

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

#75/76

CIVIL MINUTES - GENERAL

Case No.	CV 11-9514 PSG (JCGx)	Date	February 26, 2013
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Title	Manwin Licensing International S.A.R.L., et al. v. ICM Registry, LLC, et al.
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Present:	The Honorable Philip S. Gutierrez, United States District Judge
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Wendy K. Hernandez	Not Present	n/a
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Deputy Clerk	Court Reporter	Tape No.
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Attorneys Present for Plaintiff(s):

Attorneys Present for Defendant(s):

Not Present

Not Present

Proceedings: (In Chambers) Order GRANTING Defendants' Motion to Dismiss and GRANTING Defendants' Motion to Strike

Before the Court are Plaintiff and Counter-Defendants Manwin Licensing International S.À.R.L and Digital Playground, Inc.'s (collectively, "Manwin" or "Plaintiffs") motion to dismiss Defendant and Counter-Plaintiff ICM Registry, LLC's ("ICM", together with Internet Corporation for Assigned Names and Numbers ("ICANN"), "Defendants") First Amended Counterclaims and motion to strike pursuant to California Code of Civil Procedure section 425.16 (Anti-SLAPP). Dkts. # 75, 76. After considering the moving and opposing papers and arguments made at the February 15, 2013 hearing, the Court GRANTS the motion to dismiss and GRANTS the motion to strike.

I. Background

The Internet is an international network of interconnected servers and computers. *FAC* ¶ 13. Each computer or host server connected to the Internet has a unique identity that is established by the Internet Protocol address ("IP address"). *FAC* ¶ 16. An IP address consists of four numbers between 0 and 255 that are separated by periods. *FAC* ¶ 16. The IP address ensures that users are directed to the computer or host server for the particular website that they intend to visit. *FAC* ¶ 16.

Because IP addresses are difficult to remember, the Domain Name System ("DNS") was introduced to allow users to identify a computer using alphanumeric domain names, such as "YouPorn.com." *FAC* ¶ 17. Within each domain name, the letters to the right of the last period

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constitute the Top Level Domain (“TLD”). *FAC* ¶ 19. For example, in the domain name “YouPorn.com,” the TLD is “.com.” *FAC* ¶ 19.

Most TLDs with three or more characters are referred to as generic TLDs (“gTLDs”). *FAC* ¶ 20. gTLDs can be sponsored or unsponsored. *FAC* ¶ 20. A sponsored gTLD (“sTLD”) is a specialized TLD that has a sponsor, usually an entity representing a narrower group or industry. *FAC* ¶ 20. The sponsor makes policy decisions for the sTLD. *FAC* ¶ 20. For example, the sTLD “.museum” is operated for the benefit of museums, museum associations, and museum professionals. *FAC* ¶ 20. There are currently twenty-two gTLDs, fourteen of which are sTLDs. *FAC* ¶ 21.

Each TLD is operated by an assigned organization, referred to as a registry operator or registry. *FAC* ¶ 22. Operating responsibilities include overseeing the sale and allocation of domain names in the TLD and maintaining a database directory. *FAC* ¶ 22. Registries, in turn, authorize separate companies called registrars to directly sell the TLD domain names to businesses or consumers owning and using those names in the TLD. *FAC* ¶ 22. Registries then collect fees from registrars, usually on an annual basis. *FAC* ¶ 22.

In 1998, ICANN was created to operate the DNS. *FAC* ¶ 6. ICANN is a non-profit public benefit corporation. *FAC* ¶ 6. ICANN’s duties include determining what new TLDs to approve, choosing registries for existing or newly approved TLDs, and contracting with the registries to operate the TLDs. *FAC* ¶ 25. According to its Articles of Incorporation, ICANN was established “for the benefit of the Internet industry as a whole.” *FAC* ¶ 27. In its agreements, ICANN has stated that it would appropriately consider the need for market competition and the protection of rights in names and other intellectual property when approving TLDs and registries. *FAC* ¶ 29. ICANN earns fees from approving new TLDs, new registry operators, and new registrars. *FAC* ¶ 32. ICANN also charges registries and registrars fixed annual fees as well as per-transaction fees (e.g., registries and registrars pay ICANN a certain amount for every domain name registered). *FAC* ¶ 32.

In about 2000, ICM first applied to ICANN for approval of a new .XXX TLD, intended primarily for adult content. *FAC* ¶ 34. ICANN rejected the application, finding that the .XXX TLD did not meet unmet needs and noting opposition from some segments of the adult online content industry. *FAC* ¶ 34. ICM unsuccessfully applied for approval again in 2004, 2006, and 2007. *FAC* ¶¶ 37, 43. In 2008, ICM filed an Independent Review Proceeding, challenging ICANN’s rejection of the .XXX TLD. *FAC* ¶ 44. In 2010, the Independent Review Panel

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issued a non-binding Declaration that ICANN had determined that ICM met the sponsorship criteria in 2005. *FAC* ¶ 46.

In 2011, ICANN agreed to approve ICM's application for the .XXX TLD. *FAC* ¶ 48. ICANN and ICM then signed a registry contract under which ICM agreed to provide registry services for the .XXX TLD. *FAC* ¶ 48.

In November 2011, Manwin filed suit against Defendants. Dkt. # 1. Manwin Licensing International S.À.R.L owns and licenses one of the largest portfolios of adult-oriented website domain names and trademarks. *FAC* ¶ 4. Digital Playground, Inc. is a leader in adult-oriented filmmaking and interactive formats. *FAC* ¶ 5. In their First Amended Complaint, Plaintiffs assert five causes of action, alleging various violations of the Sherman Antitrust Act ("Sherman Act"), 15 U.S.C. §§ 1, 2. *FAC* ¶¶ 93-139. Defendants moved to dismiss the First Amended Complaint, which this Court granted in part and denied in part. *See* Dkt. # 40.

ICM then filed its First Amended Counterclaims. *See* Dkt. # 60. The FACC alleges counterclaims for (1) violation of the Sherman Act, 15 U.S.C. § 1, (2) violation of the Sherman Act, 15 U.S.C. § 2, (3) attempt to monopolize, (4) conspiracy to monopolize, (5) unfair competition under the Lanham Act, 15 U.S.C. § 1125(a); (6) unfair competition under California's Business and Professions Code §§ 17200, *et seq.*, and (7) tortious interference with prospective economic advantage. *FACC* ¶¶ 48-115.

