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WIKIMEDIA FOUNDATION, INC.

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SAN FRANCISCO

UNLIMITED DIVISION

WIKIMEDIA FOUNDATION, INC.,

Plaintiff,

v.

INTERNET BRANDS, INC.,

Defendant.

Case No. CGC-12-523971

PLAINTIFF WIKIMEDIA FOUNDATION INC.'S OPPOSITION TO DEMURRER

Date: November 19, 2012
Time: 9:30 a.m.
Judge:
Dept: 302

Trial Date: Not yet set

BY FAX

I. INTRODUCTION.

Plaintiff Wikimedia Foundation, Inc. ("Wikimedia Foundation") is happy to hear that defendant Internet Brands, Inc. ("IB") does not oppose any of the relief sought in its Complaint for declaratory relief. If that is truly the case, and there is truly no controversy, then IB should file an answer that says so, and/or enter into a stipulated judgment pertaining to the relief requested. Instead, IB has filed a demurrer that seeks to contradict the Wikimedia Foundation's factual allegations regarding the existence of a case or controversy. However, the purpose of a demurrer is to attack technical defects that appear on the face of a pleading, not to challenge the factual allegations contained therein, which must be accepted as true. IB's demurrer does no such

thing. Moreover, IB's actions (*e.g.*, making public statements about the Wikimedia Foundation's involvement in an allegedly unlawful scheme, and threatening to sue individuals who contact users of IB's Wikitravel website), contradict its claims regarding the non-existence of a dispute between the parties. IB seeks to dissociate these actions from the declaratory relief sought herein, but their very purpose, as pled in the Complaint, is to thwart the activities IB now contends it does not dispute. IB may claim otherwise, but that is a factual issue that cannot be determined on demurrer.

For these reasons, and the reasons that follow, the Wikimedia Foundation respectfully requests that the Court overrule IB's demurrer in its entirety.

II. LEGAL STANDARD.

A demurrer is designed to raise issues of law and not any issues of fact. Cal. Civ. Proc. Code § 422.10. As such, a demurrer admits the truth of all facts alleged in the complaint, no matter how unlikely. *See Del E. Webb Corp. v. Structural Materials Co.*, 123 Cal. App. 3d 593, 604 (1981). The court must not only treat the demurrer as admitting all material facts properly pled, but also "give the complaint a reasonable interpretation, reading it as a whole and its parts in their context." *Quelimane Co. v. Stewart Title Guar. Co.*, 19 Cal. 4th 26, 38 (1998) (quoting *Blank v. Kirwan*, 39 Cal. 3d 311, 318 (1985). Courts accept as true not only the facts stated in the complaint, but also all facts that may be implied or inferred from the facts alleged. *Morgan Phillips, Inc. v. JAMS/Endispute, L.L.C.*, 140 Cal. App. 4th 795, 798 (2006) (citing *Thaler v. Household Finance Corp.*, 80 Cal. App. 4th 1093, 1098 (2000).

A demurrer can be used only to challenge defects that appear on the face of the pleading under attack; or from matters outside the pleading that are judicially noticeable. *Kirwan*, 39 Cal. 3d at 318. No other extrinsic evidence can be considered. *Id.*

III. ARGUMENT.

A. The Wikimedia Foundation has adequately pled the existence of a case or controversy.

The Wikimedia Foundation's Complaint alleges the existence of a number of disputes between the parties, which the Court must accept as true for purposes of demurrer. (Compl. ¶¶

36, 38-43.) For example, the Complaint alleges a dispute exists over the public's right to use, reproduce, sell, or modify the content volunteer contributors created and donated to IB's Wikitravel website.[1] (*Id.* at ¶ 38.) In support of this allegation, the Complaint further alleges that IB filed a frivolous trademark infringement lawsuit–to which Wikimedia Foundation is not a party–in Los Angeles County, and that this lawsuit is a subterfuge designed to thwart the copying of such content by anyone (not just by the named defendants in that action), and prevent other volunteer editors from migrating over to the Wikimedia Foundation's new website. (*Id.* at ¶¶ 32-34.) In response, IB's demurrer does nothing more than assert that these *factual* allegations are untrue.[2] (Demurrer 2-3.) This is not the proper function of a demurrer, which admits the truth of all facts alleged in the complaint. *Del E. Webb*, 123 Cal. App. 3d at 604.

Moreover, judicially noticable developments in the Los Angeles case have borne out the truth of the Wikimedia Foundation's allegations here. One of the defendants in that action–a former Wikitravel volunteer contributor–recently filed an anti-SLAPP motion, arguing that IB's trademark infringement case was a strategic lawsuit against public participation ("SLAPP"), a meritless lawsuit intended not to win, but to intimidate threaten, and ultimately silence the defendants *and any other individual* who expressed support for, or wished to assist in the creation of, a competing travel wiki. IB responded to the anti-SLAPP motion by dropping its federal trademark claims entirely, and admitted that the claims were based on an "assumption" that proved false and therefore had no factual basis.[3] (Opp'n to Defs.' Special Mot. Strike, at 13,

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[1] That content is subject to a Creative Commons Attribution-ShareAlike License ("CC License") and, as such, may be copied, distributed, sold, or modified by anyone, in any manner they wish. (Compl. ¶ 12.)

[2] IB claims that the Los Angeles County action is focused on trademark rights alone, and was not intended to thwart the creation of a new travel site, or to prevent its volunteers from migrating over to the new site. (Demurrer 3-4.) But that is a factual question that cannot be determined on demurrer.

