avoid, litigation”).

Here, ICM complains about demands allegedly made by Manwin in anticipation of litigation. ICM’s President Stuart Lawley so admitted in his declaration filed in support of ICM’s earlier Special Motion to Strike. In the

1 declaration, Mr. Lawley admits that the “demands” were made during meetings  
2 between ICM and Manwin mere weeks before this lawsuit was filed, and included  
3 express threats to file litigation if the demands were not met. Lawley Decl. ¶¶ 30,  
4 31; *see also* Miller Decl. ¶¶ 2-5. The purported demands are thus protected  
5 activity under the anti-SLAPP statute. *See, e.g.*, CC ¶¶ 30, 31, 34, 36, 55.

6 ICM’s inaccurate and pejorative characterization of the discussions as  
7 “attempts to extort concessions” does not change this result. *See, e.g.*, CC ¶ 30;  
8 *see also Feldman v. 1100 Park Lane Associates*, 160 Cal. App. 4th 1467, 1481, 74  
9 Cal. Rptr. 3d 1, 12 (2008) (Landlords “threats” were protected activities, as they  
10 constituted “communications in connection with an ongoing dispute and in  
11 anticipation of litigation.”); *Fleming v. Coverstone*, No. 08cv355 WQH, 2009 U.S.  
12 Dist. LEXIS 22021, at \*10-12 (S.D. Cal. Mar. 18, 2009) (email sent threatening to  
13 expose plaintiff’s ethics violations and illegal tax scam was in anticipation of  
14 litigation and so protected activity).

15 **V. ICM CANNOT SHOW A LIKELIHOOD OF PREVAILING ON THE**  
16 **MERITS**

17 Under the second step of the anti-SLAPP analysis, “the burden shifts to the  
18 plaintiff to demonstrate a probability of prevailing on the challenged claims.”  
19 *Roberts v. McAfee, Inc.*, 660 F.3d 1156, 1163 (9th Cir. 2011); *Steed*, 204 Cal. App.  
20 4th at 119. To meet its burden, the moving party may not rely on its allegations  
21 alone; instead, its showing must be made through “competent admissible  
22 evidence.” *Paiva*, 168 Cal. App. 4th at 1017; *see also Steed*, 204 Cal. App. 4th at  
23 120 (“to carry his burden to demonstrate probability of prevailing on their  
24 complaint, [Plaintiff] must demonstrate *by admissible evidence* the probability that  
25 [he] would succeed on the merits”) (internal quotation marks omitted) (emphasis  
26 added). Moreover, the moving party’s showing “is considered under a standard  
27

1 similar to that employed in determining nonsuit, directed verdict or summary  
2 judgment motions.” *Paiva*, 168 Cal. App. 4th at 1017.

3 ICM cannot meet these burdens. Indeed, for the reasons specified in  
4 Manwin’s simultaneously filed motions to dismiss, which is incorporated herein,  
5 ICM’s state law claims fail as a matter of law.

6 **VI. MANWIN IS ENTITLED TO ITS FEES IN BRINGING THIS**  
7 **MOTION**

8 A moving party which prevails on any portion of its anti-SLAPP motion is  
9 entitled to recover its attorney’s fees. Code Civ. Proc. § 425.16(c); *see also*  
10 *New.Net, Inc. v. Lavasoft*, 356 F. Supp. 2d 1090, 1115 (C.D. Cal. 2004) (“An  
11 award is proper even if the anti-SLAPP motion is granted as to only some of a  
12 plaintiff’s claims”). Manwin should thus recover its fees upon granting of this  
13 Motion.

14 DATED: December 7, 2012

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

17  
18 By: /s/ Jean Pierre Nogues  
Jean Pierre Nogues  
19 Attorneys for Plaintiffs and  
Counterdefendants  
20  
21  
22  
23  
24  
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26  
27