ICM alleges that Manwin Licensing International S.À.R.L has engaged in anti-competitive behavior by colluding and conspiring with Digital Playground, Inc. to destroy ICM's commercialization of .XXX. *FACC* ¶ 8. According to ICM, Manwin's dominance in the adult entertainment industry is related to its ownership of various "tube" sites. *FACC* ¶ 15. Tube sites, like YouTube.com, are sites in which other users upload searchable content. *FACC* ¶ 12. The online Internet traffic for the adult entertainment industry is concentrated in tube sites, many of which are owned by Manwin, including YouPorn.com, xTube.com, Pornhub.com, Extreme Tube, SexTube, Gaytube, and Spankwire. *FACC* ¶ 15. ICM alleges that Manwin has interfered with the .XXX TLD because the presence of the .XXX TLD would threaten Manwin's dominance over the tube site market. *FACC* ¶ 19. Manwin's dominance would be threatened because search engines, like Google, Bing, and Yahoo!, could use search engine analytics to place websites bearing a .XXX TLD higher on a list of search results than websites ending with a .com or .net TLD. *Id.* A significant portion of Manwin's online traffic is generated by search engines. *FACC* ¶ 19. Thus, the enhanced exposure for .XXX tube sites as opposed to .com tube

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sites would affect Manwin's dominance in the adult entertainment market. *Id.* For this reason, Manwin's managing partner attempted to buy into ICM in July 2010, but was rebuffed. *FACC* ¶ 21. ICM contends that after this incident, Manwin has attempted to thwart the commercialization of .XXX by *inter alia*, filing this lawsuit, engaging in tying arrangements with webmasters, requiring webmasters to sign terms and conditions that limit their rights to register domain names with .XXX, instigating a boycott, and interfering with sponsorship opportunities. *FACC* ¶¶ 21, 22, 32, 35, 37, 41.

Manwin filed this motion to dismiss, or in the alternative, motion to strike. Dkts. # 75, 76. The Court will first address the Motion to Dismiss followed by the Motion to Strike.

II. Motion to Dismiss

A. Legal Standard

Under Rule 12(b)(6) of the Federal Rules of Civil Procedure, a defendant may move to dismiss a cause of action if the plaintiff fails to state a claim upon which relief can be granted. *See Fed. R. Civ. P. 12(b)(6)*. In evaluating the sufficiency of a complaint under Rule 12(b)(6), courts should be mindful that the Federal Rules of Civil Procedure generally require only that the complaint contain "a short and plain statement of the claim showing that the pleader is entitled to relief." *Fed. R. Civ. P. 8(a)(2)*. Although detailed factual allegations are not required to survive a Rule 12(b)(6) motion to dismiss, a complaint that "offers 'labels and conclusions' or 'a formulaic recitation of the elements of a cause of action will not do.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007)). Rather, the complaint must allege sufficient facts to support a plausible claim for relief. *See id.*

In evaluating a Rule 12(b)(6) motion, the court must engage in a two-step analysis. *See id.* at 1950. First, the court must accept as true all non-conclusory, factual allegations made in the complaint. *See Leatherman v. Tarrant Cnty. Narcotics Intelligence & Coordination Unit*, 507 U.S. 163, 164 (1993). Based upon these allegations, the court must draw all reasonable inferences in favor of the plaintiff. *See Mohamed v. Jeppesen Dataplan, Inc.*, 579 F.3d 943, 949 (9th Cir. 2009).

Second, after accepting as true all non-conclusory allegations and drawing all reasonable inferences in favor of the plaintiff, the court must determine whether the complaint alleges a

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plausible claim for relief. *See Iqbal*, 556 U.S. at 679. Despite the liberal pleading standards of Rule 8, conclusory allegations will not save a complaint from dismissal. *See id.*

B. Discussion

Manwin moves to dismiss the First Amended Counterclaims on various grounds. Manwin argues that ICM has failed to plead violations of Sections 1 and 2 of the Sherman Act, attempt and conspiracy to monopolize, the Lanham Act, California's Unfair Competition Law, and Tortious Interference with Prospective Economic Relations.

i. Sherman Act Claims

Section 1 of the Sherman Act provides: "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal." 15 U.S.C. § 1. To establish a Section 1 claim, a plaintiff must show (1) concerted action among two or more independent entities, (2) an unlawful restraint of trade, and (3) antitrust injury. *See Kendall v. Visa U.S.A., Inc.*, 518 F.3d 1042, 1047 (9th Cir. 2008).

Section 2 of the Sherman Act imposes liability on "[e]very person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations." 15 U.S.C. § 2. For a Section 2 monopolization claim, a plaintiff must establish (1) possession of monopoly power by defendant in a relevant market, (2) predatory conduct, and (3) causal antitrust injury. *MetroNet Servs. Corp. v. Qwest Corp.*, 383 F.3d 1124, 1130 (9th Cir. 2004).

An attempted monopolization claim requires (1) specific intent to control prices or destroy competition, (2) predatory or anticompetitive conduct, (3) a dangerous probability of success, and (4) causal antitrust injury. *McGlinchy v. Shell Chem. Co.*, 845 F.2d 802, 811 (9th Cir. 1988).

A conspiracy to monopolize claim requires (1) the existence of a combination or conspiracy to monopolize, (2) an overt act in furtherance of the conspiracy, (3) the specific intent to monopolize, and (4) causal antitrust injury. *Paladin Assoc., Inc. v. Mont. Power Co.*, 328 F.3d 1145, 1158 (9th Cir. 2003).

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Manwin alleges that ICM has failed to state causes of action for violations of Sections 1 and 2 of the Sherman Act because it has no standing, has not alleged an adequate market, has not shown any harm to competition, has not pleaded the presence of bilateral agreements under Section 1, and has not pleaded any anticompetitive conduct under Section 2. Manwin similarly argues that ICM has failed to allege attempt to monopolize and conspiracy to monopolize. Each argument will be addressed in turn.