[3] The purpose of the Los Angeles County lawsuit – to intimidate and threaten others – is perhaps best evidenced by juxtaposing Paragraph 35 of IB's complaint in that action (attached hereto as Exhibit A), with the fact that no additional defendants have been named there. Exh. A, ¶ 35; *see also* Compl. ¶ 34. Among other things, Paragraph 35 identifies the Wikimedia Foundation and other unnamed individuals as potential "co-conspirators" and further alleges that: "Additional defendants and causes of action are expected through amendment, potentially including other Administrators that have been most corrupt in this scheme . . . This potentially includes the

Internet Brands, Inc. v. Holliday, No. cv-12-08088 SVW (RZx) (C.D. Cal. Oct. 12, 2012), attached hereto as Exhibit B.)

Having been put to task by the Complaint in this action, IB now contends that it does not dispute the public's right to copy content from the Wikitravel website, and is not seeking to prevent others from volunteering their time to the betterment of the new travel site. IB even claims that it has no dispute with the Wikimedia Foundation. (Demurrer 1:3-4 ("Wikimedia's filing imagines a 'case or controversy' that does not exist. It merely concludes that there is a dispute between the parties when in fact there is not."); *id.* at 4:12-13 ("Internet Brands' only dispute is with the defendants in the other case, not with Wikimedia Foundation.").) But IB is talking out of both sides of its mouth. Indeed, three days before it filed the instant demurrer, IB represented to the United Stated District Court for the Central District of California that it was in a "business dispute," not with the defendants in that action, *but with the Wikimedia Foundation.* (Opp'n to Defs.' Special Mot. Strike, at 10:5-9, *Internet Brands, Inc. v. Holliday*, No. cv-12-08088 SVW (RZx) (C.D. Cal. Oct. 12, 2012), attached hereto as Exhibit B (characterizing the Los Angeles action as "a business dispute where one competing entity (Wikimedia) has misspoken about, and unlawfully maligned, its competitor's (Internet Brands) website. It is not any more than that, as a matter of fact or law.").) Thus, IB is making different factual contentions depending on which forum it is in.

In any event, these factual issues are not the proper subject of a demurrer, which challenges only technical defects in a pleading. If IB has had a legitimate change of heart such that it now denies the existence of a dispute, the appropriate response–and the only procedural mechanism available to IB under these circumstances–is to file an answer where it can admit or deny the Complaint's factual allegations regarding the existence of such a dispute.

Instead, IB seeks to deflect attention by suggesting that the claims at issue here are more properly a part of the Los Angeles action. (Demurrer 4:2-4 ("Any claims arising out of facts

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Wikimedia Foundation, members of its Board, other individual members of the Foundation, or anyone else who acted tortiously." Exh. A. This statement is intended to serve as a warning shot to others who might wish to participate in the creation of a new travel wiki.

pleaded in the other case would have to be compulsory counterclaims in the other suit." (emphasis in original)).) But the Wikimedia Foundation is not a party to that action; nor are the other individuals whom IB has threatened, but elected not to sue.[4] Consequently, the Wikimedia Foundation cannot seek an adjudication of the parties' respective rights in the Los Angeles action. Moreover, IB itself admits that the two suits are different. The Los Angeles County lawsuit is purportedly focused on trademark issues, whereas this action alleges that IB has taken actions–including, but not limited to, the filing of the SLAPP suit in Los Angeles–to thwart members of the public from exercising rights that IB now claims it does not deny. Accordingly, the Wikimedia Foundation filed the instant lawsuit in the City and County of San Francisco, where it is based, in order to have all of the relevant issues adjudicated in one forum.

B. The Wikimedia Foundation's ongoing investigation has uncovered additional means by which IB is seeking to thwart the creation of a new travel website.

IB cannot avoid this lawsuit with conclusory statements about the lack of a dispute when such statements are belied by its own actions. By way of example, IB claims that it:

> sees no problem with Plaintiff, or any other entity interested in starting a competing travel website, communicating with former or current posters and content providers to Wikitravel and recruiting them to provide content to the competing website, even if poster [sic] does so to the exclusion of providing any future content to Defendant, provided that Plaintiff does so in a lawful manner (i.e., without defaming Defendant, infringing Defendant's trademarks or using forums and/or trade secret information -- not the content in question- to which Plaintiff does not rightfully have access).

(Demurrer 3.)

The Wikimedia Foundation has learned, however, that IB sent an email to a number of individuals (not just those named as defendants in the Los Angeles County action) that contained the following legal threat:

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[4] IB chose not to sue the Wikimedia Foundation by design, despite alleging that the Wikimedia Foundation orchestrated the efforts of the defendants in that action, and created a competing travel wiki called "Wiki Travel Guide" (an allegation that IB has since withdrawn and admitted it made without factual basis). Exh. A, ¶¶ 20-22, 35; Exh. B, at 13. IB's decision to sue two volunteer contributors instead of the Wikimedia Foundation confirms the purpose of that lawsuit: to silence individuals wishing to discuss the creation of a new travel wiki, and to intimidate volunteers thinking about donating their time to the competing travel wiki.

> Please be advised your recent actions communicating directly with members of Wikitravel could put you in violation of numerous federal and state laws. We strongly urge you to cease and desist all action detrimental to Wikitravel.org. If you persist in this course of conduct, you will potentially be a named defendant, and therefore liable for any and all resulting damages.

Legal threats of this nature are inconsistent with IB's representations to this Court. Indeed, the very purpose of this threatening email was to prevent its recipients from communicating with Wikitravel members about a proposal to create a new website (one of the issues upon which declaratory relief is sought). IB may dispute this point but, at the very least, it is a factual issue that cannot be resolved on a demurrer.

Other examples of obstructionist behavior abound. For instance, IB claims that it "has not disputed that content created by volunteer users and administrators of Wikitravel may be copied or migrated to other websites as the terms of the CC License indicate, and [] has not threatened to restrict or otherwise interfere with such content migration." (Demurrer 2:18-21.) However, further investigation has confirmed that IB has shut down the application programming interface ("API")[5] for the Wikitravel website, which impedes users' ability to copy publicly-owned content (which they themselves contributed) from the Wikitravel website.

Thus, IB may claim, in principle, that it does not dispute the creation of a new travel website, but its practices reflect the opposite. And although the Wikimedia Foundation's allegations, as set forth above, are more than sufficient to survive demurrer, it is prepared to amend its Complaint to allege the above additional facts, and others.

C. IB's "ripeness" argument is inapposite.

IB spends a great deal of effort arguing that the Wikimedia Foundation's claim for Declaratory Relief is not ripe for adjudication. (Demurrer 5-8.) But IB fails to cite a single case that is relevant to the current dispute.

As IB notes, "[a] complaint for declaratory relief must demonstrate: (1) a proper subject of

[5] An API is a set of programming instructions and standards for accessing a Web-based software application or Web tool, in this case the Wikitravel website. A software company or website releases its API to the public so that other software developers can design products that can interact with its service.

declaratory relief, and (2) an actual controversy involving justiciable questions relating to the rights or obligations of a party." *Brownfield v. Daniel Freeman Marina Hosp.*, 208 Cal. App. 3d 405, 410 (1989). IB does not dispute that the Complaint sets forth a "proper subject of declaratory relief." Indeed, California Code of Civil Procedure Section 1060 makes clear that "any person . . . who desires a declaration of his or her rights or duties with respect to another" may seek declaratory relief. Here, the Wikimedia Foundation has made clear that it is seeking a declaration of its rights and obligations with respect to IB as it relates to the free movement of information under the CC License.

Because no dispute exists about whether the Complaint is the proper subject of declaratory relief, IB focuses its attention on the second prong of the declaratory relief analysis–whether the complaint presents an actual controversy involving justiciable questions–and improperly presents this issue within some sort of "ripeness" framework. IB seems to believe that it can simply say that it agrees with the Wikimedia Foundation and expect the lawsuit to be dismissed on "ripeness" grounds. As an initial matter, IB's statement that it does not dispute the Wikimedia Foundation's claims is outside of the Complaint and therefore not relevant to a facial challenge brought on demurrer. *See e.g., Donabedian v. Mercury Ins. Co.*, 116 Cal. App. 4th 968, 994 (2004) (the purpose of a demurrer is to test the legal sufficiency of a complaint). The Wikimedia Foundation contends that a controversy exists and has pointed to allegations in the Complaint, as well as judicially noticeable facts, that support this contention. (*See* Section III.A., B., *supra.*)

Yet IB asks the court to consider matters outside the Complaint–*e.g.*, that the Wikimedia Foundation filed this action to "drum up publicity" (which is untrue and irrelevant)–in order to make some sort of factual determination regarding the non-existence of a controversy. However, even if these "facts" were credited (and they cannot be), they have nothing to do with the concept of "ripeness" that appears in IB's authorities. Moreover, most of IB's cited cases militate against deciding a ripeness challenge at this stage of the proceeding. First, IB cites *Wilson & Wilson v. City Council of Redwood City*, 191 Cal. App. 4th 1559 (2011), *California Water & Telephone Co. v. County of Los Angeles*, 253 Cal. App. 2d 16 (1967), *Pacific Legal Foundation v. California Coastal Comm.*, 33 Cal. 3d 158 (1982), and *City of Santa Monica v. Stewart*, 126 Cal. App. 4th

43 (2005). All of these cases analyzed "ripeness" at the summary judgment stage or later. For example, in *California Water*, the plaintiff challenged the application of a city water ordinance. In upholding the trial court's *grant* of declaratory relief, the Court of Appeal noted "[t]he character of the challenged statute or ordinance is merely one factor to be considered *with all the other facts and circumstances* to determine the propriety of granting declaratory relief." *California Water*, 253 Cal. App. 2d at 24 (emphasis added). Likewise, here a ripeness determination requires looking at all the other facts and circumstances surrounding IB's actions. These issues cannot be determined on a demurrer, which is limited to the face of the pleadings.

IB next cites *Daniel Freeman Marina Hosp.*, 208 Cal. App. 3d 405. While this case was decided on demurrer, the court dismissed the plaintiff's declaratory relief claim only because on the face of plaintiff's complaint it was clear that plaintiff had a cause of action for damages, thus making declaratory relief inappropriate. Likewise, in *Fritz v. Superior Court*, 18 Cal. App. 2d 232 (1936), the court dismissed the plaintiff's declaratory relief claim on the grounds that an action had already accrued and the plaintiff could seek a remedy for damage already incurred. Here, the Wikimedia Foundation is seeking a declaration regarding its rights under the CC License. The Wikimedia Foundation has no other remedy to remove the shadow of threatened litigation cast by IB.

In citing another pre World War II case, IB cherry picks language from *Golden Gate Bridge & Highway Dist. v. Felt*, 214 Cal. 308 (1931). IB quotes *Golden Gate* as saying "an action not brought for the purpose of securing a determination of a point of law . . . will not be entertained." (Demurrer 5.) While that quotation sounds nice, IB is being disingenuous about its intent, as it has obliterated the phrase "is collusive and" with ellipses. *See Golden Gate*, 214 Cal. at 316. That phrase completely changes the meaning of the sentence, and makes it irrelevant to the case at issue. In *Golden Gate* the court was cautioning against hearing cases where the two parties had colluded to bring suit purely to get a judicial declaration that they both desired. That is clearly not the case here as evidenced by IB's demurrer.

Finally, IB cites another pre World War II case. In *Gillies v. La Mesa Lemon Grove and Spring Valley Irr. Dist.*, 54 Cal. App. 2d 756, 762 (1942), a riparian water rights dispute, the

plaintiffs based their declaratory relief claim on a contract that had been superseded as a matter of law. Here, IB does not claim that the CC License is not valid or has been superseded. Indeed, IB concedes the validity of the underlying contract. (*See* Demurrer 1.)