1. Antitrust Standing

Antitrust standing is a jurisdictional prerequisite to both a Section 1 and Section 2 claim. *See In re ATM Fee Antitrust Litig.*, 686 F.3d 741, 744 (9th Cir. 2012). Under Section 4 of the Clayton Act, “any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue . . . and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney’s fee.” 15 U.S.C. § 15(a). However, “[t]he Supreme Court has interpreted that section narrowly, thereby constraining the class of parties that have statutory standing to recover damages through antitrust suits.” *Del. Valley Surgical Supply Inc. v. Johnson & Johnson*, 523 F.3d 1116, 1120 (9th Cir. 2008) (citation omitted); *accord Am. Ad Mgmt., Inc. v. Gen. Tel. Co. of Cal.*, 190 F.3d 1051, 1054 (9th Cir.1999) (noting that Section 4 is not to be read to “afford relief to all persons whose injuries are causally related to an antitrust violation[;]” rather, “courts have constructed the concept of antitrust standing, under which they ‘evaluate the plaintiff’s harm, the alleged wrongdoing by the defendants, and the relationship between them,’ [in order] to determine whether a plaintiff is a proper party to bring an antitrust claim.”). As a result, “[a]ntitrust standing is distinct from Article III standing,” and a “plaintiff who satisfies the constitutional requirement of injury in fact is not necessarily a proper party to bring a private antitrust action.” *Id.* at 1054 n.3. The issue may be raised at any stage of litigation. *R.C. Dick Geothermal Corp. v. Thermogenics, Inc.*, 890 F.2d 139, 145 (9th Cir. 1989). Thus, antitrust standing involves two primary considerations. First, a plaintiff alleging an antitrust violation must allege that it has experienced an injury. Second, a plaintiff alleging an antitrust violation must allege that it is a proper party to bring the antitrust claim. *See Associated General Contractors of California, Inc. v. California State Council of Carpenters*, 459 U.S. 519, 536, n.31 (1983) (“Harm to the antitrust plaintiff is sufficient to satisfy the constitutional standing requirement of injury in fact, but the court must make a further determination whether the plaintiff is a proper party to bring a private antitrust action.”)

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To allege antitrust injury, ICM must show that Manwin's conduct will harm competition in the relevant market. *Coal. for ICANN Transparency, Inc. v. Verisign*, 611 F.3d 495, 502 (9th Cir. 2010). Manwin contends that ICM has failed to allege that Manwin's conduct will harm competition. Moreover, Manwin claims that even if ICM has pleaded that Manwin's conduct will harm competition, it will not harm ICM because Manwin and ICM are not competitors in the same market. At best, ICM alleges that Manwin's conduct will prevent ICM from commercializing the .XXX TLD. *FACC* ¶ 59. However, ICM's alleged inability to commercialize the .XXX TLD does not allege a restraint on competition in the relevant market because there is no shortage of TLDs available to "online search and access to adult entertainment via websites." ICM claims that "[t]his harm will also destroy or damage competition by preventing Internet stakeholders from competing with Manwin's tube sites in .XXX." *FACC* ¶ 59. However, the presence of the .XXX TLD has no bearing on the number of websites that can compete with Manwin's tube sites. As this Court has previously recognized, "an adult content website registered in the .com TLD is an adequate economic substitute for an adult content website registered in the .XXX TLD." Dkt. # 40 at 11. Websites seeking to compete with Manwin's sites could easily form a new website, regardless of whether that site bears the .XXX TLD or an alternate TLD. Thus, ICM has failed to make an argument that failure to commercialize the .XXX TLD will reduce the number of competitors in the market for "online search and access to adult entertainment via websites." The only potential harm is to ICM itself. Harm to ICM only is not sufficient to constitute antitrust injury. It must allege harm to the competitive process. *See Brown Shoe Co. v. United States*, 370 U.S. 294, 344 (1962) ("It is competition, not competitors, which the [Sherman] Act protects"); *LiveUniverse, Inc. v. MySpace, Inc.*, 2007 U.S. Dist. LEXIS 43739, *51 (C.D. Cal. June 4, 2007) ("Internet aficionados easily move from one website to another in seconds. Although purporting to address the impact on competition generally, LiveUniverse really complains about the impact on LiveUniverse itself"). Thus, ICM has not adequately alleged harm to competition.

In addition, ICM has failed to show that it is the proper party to claim an antitrust violation. The Supreme Court has identified certain factors for determining whether a plaintiff who has borne an injury for purposes of Article III standing has suffered injury for antitrust purposes. *Am. Ad Mgmt., Inc. v. Gen. Tel. Co. of California*, 190 F.3d 1051, 1054 (9th Cir. 1999). These factors include: (1) the nature of the plaintiff's alleged injury; that is, whether it is the type the antitrust laws were intended to prevent; (2) the directness of the injury; (3) the speculative measure of the harm; (4) the risk of duplicative recovery; and (5) the complexity in apportioning damages. *Amarel v. Connell*, 102 F.3d 1494, 1507 (9th Cir. 1996); *accord Associated Gen.*, 459 U.S. at 538-45.

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Courts have stated that “no single factor is decisive,” *R.C. Dick Geothermal*, 890 F.2d at 146, and that it is “virtually impossible to announce a black-letter rule that will dictate the result in every case.” *Am. Ad Mgmt.*, 190 F.3d at 1054. However, the first factor, whether the antitrust laws were intended to prevent the type of injury alleged by the plaintiff, is of such “tremendous significance” in determining whether a plaintiff has antitrust standing that its presence is necessary, though not always sufficient. *Bhan v. NME Hosps., Inc.*, 772 F.2d 1467, 1470 n.3 (9th Cir. 1985); *accord Glen Holly Entm’t, Inc. v. Tektronix, Inc.*, 352 F.3d 367, 372 (9th Cir. 2003) (“[T]o acquire ‘antitrust standing,’ a plaintiff must adequately allege and eventually prove ‘antitrust injury.’”).

Here, Manwin argues that ICM has failed to allege antitrust injury because the antitrust laws were not designed to prevent injury to those who are not competitors. ICM is not a competitor in Manwin’s market of “online search and access to adult entertainment via websites.” *FACC* ¶ 50. ICM operates neither adult websites nor search engines; it only sells domain names to registrants who in turn supply adult content to consumers.¹ According to Manwin, the antitrust laws were not designed to protect those who bear only an attenuated relationship to the market.

ICM argues that it has standing because it is a supplier of goods and services to the relevant market of “online search and access to adult entertainment via websites.” *FACC* ¶ 50; *see Associated Gen.*, 459 U.S. at 538 (noting that courts have “emphasized the central interest [of the Sherman Act] in protecting the economic freedom of participants in the relevant market.”). However, the courts have derived from this principle the “corollary” that the “injured party be a participant in the same market as the alleged malefactors.” *Bhan v. NME Hospitals, Inc.*, 772 F.2d 1467, 1470 (9th Cir. 1985). Antitrust injury requires the plaintiff to have suffered its injury in the market where competition is being restrained. *Am. Ad. Mgmt.*, 190 F.3d at 1057.

For example, in *Associated General*, upon which ICM relies, the Supreme Court found that the plaintiff was not a competitor in the relevant market. *Associated Gen.*, 459 U.S. at 520-

¹ ICM represented at oral argument that it is a competitor in the market of “online search and access to adult entertainment via websites,” citing paragraphs 30, 31, and 45 of the *FACC*. At best, paragraph 31 mentions “certain premium .XXX domains (such as search.xxx)” which are potentially domain names owned by ICM. However, ICM’s allegations do not represent that it owns the premium domain names and also do not indicate that “search.xxx” or any similar domain names are a part of the market.

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21. Two unions brought suit alleging that a multiemployer association had violated antitrust laws by coercing third parties, as well as some of the association's members, to enter into business relationships with nonunion firms. *Id.* The unions alleged that this conduct adversely affected the trade of certain unionized firms and restrained the business activities of the unions. *Id.* The Supreme Court reasoned that because the unions were neither consumers nor competitors in the market in which trade was restrained, this was not the type of injury that antitrust laws sought to prevent. *Id.* at 539.

Like in *Associated General*, ICM alleges an indirect impact on its business activities. It alleges that Manwin coerced third parties to sign terms and conditions agreements limiting their rights to register domain names with .XXX TLD's. This adversely affected the trade of the .XXX TLD's and restrained ICM's business. The attenuated link between Manwin's conduct with webmasters and the impact on ICM is not the kind of injury that antitrust laws were designed to prevent.

Manwin also notes that ICM does not sell domain names directly to website operators, but sells them indirectly through registrars. Only the direct sellers, *i.e.*, the registrars, may assert damages claims for any domain names lost as a result of Manwin's allegedly anticompetitive conduct. *See, e.g., Ill. Brick Co. v. Ill.*, 431 U.S. 720, 730-31 (1977) (barring indirect purchasers from seeking antitrust damages where plaintiffs attempted to recover damages from defendants who allegedly had overcharged the sellers from whom the plaintiffs purchased); *see also Sea-Land Serv. v. Atl. Pac. Int'l*, 61 F. Supp. 2d 1092, 1095 (D. Haw. 1999) (finding antitrust claims barred where plaintiff "had not alleged that it purchased transportation directly" from defendant); *Zinser v. Cont'l Grain Co.*, 660 F.2d 754, 759 (10th Cir. 1981) ("In *Illinois Brick*, an indirect purchaser could not recover for an overcharge which had been passed on to him. It logically follows that an indirect seller, *i.e.*, one who did not deal with the defendant, may not recover for an undercharge set in motion by the indirect buyer's unlawful activities."). ICM's attempt to argue that it is a direct market participant further establishes the attenuated link between Manwin's conduct and the impact on ICM:

Manwin's argument that ICM has not experienced antitrust injury also ignores the fact that, as a registry operator, ICM is a direct participant in the market for online search and access to adult content via websites because it supplies domain names to registrars, who then sell domain names to registrants (website operators), who in turn supply adult content to end users.

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Opp. 11:20-25. Because ICM's own description establishes that it not a direct participant in the market, but only an indirect seller, it has failed to plead that it suffered the type of injury antitrust laws are designed to prevent. Because such an antitrust injury is a necessary component for proof of antitrust standing, the Court need not address the other components of antitrust standing. *See Bhan*, 772 F.2d at 1470 n.3; *accord Glen Holly Entm't*, 352 F.3d at 372.

Accordingly, based on the foregoing, ICM has failed to adequately plead the requirements for causes of action under Section 1 and Section 2 of the Sherman Act because its allegations do not show that ICM has standing. Similarly, because attempt to monopolize and conspiracy to monopolize both require causal antitrust injury, ICM has failed to allege those claims. Because ICM has failed to allege standing, the Court need not address ICM's other arguments at this time. Manwin's motion to dismiss the claims is GRANTED, with leave to amend.

ii. Unfair Competition under the Lanham Act

ICM alleges that Manwin violated the Lanham Act. ICM alleges only that Manwin violated 15 U.S.C. § 1125(a) of the Lanham Act, and does not specify a particular provision. However, based on ICM's arguments, it appears that ICM alleges that Manwin violated 15 U.S.C. § 1125(a)(1)(B). That provision bans "commercial advertising or promotion" that misrepresents "the nature, characteristics, qualities, or geographic origin of . . . another person's goods, services or commercial activities." 15 U.S.C. § 1125(a)(1)(B). Thus, the threshold requirement for such a claim is that the alleged misrepresentation constitutes commercial advertising or promotion. *See Oxycal Labs., Inc. v. Jeffers*, 909 F. Supp. 719, 723 (S.D. Cal. 1995). The crux of ICM's allegation is that Manwin engaged in libel and trade defamation when it published a press release regarding this lawsuit. In support of this contention, ICM specifically identifies two statements in the press release. First, the press release stated that this "lawsuit reveals ICM intended to exploit the defensive registration process to reap profits and conspired with ICANN to monopolize the .XXX domain TLD." *FACC* ¶ 84. Second, Manwin asserted in the press release that the lawsuit revealed "new details about the illegal scheme by ICANN and ICM to eliminate competitive bidding and market restraints in, and to monopolize, the markets for .XXX registry services." ICM contends that these statements violate the Lanham Act because they are false and were made with intent to interfere with ICM's existing and prospective business relationships. *FACC* ¶ 85.