IB has not cited a single case for the proposition that a defendant can defeat declaratory judgment on demurrer simply by claiming that no controversy exists. In every "ripeness" case cited, the court either considered *evidence* produced by both sides (which a court may not do on demurrer), or ruled as a matter of law that the underlying contract was invalid or that the plaintiff had a cause of actions for damages. None of these scenarios apply here and none of IB's cited cases changes the fact that the Complaint is facially sufficient and a demurrer cannot be sustained.

IV. CONCLUSION.

For the foregoing reasons, the Wikimedia Foundation respectfully requests that the Court overrule IB's demurrer.

Dated: November 5, 2012

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EXHIBIT A

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NO SUMMONS ISSUED UPON FILING

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF LOS ANGELES – CENTRAL DISTRICT

INTERNET BRANDS, INC., a Delaware corporation,

Plaintiff,

v.

WILLIAM RYAN HOLLIDAY, an Individual; HOLLIDAY IT SERVICES, INC., a California corporation; and JAMES HEILMAN, an individual; and DOES 1-10, inclusive,

Defendants.

Case No. YC067706

COMPLAINT FOR:

1) TRADEMARK INFRINGEMENT;

2) UNFAIR BUSINESS PRACTICES UNDER THE LANHAM ACT;

3) UNFAIR BUSINESS PRACTICES UNDER CALIFORNIA BUSINESS PRACTICES ACT, SECTION 17200; and

4) CIVIL CONSPIRACY

BY FAX

COMES NOW Plaintiff, INTERNET BRANDS, INC. ("Internet Brands" or "Plaintiff"), and for its claims against WILLIAM RYAN HOLLIDAY, an individual, HOLLIDAY IT SERVICES, INC., a California Corporation, and JAMES HEILMAN, an individual, (collectively, "Defendants") hereby alleges as follows:

JURISDICTION AND VENUE

1. This Court has personal jurisdiction over Defendants pursuant to the California Code of Civil Procedure, Section 410.10, the California State Constitution, and the United States Constitution, in that Defendants Holliday and Holliday IT Services, Inc. are residents of the State of California and Defendant Heilman has purposefully availed himself of commerce in the State of California, violated a contract entered into in California, and tortuously caused injury within the State of California.

2. Venue is proper in this Court pursuant to California Code of Civil Procedure, Section 395, in that Defendants Holliday and Holliday IT Services, Inc. reside in Los Angeles County and the injury occurred in Los Angeles County.

THE PARTIES

1. Internet Brands is a Delaware corporation having its principal place of business at 909 Sepulveda Boulevard, 11th Floor, El Segundo, California, 90245.

2. Plaintiff is informed and believes and thereon alleges that Defendant Holliday IT Services, Inc. is a corporation organized and existing pursuant to the laws of the State of California, with its principal place of business located at 4247 Neosho Ave., Los Angeles, CA90066-6129.

3. Plaintiff is informed and believes and thereon alleges that Defendant William Ryan Holliday ("Holiday") is an individual who resides in Los Angeles County, State of California.

4. Upon information and belief, Defendant Holliday IT Services, Inc. is merely the alter-ego of Defendant Holliday and thus liability against Defendant Holliday and Defendant Holliday IT Services, Inc. should be joint and several, and this Court may appropriately pierce the improper corporate veil to adjudicate personal liability against Defendant Holliday.

5. Plaintiff is informed and believes and thereon alleges that Defendant James Heilman ("Heilman") is an individual who resides in the province of

Saskatchewan, Canada.

FACTS GIVING RISE TO CLAIMS

6. Internet Brands restates, re-alleges and incorporates paragraphs 1 through 5 as if fully set forth herein.

7. Headquartered in El Segundo, California, Internet Brands is a media company that operates various websites and also develops and licenses Internet software and social media applications. Within its Consumer Internet Division, Internet Brands owns and operates more than 200 websites in nine different categories, including travel.

8. Within the travel category, Internet Brands owns and operates twenty-seven different travel related websites, including wikitravel.org (the "Wikitravel Website"), which it acquired in 2005 for $1,700,000 from Evangelo Prodromou and Michele Jenkins (the "Sellers").

9. The Wikitravel Website is a website designed and operated to create a free, complete, up-to-date, and reliable worldwide travel guide. To date, the Wikitravel Website has over 62,000 destination guides and other articles written and edited by travellers from around the globe.

10. In addition to owning the Wikitravel Website, Internet Brands owns and has the rights to the trademark "WIKITRAVEL" (the "Trademark"), which it has used consistently and continuously since 2005. Today, Wikitravel is one of the largest and most popular travel information website in the world, known worldwide by its tradename.

11. The content on the Wikitravel Website can be created, deleted, modified, and otherwise edited by anyone, and is done so under a Creative Commons Attribution – ShareAlike License (the "License").

12. The License essentially provides that every contributor to the Wikitravel Website gives the right to anyone else to copy the content, so long as the copier gives attribution to the original content creator and retains the work and

any derivative works under the same License.

13. Internet Brands employs a strong team of technology, management, and other business personnel to oversee, operate, and improve the Wikitravel Website.

14. In addition, Internet Brands relies on its staff and dozens of volunteer administrators (the "Administrators") to protect the quality of the content posted, to remove spam, and to otherwise oversee the Wikitravel Website.

15. Defendant Holliday was an Administrator on Wikitravel from June 27, 2005 until August 21, 2012.

16. The Wikimedia Foundation is the organization that operates Wikipedia.org and other "sister projects."

17. The Wikimedia Foundation has raised tens of millions of dollars, some of, which it intends to use for the benefit of "sister projects" including other Wiki sites.