Manwin responds that ICM cannot state a claim under the Lanham Act because the press release was not commercial speech. *See Oxycal Labs*, 909 F. Supp. at 723 ("[T]he Lanham Act

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can only reach commercial speech.”) (citation omitted). “The core notion of commercial speech is ‘speech which does no more than propose a commercial transaction.’” *Rice v. Fox Broad Co.*, 330 F.3d 1170, 1181 (9th Cir. 2003) (quotation omitted). Commercial speech must be “related *solely* to the economic interests of the speaker and its audience.” *Ballen v. City of Redmond*, 466 F.3d 736, 741-42 (9th Cir. 2006) (quotation omitted). “The key seems to be a determination of whether the speech is primarily motivated by commercial concerns, or whether there are sufficient non-commercial motivations.” *Oxycal*, 909 F. Supp. at 725. The Manwin press release did not propose any commercial transactions, but just described the allegations of a lawsuit. *FACC* ¶ 84. The press release is similarly not solely related to the economic interests of Manwin and its audience members, as its primary purpose is in describing a lawsuit. Although lawsuits are frequently related to economic interests, in similar cases, press statements about litigation have been determined not to constitute commercial speech in the context of the Lanham Act. *See Porous Media Corp. v. Pall Corp.*, 201 F.3d 1058, 1059 (8th Cir. 2000) (concluding that a press release regarding litigation was not commercial advertising or promotion); *Encompass Ins. Co. v. Giampa*, 522 F. Supp. 2d 300, 311 (D. Mass. 2007) (same). Thus, because the speech is not commercial speech, Manwin’s issuance of a press release did not violate the Lanham Act.

ICM attempts to distinguish the cases cited by Manwin, arguing that law reaches “more than the typical advertising campaign.” *Oxycal*, 909 F. Supp. at 723. However, all of the cases cited by ICM still show speech in which a party was proposing a commercial transaction, even if they did not resemble typical advertisements. *See Semco v. Amcast, Inc.*, 52 F.3d 108, 112 (6th Cir. 1995) (finding that a rational jury could find that an article about manufacturing plunger tips was commercial speech where it both referenced the company’s products and the company had an economic motivation for submitting the article); *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60 (1983) (“The mere fact that these pamphlets are conceded to be advertisements clearly does not compel the conclusion that they are commercial speech . . . Similarly, the reference to a specific product does not by itself render the pamphlets commercial speech . . . Finally, the fact that Youngs has an economic motivation for mailing the pamphlets would clearly be insufficient by itself to turn the materials into commercial speech . . . The combination of all these characteristics, however, provides strong support for the . . . conclusion that the informational pamphlets are properly characterized as commercial speech.”); *Birthright v. Birthright, Inc.*, 827 F. Supp. 1114, 1138 (D.N.J. 1993) (finding that fundraising letters constitute commercial speech).

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The Court agrees with ICM that the gravamen of whether something is considered commercial speech is whether it is motivated primarily by commercial concerns, not the form of the speech. *See United States v. Edge Broad. Co.*, 509 U.S. 418, 426 (1993); *Oxycal*, 909 F. Supp. at 720-21, 725. However, ICM has failed to offer any competing cases suggesting that a press release regarding litigation could be motivated primarily by commercial concerns. Given other courts' findings in *Porous* and *Encompass* that such press releases do not constitute commercial speech, this Court agrees that press releases regarding litigation generally do not constitute commercial speech. ICM failed to offer any reason why the Court should not rely on those two cases. Accordingly, as to the motion to dismiss ICM's counterclaim for unfair competition under the Lanham Act, the motion is GRANTED, with leave to amend.

iii. Unfair Competition under California's UCL

At oral argument, ICM conceded that its claims for unlawful and unfair conduct under California's UCL were based solely on its allegations that Manwin's conduct violated the antitrust laws and the Lanham Act. Where a party's UCL allegations are based on alleged antitrust violations, the failure to allege an antitrust violation results in the failure to allege unfair competition. *See, e.g., Carter v. Variflex, Inc.*, 101 F. Supp. 2d 1261, 1270 (C.D. Cal. 2000) (finding on summary judgment that failure to satisfy requirements under the Sherman Act resulted in a failure to satisfy California's unfair competition law); *Chavez v. Whirlpool Corp.*, 93 Cal. App. 4th 363, 375, 113 Cal. Rptr. 2d 175 (2001) ("If the same conduct is alleged to be both an antitrust violation and an 'unfair' business act or practice for the same reason—because it unreasonably restrains competition and harms consumers—the determination that the conduct is not an unreasonable restraint of trade necessarily implies that the conduct is not 'unfair' toward consumers."). Similarly, failure to allege a violation of the Lanham Act precludes recovery under the UCL for the same conduct. *Cleary v. News Corp.*, 30 F.3d 1255, 1262-63 (9th Cir. 1994). Because ICM fails to distinguish its allegations as to the UCL claim from the allegations as to the federal antitrust claims and Lanham Act claim, the motion to dismiss the UCL claim is GRANTED, with leave to amend.

iv. Tortious Interference with Prospective Economic Advantage

To state a claim for the tort of intentional interference with prospective economic advantage, a plaintiff must sufficiently allege the following: (1) an 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 on the part of the

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defendant designed to disrupt the relationship; (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, 131 Cal.Rptr. 2d 29 (2003). Further, to successfully plead a claim for tortious interference with prospective economic advantage under California law, the plaintiff must plead that the alleged interference was independently wrongful by some measure beyond the fact of the interference itself. *Sybersound Records, Inc. v. UAV Corp.*, 517 F.3d 1137, 1151 (9th Cir. 2008); *Meridian Project Systems, Inc. v. Hardin Const. Co., LLC*, No. Civ. S-04-2728 FDC DAD, 2005 WL 2615523, at *7 (E.D. Cal. Oct. 14, 2005).