18. Heilman is a Board member of Wikimedia Canada, which is the thirty-third local chapter of the Wikimedia Foundation.

19. On February 23, 2012, Heilman signed up for an account on Wikitravel, and, for the first time, posted on that site.

20. Heilman's February 23rd and subsequent posts were not for the benefit of the Wikitravel users or its broad community, but were specifically for the benefit of the Wikimedia Foundation. Specifically, he began a course of conduct intended to usurp the Wikitravel community; these actions included deliberately misleading statements, and Trademark infringement and violation of Internet Brands' intellectual property rights.

21. His plan was simple: create the illusion that Wikitravel Website was substantially "broken" and that the Wikimedia Foundation, out of generosity and benevolence, would be "bringing together," "integrating" or "migrating" Wikitravel to its control for the benefit and betterment of the Wiki community.

22. Heilman announced that the "new" site, which would combine the Wikitravel Website through a straw-man transaction with Wikivoyage.org (the "Wikivoyage Website") into a Wikimedia Foundation website that would be called "Wiki Travel Guide" (the "Infringing Website").

23. In order to help effectuate this plan, Heilman offered to assist the formation of the Infringing Website, spearheading and organizing certain planning and logistics of the infringing activity, and playing a broad and substantive role in "carrying the water" for the Infringing Website including the infringing acts.

24. Heilman was heavily involved in recruiting the support of others for various aspects of the development of the Infringing Website, the violation of the Trademark, and violation of the License.

25. In April, Heilman and Ryan engaged in an email thread with several others involved in the scheme in which the parties specifically discussed keeping the matter private for fear that Internet Brands would "get wind of it" and begin "actively resisting."

26. On July 12, 2012, Heilman met at the Wikimania convention with a number of Administrators and others to reach a further meeting of the minds as to the unlawful acts to be undertaken.

27. On July 14, 2012, more clearly revealing their true intent of converting the Wikitravel Website to its own project, the Wikimedia Foundation asked Internet Brands to "donate" the Wikitravel Website, domain name, and the trademark rights to WIKITRAVEL.

28. When Internet Brands refused, the defendants escalated their efforts to trade on the Trademark, confuse the marketplace, misrepresent the origin, and violate the License.

29. For example, on August 18, 2012, Holliday improperly and wrongfully emailed at least several hundred of Wikitravel members, purporting to be from Wikitravel and informing members that the Wikitravel Website was

"migrating" to the Wikimedia Foundation. Upon information and belief, the number emailed is far greater.

30. Specifically, Holliday's email contained the Subject Line, "Important information about Wikitravel" and its body stated, "This email is being sent to you on behalf of the Wikitravel administrators since you have put some real time and effort into working on Wikitravel. We wanted to make sure that you are up to date and in the loop regarding big changes in the community that will affect the future of your work! As you may already have heard, Wikitravel's community is looking to migrate to the Wikimedia Foundation."

31. Holliday and Heilman clearly intended to confuse Wikitravel Website participants into thinking the Wikitravel Website is migrating to Wikimedia, in order to gain, through improper and illegal means, all the traffic and content creators currently contributing to Wikitravel.

32. Holliday not only violated trademark laws, he violated the administrative access given to him by Internet Brands by improperly using personal information stored on Internet Brands' servers about users and writing to them by name, in an attempt to bolster the appearance of a direct communication from the owners of the Wikitravel Website.

33. The defendants pride themselves in operating in a transparent fashion, when in actuality, the defendants have deliberately misrepresented facts and conspired with each other and many more to violate several laws in order to gain personally.

34. Worse still, the creation of "Wiki Travel Guide" has been done without proper attribution to the original content creators, in clear violation of the Attribution-Share License and the rights of the original creators.

35. The defendants Heilman and Holliday clearly have not acted alone. Further investigation continues to reveal additional co-conspirators and additional tortious and improper conduct. Additional defendants and causes of action are

expected through amendment, potentially including other Administrators that have been most corrupt in this scheme and any entity or individuals that provided them support or otherwise participated in these wrongful acts. This potentially includes the Wikimedia Foundation, members of its Board, other individual members of the Foundation, or anyone else who acted tortiously.

COUNT I

COMMON LAW TRADEMARK INFRINGEMENT

36. Internet Brands re-alleges and incorporates the allegations set forth in paragraph 1 through 35 herein

37. Internet Brands owns and uses the Wikitravel trademark and enjoys common law rights to the trademark as set forth above and thus these rights are superior and senior to any rights that Defendants or anyone else may claim to the Trademark.

38. Defendants' use of the Trademark is intentionally designed to replicate the Trademark owned by Plaintiff so as to likely cause confusion in the marketplace as to the source of the Infringing Website, and designed to create the illusion as to the affiliation with or creation by Internet Brands' Wikitravel Website.

39. Defendants' actions are to the detriment of Plaintiff.

40. As a result of the infringing acts by Defendants, Plaintiff has been and continues to be injured and damaged.

COUNT II

FEDERAL UNFAIR COMPETITION, FALSE DESIGNATION OF ORIGIN AND TRADE NAME INFRINGEMENT

(Lanham Act, §43(a), 15 U.S.C. §1125)

41. Internet Brands re-alleges and incorporates the allegations set forth in paragraph 1 through 40 herein.

42. Defendants' unauthorized use of a mark confusingly similar to

Internet Brands' Wikitravel trade name and trademarks for identical and related products, i.e., an informational travel website, falsely indicates that Defendants' and their website are connected with, sponsored by, affiliated with or related to Wikitravel.

43. Defendants' unauthorized use of a mark confusingly similar to Internet Brands' Wikitravel trade name and trademarks for an identical and related website is likely to cause confusion, mistake or deception as to the source, business affiliation, connection or association of Defendants and their website.

44. Defendants' unauthorized use of a mark confusingly similar to Internet Brands' Wikitravel trade name and trademarks for identical and related website allows Defendants to receive the benefit of Internet Brands' Wikitravel goodwill, which Internet Brands has established at great labor and expense, and further allows Defendants to expand its business, based not on its own qualities, but on the reputation and goodwill of Internet Brands' Wikitravel.

45. The acts of Defendants complained of herein constitute unfair competition, false designation of origin, and trade name infringement in violation of Section 43(a) of the Lanham Act, 15 U.S.C. §1125(a).

46. Internet Brands is informed and believes and thereon alleges that Defendants' acts complained of herein have been deliberate, willful and intentional, with full knowledge and in conscious disregard of Internet Brands' rights in its Wikitravel trademark and with intent to trade off of Internet Brands' vast goodwill in its mark.

47. As a result of the foregoing alleged actions of Defendants, Defendants have been unjustly enriched and Internet Brands has been injured and damaged.

COUNT III

UNFAIR COMPETITION

(Cal. Bus. Prof. Code §17200)

48. Internet Brands re-alleges and incorporates the allegations set forth in

paragraph 1 through 47 herein.

49. Defendants are offering Administrators, contributors and other users a competitive website by trading on Internet Brands' Wikitravel Trademark.

50. Internet Brands is informed and believes and thereon alleges that Defendants are profiting, directly or indirectly, through the use of Internet Brands' Wikitravel Trademark in a deliberate, willful, intentional and wrongful attempt to trade off of Internet Brands' goodwill, reputation and financial investment in its Wikitravel trademark.

51. By reason of the conduct described above, Defendants have engaged in unlawful, unfair and/or fraudulent business practices, and is in violation of Cal. Bus. & Prof. Code Section 17200 because it is likely to deceive and mislead the public.

52. As a direct result of Defendants' unfair competition, Defendants have unlawfully acquired, and continue to acquire on an ongoing basis, an unfair competitive advantage and have engaged, and continue to engage, in wrongful business conduct to their advantage and to the detriment of Internet Brands.

53. As a result of the foregoing alleged actions of Defendants, Defendants have been unjustly enriched and Internet Brands has been injured and damaged.

COUNT IV
CIVIL CONSPIRACY

54. Internet Brands re-alleges and incorporates the allegations set forth in paragraph 1 through 53 herein.

55. Two or more persons, including both Defendants, had an agreement or meeting of the minds to commit numerous tortious acts.

56. Two or more persons, including both Defendants did in fact commit numerous tortious acts, as agreed.

57. The commission of those tortious acts caused Plaintiff injury and

damages.

58. As a result, Defendants have been unjustly enriched and Internet Brands has been injured and damaged.

JURY DEMAND

Plaintiffs request a jury trial on all claims so triable.

PRAYER FOR RELIEF

WHEREFORE, Internet Brands prays that:

1. Judgment be entered for Internet Brands on all claims.

2. Defendants, their agents, servants, employees, attorneys, and all others in active concert or participation with any of them, be enjoined and restrained permanently from:

(a) making visible use of the Internet Brands' Wikitravel mark or any other mark confusingly similar thereto;

(b) making any other trademark use of Internet Brands' Wikitravel trade name or trademark; and

(c) doing any other act or thing likely to confuse, mislead, or deceive others into believing that Defendants or their affiliates, employers, contractors, or agents are providing a website service that comes from, is affiliated with, connected with, sponsored or approved by, or associated with Internet Brands' Wikitravel Website;

3. Defendants be required to pay:

(a) damages, according to proof at trial;

(b) Internet Brands' attorneys' fees and costs of this action, as a result of Defendants' willful infringement of Internet Brands' trademark; and

(c) punitive damages in an amount to be determined at trial as a result of Defendant's willful conspiracy to commit unlawful business practices.

4. Any other relief this Court deems just and appropriate.

//

DATED: August 24, 2012

Respectfully submitted,

iGENERALCOUNSEL, P.C.

By: Wendy Evelyn Gibetti

Wendy Evelyn Gibetti
Attorney for Plaintiff INTERNET BRANDS, INC., a Delaware Corporation

EXHIBIT B

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Attorneys for Plaintiff Internet Brands, Inc.

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA, WESTERN DIVISION

INTERNET BRANDS, INC., a Delaware corporation,

Plaintiff,

v.

WILLIAM RYAN HOLLIDAY, an individual; HOLLIDAY IT SERVICES, INC., a California corporation; and JAMES HEILMAN, an individual,; and DOES 1-10, inclusive,

Defendants.

Case No. cv12-8088-SVW(RZx)

OPPOSITION TO DEFENDANTS' SPECIAL MOTION TO STRIKE AND MOTION TO DISMISS

Judge: Hon. Stephen V. Wilson
Date: November 5, 2012
Time: 1:30 p.m.
Crtrm.: 6

Hon. Stephen V. Wilson

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MEMORANDUM OF POINTS AND AUTHORITIES

I.

INTRODUCTION

Defendants' anti-Slapp Motion must fail because as a matter of fact and law, none of the conduct giving rise to this lawsuit is related to constitutionally protected free speech. Defendants would have this Court believe that the crux of this lawsuit is Plaintiff's opposition to Defendants creating a new, competing online travel guide sponsored by Wikimedia that is not true, and has not been alleged by Plaintiff. Wikimedia foundation has even filed a declaratory relief action in another court -- in the Superior Court of California -- alleging the existence of a dispute that does not, in fact, exist. Finally, they allege here that the non-existent "public interest" issue that they themselves concocted in their case also exists here, in this case. It does not. This lawsuit has nothing to do with the creation of a rival online travel site or the migration of content from Plaintiff's website Wikitravel.org ("Wikitravel") to a competing site run by Wikimedia or otherwise. As the allegations demonstrate, this action strictly relates to actions and communications by Defendants in which they infringe Plaintiff's Wikitravel mark and engage in an attempt to confuse and deceive Wikitravel users into thinking that Plaintiff's Wikitravel site was either shutting down or migrating in its entirety to a Wikimedia-run site. In short, this is strictly a dispute amongst would be business competitors which, as a matter of fact and law, is not an issue of public interest.