Here, ICM asserts that it had economic relationships with third parties, including Reality Kings and Really Useful, Ltd (“Really Useful”). *FACC* ¶¶ 108-110. However, to state a claim for tortious interference with prospective economic advantage, Manwin must be a “stranger” to the transaction. *Lowell v. Mother’s Cake & Cookie Co.*, 79 Cal.App.3d 13, 21-22, 144 Cal.Rptr. 664 (1978) (finding that respondent was a “stranger” to the sale of appellant’s business because respondent was not a “part owner” of the business). A defendant has a “direct interest” in a business relationship when the underlying contract cannot exist without the defendant’s participation or cooperation. *Marin Tug & Barge, Inc. v. W. Petroleum, Inc.*, 271 F.3d 825, 834 (9th Cir. 2000) (“Because the economic relationship between Marin Tug and the buyer of any Shell oil shipped on Marin Tug’s barges depends on Shell’s cooperation, Shell is not easily characterized as a stranger to that relationship.”). ICM’s allegations as to Reality Kings are based on the fact that Manwin purchased Reality Kings on April 16, 2012, and *subsequently* interfered with the agreement between ICM and Reality Kings. *FACC* ¶ 108. As *Lowell* and *Marin* indicate, once Manwin acquired Reality Kings, it had a “direct interest” in the agreement between ICM and Reality Kings because as the owner of Reality Kings, Manwin stood to suffer if Reality Kings performed the contract.

Moreover, California law requires a plaintiff to plead that the defendant engaged in an independently wrongful act. *Korea Supply*, 29 Cal. 4th at 1158-59. An act is not independently wrongful merely because a defendant acted with an improper motive. *Id.* To satisfy the requirement of a “wrongful act,” it must be pleaded that the act is proscribed by some constitutional, statutory, regulatory, common law, or other determinable legal standard. *Id.* The allegations as to Reality Kings and Really Useful are limited to Manwin’s allegedly wrongful interference and do not relate to any independently wrongful conduct. Moreover, even if the allegations did relate to the allegedly wrongful conduct identified in the *FACC*, all of those causes of action were deemed deficient. ICM has failed to allege any other wrongful behavior on part of Manwin relating to Reality Kings and Really Useful. *See Universal Grading Serv. v.*

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eBay, Inc., No. C-09-2755 RMW, 2012 WL 70644, *10 (N.D. Cal. Jan. 9, 2012) (granting a motion to dismiss where the conduct responsible for interference with prospective economic advantage did not run afoul of federal or state law). Thus, ICM has failed to plead independently wrongful conduct and cannot sustain a claim under California law.

Accordingly, Manwin's motion to dismiss ICM's claim for interference with prospective economic advantage is GRANTED, with leave to amend.

Having dismissed ICM's claims on other grounds, the Court need not consider Manwin's argument that the *Noerr-Pennington* doctrine bars the state law claims.

III. Motion to Strike

Manwin also brought a motion to strike on the grounds that ICM's state law unfair competition and tortious interference with prospective economic advantage counterclaims arise from protected activity under the Strategic Lawsuit Against Public Participation ("SLAPP") statute. Dkt. # 76. Resolution of the underlying action does not render moot the anti-SLAPP motion, because the anti-SLAPP statute mandates that "a prevailing defendant on a special motion to strike shall be entitled to recover his or her attorney's fees and costs." Cal. Civ. Proc. Code § 425.16(c)(1); *see also White v. Lieberman*, 103 Cal. App. 4th 210, 220, 126 Cal.Rptr.2d 608, 614 (2002); *Collins v. Allstate Indem. Co.*, 428 F. App'x 688, 690 (9th Cir. 2011).

A. Legal Standard

As to the state law claims, California's anti-SLAPP statute provides:

A cause of action against a person arising from any act of that person in furtherance of the person's right of petition or free speech under the United States Constitution or the California Constitution in connection with a public issue shall be subject to a special motion to strike, unless the court determines that the plaintiff has established that there is a probability that the plaintiff will prevail on the claim.

Cal. Civ. Proc. Code § 425.16(b)(1). SLAPP claims are actions filed with the intent of chilling constitutionally protected speech and should be dismissed quickly if they lack merit. *See Batzel v. Smith*, 333 F.3d 1018, 1023-24 (9th Cir. 2003) ("These are lawsuits that masquerade as

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ordinary lawsuits but are brought to deter common citizens from exercising their political or legal rights or to punish them for doing so. The anti-SLAPP statute was enacted to allow for early dismissal of meritless first amendment cases aimed at chilling expression through costly, time-consuming litigation.” (quotations and internal citations omitted)). Section 425.16 encompasses a wide range of expression. *See Wilbanks v. Wolk*, 121 Cal. App. 4th 883, 893, 17 Cal. Rptr. 3d 497 (2004) (noting that the California legislature “added to section 425.16 the proviso that it ‘shall be construed broadly.’”). Federal courts can grant special motions to strike pursuant to California’s anti-SLAPP statute. *See United States ex rel. Newsham v. Lockheed Missiles & Space Co., Inc.*, 190 F.3d 963, 972-73 (9th Cir. 1999). Furthermore, in resolving an anti-SLAPP motion, the district court considers supporting and opposing affidavits in addition to the pleadings. *See* Cal. Civ. Proc. Code § 425.16(b)(2).

B. Discussion

Resolving a special motion to strike under the anti-SLAPP statute involves a burden-shifting analysis. First, Manwin must make the threshold showing that the cause of action arises from a protected activity. Second, if Manwin can prove the case involves a protected activity, then ICM must demonstrate a probability of prevailing on the claim. *See Hailstone v. Martinez*, 169 Cal. App. 4th 728, 735, 87 Cal. Rptr. 3d 347 (2008). For the reasons that follow, Manwin has established that ICM’s claims arise from protected activity.

i. Protected Activity

The Anti-SLAPP statute identifies four categories of protected speech: (1) any written or oral statement or writing made before a legislative, executive, or judicial proceeding, or any other official proceeding authorized by law, (2) any written or oral statement or writing made in connection with an issue under consideration or review by a legislative, executive, or judicial body, or any other official proceeding authorized by law, (3) any written or oral statement or writing made in a place open to the public or a public forum in connection with an issue of public interest, or (4) any other conduct in furtherance of the exercise of the constitutional right of petition or the constitutional right of free speech in connection with a public issue or an issue of public interest.