Defendants conflate facts and misapply caselaw in the hopes of convincing this Court that the wiki culture and creation of wiki sites is an issue in this case at all, and that it is somehow a public issue. This Court should not be fooled. Defendants cannot act against a competitor, then seek public comment on their actions and other topics they claim are related (but in fact are not), and then hide behind "free speech" and "public issue" posts created after the fact. Since Defendants have failed to meet their initial burden of demonstrating that an issue of

public interest, and therefore constitutional free speech, is involved, their Motion must be denied.

II.

DEFENDANTS' ANTI-SLAPP MOTION SHOULD BE DENIED

A. Applicable Standards

"A court considering a motion to strike under the anti-SLAPP statute must engage in a two-part inquiry...First, the defendant must make a prima facie showing that the plaintiff's suit arises from an act in furtherance of the defendant's rights of petition or free speech." *Mindy's Cosmetics, Inc. v. Dakar,* 611 F.3d. 590, 595 (9th Cir. 2010). Only after defendant has made such a prima facie showing does the burden shift to plaintiff to demonstrate a probability of prevailing on the challenged claims. *Id.* "To satisfy this second prong, the plaintiff must show a reasonable probability of prevailing in its claims for those claims to survive dismissal." *Id.* at. 598. "Reasonable probability" in the anti-Slapp context has a specialized meaning and only requires a "minimum level of legal sufficiency and triability." *Id.* Often called the "minimal merit" prong, it requires only that the plaintiff "state and substantiate a legally sufficient claim." *Id.* at 598-599. "The applicable burden is much like that used in determining a motion for nonsuit or directed verdict, which mandates dismissal **when no reasonable jury could find for the plaintiff.**" *Id.* (boldface added). "It is enough that the plaintiff demonstrates that the suit is viable, so that the court should deny the special motion to strike and allow the case to go forward." *Tichinin v. City of Morgan Hill,* 177 Cal.App.4th 1049, 1062 (2009).

B. THE ACTION DOES NOT IMPLICATE DEFENDANTS' PROTECTED RIGHTS OF FREE SPEECH

1. Defendants Have no First Amendment Right in the Choice of Domain Names

In *Bosley Medical Institute, Inc. v. Kremer,* 403 F.3d. 672 (9th Cir. 2005), the Ninth Circuit stated that "an infringement lawsuit by a trademark owner

over a defendant's unauthorized use of the mark as his domain name does not necessarily impair the defendant's free speech rights." *Id.* at 682. The court explained that "domain names...per se are neither automatically entitled to nor excluded from the protections of the First Amendment, and the appropriate inquiry is one that fully addresses the particular circumstances presented with respect to each domain name." *Id.* The court thus reasoned that "while a summary judgment motion might have been well-taken, an anti-Slapp motion to strike was not." *Id.*

Here, Plaintiff has alleged that Defendants have used Plaintiff's mark, or a confusingly similar version thereto, as part of Defendants' domain name for the rival website. (Complaint, ¶¶22, 24, 38, 42, 49). As the *Bosley* case makes clear, Defendants have no protected free speech interest in the naming of their competing website, so they have failed to establish the first-prong of the anti-Slapp inquiry and their Motion must therefore be denied.

2. The Dispute Between Plaintiff and Defendants is Not a "Public Issue or Issue of Public Interest"

Defendants argue that the email sent by them to Wikitravel members is protected under Subdivision(e)(4) of the anti-Slapp statute, which protects "any 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." However, while Defendants spend substantial time arguing that expression in a private email may be protectable if they involve a public issue (which Plaintiff does not dispute), they cursorily gloss over the requirements for demonstrating that the expression at issue in the present lawsuit was in fact related to a public issue. As will be demonstrated below, Defendants' limited infringing use of Plaintiff's trademark in that email for the commercial purpose of misleading Wikitravel users into thinking that Internet Brands' site was going to either cease to exist or migrate to a site owned by Wikimedia or some other third party is not a protected public issue or issue of public interest. Therefore, Plaintiff has not

impinged upon any protected activity and the Motion must be denied.

A matter of public interest is "one that is something of concern to a substantial number of people." *Language Line Services, Inc. v. Language Services Associates, LLC*, 2011 WL 5024281 at *3 (N.D. Cal. 2011). It is true that the definition of public interest can include not only governmental matters, but also private conduct that affects a broad segment of society and/or a community in a manner similar to that of the governmental entity. *Damon v. Ocean Hills Journalism Club,* 85 Cal.App.4th 468, 479 (2000). However, these matters involve "powerful organization[s] [that] may impact the lives of many individuals." *Church of Scientology v. Wollersheim,* 42 Cal.App.4th 628, 650 (1996).

The court in *Weinberg v. Feisel,* 110 Cal.App.4th 1122 (2003) explained that the attributes of an issue that would render it one of public, rather than private, interest. "First, 'public interest' does not equate with mere curiosity. [Citations omitted] Second, a matter of public interest should be something of concern to a substantial number of people. [Citation omitted] Thus, a matter of concern to the speaker and a relatively small, specific audience is not a matter of public interest. [Citations omitted] Third, there should be some degree of closeness between the challenged statements and the asserted public interest [Citation omitted]; the assertion of a broad and amorphous public interest is not sufficient. [Citation omitted] Fourth, the focus of the speaker's conduct should be the public interest rather than a mere effort to gather ammunition for another round of [private] controversy...[Citation omitted] Finally, [a] person cannot turn otherwise private information into a matter of public interest simply by communicating to a large number of people." *Id.* at 1132-1133. Taking into account the *Weinberg* factors, the analysis below of the present dispute makes clear that it is purely one of private, not public, interest, and therefore does not relate to protected activity and is not covered by the anti-SLAPP statute.