Cal. Civ. Proc. Code § 425.16(e). In order to subject ICM’s claims to the anti-SLAPP statute, Manwin bears the burden of establishing that the counterclaims arise out of speech that is

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protected under the statute. *See Hailstone*, 169 Cal. App. 4th at 735. Manwin alleges that three different kinds of speech are protected activity: (1) Manwin’s speech criticizing .XXX, *see FAC* ¶¶ 38, 45, 84, 85; (2) Manwin’s boycott, *see FAC* ¶¶ 32, 35, 37, 40 and (3) Manwin’s pre-litigation demands, *see FAC* ¶¶ 21-23, 30-31, 34, 36, 39, 55(e)-(f). ICM argues that the only speech identified by Manwin that relates to the state law counterclaims at issue is Manwin’s boycott. However, ICM incorporates by reference all of its prior allegations into its state law claims. *FACC* ¶¶ 90, 104. Thus, to the extent any of ICM’s allegations as to its state law claims are based on the speech criticizing .XXX and pre-litigation demands, the court addresses whether that speech is protected.

First, Manwin’s speech criticizing .XXX is protected activity under Section 425.16(e)(3) because it concerns a matter of public interest. *See Cross v. Cooper*, 197 Cal. App. 4th 357, 372, 127 Cal. Rptr. 3d 903 (2011) (“[C]ourts have broadly construed ‘public interest’ . . . [T]he issue need not be ‘significant’ to be protected by the anti-SLAPP statute – it is enough that it is one in which the public takes an interest.”); *Summit Bank v. Rogers*, 206 Cal. App. 4th 669, 693, 142 Cal. Rptr. 3d 40 (2012) (concluding that a posting on an Internet board about the performance of a public corporation was protected by the anti-SLAPP statute). ICM does not disagree with Manwin that the speech denouncing the .XXX TLD concerns a matter of public interest. In fact, ICM previously recognized in its own Special Motion to Strike that issues concerning the .XXX TLD meet the anti-SLAPP “public interest” standard. Dkt. # 21-1 at 19:23-25 (“Here, certainly, the outlet of expression created by ICM via .XXX has been an issue of interest to the Sponsored Community, the broader online adult-entertainment community and the public at large.”). Because the speech regarding .XXX constitutes a matter of public interest, it constitutes a “written or oral statement or writing made in a place open to the public or a public forum in connection with an issue of public interest” under Section 425.16(e)(3). Thus, it is protected speech.

Second, Manwin argues that the boycott is protected speech. Boycotts are protected under the anti-SLAPP statute as “other conduct in furtherance of the exercise of the constitutional right of petition or the constitutional right of free speech in connection with a public issue or an issue of public interest.” Code Civ. Proc. § 425.16(e)(4); *Wilcox v. Superior Court*, 27 Cal. App. 4th 809, 821, 33 Cal. Rptr. 2d 446 (1994), *disapproved of on other grounds* by *Equilon Enters. v. Consumer Cause, Inc.*, 29 Cal. 4th 53, 68, n.5, 124 Cal. Rptr. 2d 507 (1994) (“[T]he definition of ‘an act in furtherance of’ a person’s First Amendment rights is not limited to oral and written statements. 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

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required to satisfy the statute’s requirements.”). The Court recognizes the possibility that the boycott at issue could raise antitrust concerns; however, in the context of anti-SLAPP cases, *Wilcox* recognized that even where conduct is allegedly anticompetitive, “such activity is at least arguably protected by the petition clause of the First Amendment.” *Id.* at 822. *See also Flatley v. Mauro*, 39 Cal. 4th 299, 316, 46 Cal. Rptr. 3d 606, 618 (2006) (“If, however, a factual dispute exists about the legitimacy of the defendant’s conduct, it cannot be resolved within the first step but must be raised by the plaintiff in connection with the plaintiff’s burden [on the second step] to show a probability of prevailing on the merits.”); *Navellier v. Sletten*, 29 Cal. 4th 82, 94, 124 Cal. Rptr. 2d 530, 541 (2002) (“[A]ny claimed illegitimacy of the defendant’s acts is an issue which the plaintiff must raise *and* support in the context of the discharge of the plaintiff’s [secondary] burden to provide a prima facie showing of the merits of the plaintiff’s case.”) (emphasis and bracket in original) (internal quotation marks omitted); *Birkner v. Lam*, 156 Cal. App. 4th 275, 285, 67 Cal. Rptr. 3d 190, 198 (2007) (“[C]onduct that would otherwise come within the scope of the anti-SLAPP statute does not lose its coverage . . . simply because it is *alleged* to have been unlawful or unethical.”) (emphasis and bracket in original) (internal quotation marks omitted). Thus, the boycott, even though allegedly illegal under the Sherman Act, is protected speech under Section 425.16(e)(4).

Third, Manwin argues that its 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 426.16.” *Neville v. Chudacoff*, 160 Cal. App. 4th 1255, 1268, 73 Cal. Rptr. 383 (2008) (internal citations and quotation marks omitted). Statements relating to the substantive issues in the litigation and directed towards individuals having some interest in the litigation are protected. *See id.* at 1264-68 (holding that a letter sent to the non-party customers of the defendant advising them of the defendant’s misconduct and their potential involvement in threatened litigation was a protected communication because it was sent to persons whom the plaintiff “reasonably could believe had an interest in the dispute as potential witnesses to, or unwitting participants in, [the defendant’s] alleged misconduct,” and the statements of fact contained therein were “based on or related to the allegations that formed the basis of [the plaintiff’s] claims”).

ICM argues that Manwin’s speech was not protected because “the overall tone of the communications [was] one of persuasion and a desire to cooperate to achieve mutual goals” and not in “serious consideration of litigation.” *Haneline Pac. Props., LLC v. May*, 167 Cal. App. 4th 311, 319-20, 83 Cal. Rptr. 3d 919 (2008). However, the Court is not convinced that the

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overall tone of the communications was not in serious consideration of litigation. The allegations in paragraphs 30, 31, 34, 36, 55(e) and (f) of the FACC are all related to conversations that took place during settlement negotiations, at which time Manwin told ICM that it intended to file a lawsuit challenging ICM's establishment of the .XXX TLD. *See Miller Decl.*, ¶¶ 2-3, 5. Though ICM references business negotiations in the Lawley declaration, it does not suggest that the allegations referenced in the FACC, in paragraphs 30, 31, 34, 36, 55(e) and (f), were not made in conjunction with settlement negotiations. In fact, the Lawley declaration establishes that the parties were anticipating litigation, even if Manwin did not specifically mention antitrust violations. *Lawley Decl.* ¶ 3 ("Although Mr. Thylmann mentioned litigation in connection with Manwin's demands during the business development negotiations between ICM and Manwin, at no time did he or any other representative of Manwin make any reference to claims of antitrust violations by ICM in connection with the .XXX TLD"). Accordingly, because the allegations in the FACC pertain directly to comments made in serious consideration of litigation, the allegations concern protected speech.

ii. Likelihood of Prevailing on the Merits

"[N]o cause of action qualifies as a SLAPP merely because the defendant's actions conceptually fall within the ambit of the statute's initial prong." *Navellier v. Sletten*, 29 Cal. 4th 82, 95, 124 Cal. Rptr. 2d 530 (2002). ICM may therefore defeat the anti-SLAPP motion by establishing a probability of prevailing on its counterclaims. *See Equilon Enters. v. Consumer Cause, Inc.*, 29 Cal. 4th 53, 67, 124 Cal. Rptr. 2d 507 (2002). To meet this burden, ICM must establish that its counterclaims are "both legally sufficient and supported by a sufficient prima facie showing of facts to sustain a favorable judgment if the evidence submitted by [ICM] is credited." *See Navellier*, 29 Cal. 4th at 88-89. "This burden is 'much like that used in determining a motion for nonsuit or directed verdict,' which mandates dismissal when 'no reasonable juror' could find for the plaintiff." *Metabolife Int'l v. Wornick*, 264 F.3d 832, 840 (9th Cir. 2001) (quoting *Wilcox*, 27 Cal. App. 4th at 824, 829). "Thus, a defendant's anti-SLAPP motion should be granted when a plaintiff presents an insufficient legal basis for the claims or 'when no evidence of sufficient substantiality exists to support a judgment for the plaintiff.'" *Id.* (quoting *Wilcox*, 27 Cal. App. 4th at 828). ICM bases its likelihood of prevailing on its counterclaims on the allegations identified in its Opposition to Manwin's motion to dismiss. ICM fails to submit affidavits that speak to its likelihood of prevailing on the merits. Because ICM has failed to satisfy the pleading requirements for any of its causes of action, it does not meet the higher burden of showing that its claims are likely to prevail on the merits.

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C. Leave to Amend

Because ICM's state law counterclaims arise from Manwin's protected activities and ICM has failed to demonstrate through affidavits that it is likely to prevail on either claim, Manwin's motion to strike ICM's counterclaims under California's anti-SLAPP statute is granted. However, the Court recognizes that granting the anti-SLAPP motion to strike could conflict with Federal Rule of Civil Procedure 15, which freely grants leave to amend. *See Verizon Delaware, Inc. v. Covad Communications Co.*, 377 F.3d 1081, 1091 (9th Cir. 2004). The Ninth Circuit has previously recognized that defendants sued in federal courts can bring anti-SLAPP motions to strike state law claims and are entitled to attorneys' fees and costs when they prevail. *See Vess v. Ciba-Geigy Corp. USA*, 317 F.3d 1097, 1109-11 (9th Cir. 2002); *United States ex rel. Newsham v. Lockheed Missiles & Space Co.*, 190 F.3d 963, 971 (9th Cir. 1999). It has also cautioned that "[p]rocedural state laws are not used in federal court if to do so would result in a 'direct collision' with a Federal Rule of Civil Procedure." *Metabolife Int'l, Inc. v. Wornick*, 264 F.3d 832, 845-46 (9th Cir. 2001) (citation omitted). Where the policy behind granting prompt relief with regard to an anti-SLAPP Motion to Strike conflicts with Rule 15, the Ninth Circuit has previously recognized that it is appropriate to grant leave to amend in conjunction with granting a motion to strike. *Verizon*, 377 F.3d at 1091. ("Moreover, the purpose of the anti-SLAPP statute, the early dismissal of meritless claims, would still be served if plaintiffs eliminated the offending claims from their original complaint. If the offending claims remain in the first amended complaint, the anti-SLAPP remedies remain available to defendants."). Accordingly, ICM has leave to amend its counterclaims, but if the offending claims remain, the anti-SLAPP remedies remain available to Manwin.

Manwin is directed to submit a motion for attorneys' fees reasonably incurred in connection with its anti-SLAPP motion. *See* C.C.P. § 425.16(c)(1); *Ketchum v. Moses*, 24 Cal. 4th 1122, 1131, 104 Cal. Rptr. 377 (2001).

V. Conclusion

Thus, based on the foregoing, Manwin's motion to dismiss is:

- GRANTED, with leave to amend, as to the alleged violation of Section 1 of the Sherman Act;
- GRANTED, with leave to amend, as to the alleged violation of Section 2 of the Sherman Act;

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Act;

- GRANTED, with leave to amend, with regard to attempt to monopolize;
- GRANTED, with leave to amend, with regard to conspiracy to monopolize;
- GRANTED, with leave to amend, with regard to unfair competition under the Lanham Act;
- GRANTED, with leave to amend, with regard to unfair competition under California's UCL; and
- GRANTED, with leave to amend, as to the claim for tortious interference with prospective economic advantage.
The motion to strike is:
- GRANTED as to the state law claims for unfair competition and tortious interference with prospective economic advantage.

As detailed above, ICM has leave to amend its First Amended Counterclaims. Should it choose to do so, ICM should submit its Second Amended Counterclaims by no later than **March 26, 2013**.

IT IS SO ORDERED.