It should be noted from the outset that this lawsuit does not arise out of the creation of a potential competing website to Wikitravel nor the migration of content and/or users, moderators or content contributors to a rival website. Plaintiff has never opposed any such actions and has alleged no causes of action in the Complaint that relate to same. What the Complaint does allege is that Defendants sent an email to some Wikitravel members improperly using and infringing the Wikitravel trademark in an attempt to pass themselves off as Plaintiff and convince the Wikitravel users that Wikitravel was either shutting down altogether or migrating to a platform that was no longer to be hosted by Plaintiff. In short, Defendants took a one time swing at deceiving, and diverting to a new site, the users of the Wikitravel website. Thus, there is no real nexus between Defendants' alleged "public interest" -- the proposal to create a new travel wiki edited and curated by the public (Motion, p. 16) -- and the particular statements/email that give rise to Plaintiff's claims. By Defendants' logic, every wrongdoer in a dispute with a competitor could always claim "public interest" as long as they were starting a "wiki" site, and would be immune from liability for any wrongful conduct against a competing site. This is not the law.

Furthermore, the alleged public interest here in no way amounts to the types of activities involving private conduct that courts have found deserving of anti-SLAPP protection. *See e.g. Church of Scientology,* 42 Cal.App.4th at 650 (citing product liability suits and real estate or investment scams as examples); *see also Damon,* 85 Cal.App.4th at 471-473, 479 (where there was already wide debate over whether a large residential community of over 3000 individuals and 1633 homes should continue to be self-governed or switch to a professional management company, allegedly defamatory statements regarding same involved "an inherently political question of vital importance to each individual and to the community as a whole" and therefore concerned issues of public interest); *see also Macias v. Hartwell,* 55 Cal.App.4th 669, 671-672 (1997) (campaign statements made during a

union election constituted a public issue because the statements affected 10,000 union members and concerned a fundamental political matter-the qualifications of a candidate to run for office); *see also Averill v. Superior Court,* 42 Cal.App.4th 1170 (1996) (statements opposing the location of a battered women's shelter in a neighborhood; *see also Ludwig v. Superior Court,* 37 Cal.App.4th 8 (1995) (conduct opposing development of a mall because of its environmental impact on the area). The decision as to whether Wikimedia should create a new website or whether Wikitravel users should frequent the other competing website is hardly of this type of impactful nature that gives rise to a public interest. Worse, the dispute here is not about creation of a new site or even a good faith plea to users to visit the new site. It is alleged that misstatements were made falsely designating in context the origin of the email and the relationship between Plaintiff's wikitravel.org site and the new site Defendants were unfairly promoting by use of Plaintiff's mark in confusing fashion.

Wikimedia is an entity in the business of operating and promoting websites, and the users who frequent these websites are its customers. Defendants try to conflate this point by stating that "690 members of the public responded to the Wikimedia request for public comment." (Motion, p.16). These respondents are not representative members of the general public, they are simply a combination of Wikimedia users and customers and potentially online travel site aficionados. The question of whether it should endorse a new travel website is the same as any other company deciding whether it should release a new product. This is simply a private interest amongst a narrow and select audience-Wikimedia and Wikitravel users-and therefore not one of public concern. Clearly, this is not the type of far-reaching, life-affecting activity the anti-SLAPP statute was designed to protect. Furthermore, as noted in *Weinberg,* the fact that Wikimedia has asked or attempted to involve large portions of the public in this dispute by launching the RFC does not turn this limited, private dispute into a public one.

The alleged issue of public importance essentially collapses down to whether Wikitravel users should stay at Plaintiff's site or switch to a competitor's product.[1] Courts have made clear that "the anti-SLAPP statute does not apply to commercial speech about a competitor." *TYR Sport Inc. v. Warnaco Swimwear Inc.*, 679 F.Supp.2d. 1120, 1141-1142 (C.D. Cal. 2009); *See also Globetrotter Software, Inc., v. Elan Computer Group, Inc.* 63 F.Supp.2d. 1127, 1130 (N.D. Cal. 1999) (holding that the statements of one company regarding a competitor company do not satisfy the "issue of public interest" requirement of the anti-SLAPP statute). Thus, the allegedly infringing email and activity, in which Plaintiff alleges that Defendants illegally tried to pass themselves off to promote the competing website and disparage the Wikitravel website, is not protected activity.

Furthermore, courts have rejected the contention that because the public may be interested in the quality of a given company's products or services, improper conduct criticizing or attacking those services is protected. *World Financial Group, Inc. v. HBW Ins. & Financial Services, Inc.*, 172 Cal.App.4th 1561, 1569-1570 (2009). The court in *World Financial* held that in a dispute between business competitors where defendants allegedly solicited plaintiff's employees to switch companies to join their new enterprise and where defendants were alleged to have attempted to interfere with plaintiff's customer base, "the fact that a broad and amorphous public interest can be connected to a specific dispute is not sufficient to meet the statutory requirements of an anti-SLAPP lawsuit" and the "public interest" was not implicated. Thus, the allegedly infringing email and

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[1] To the extent that Defendants would argue that that the public interest at issue is somehow tied to Plaintiff's inclusion of paid advertisements on the Wikitravel website, which according to Defendants is the impetus behind the whole desire for a competing travel website, this argument is of no avail because "a publication does not become connected with an issue in the public interest simply because it is widely disseminated, or because it can be used as an example of bad practices or how to combat bad practices." *Wilbanks v. Wolk*, 121 Cal.App.4th 883, 900 (2004).

activity, in which Plaintiff alleges that Defendants illegally tried to pass themselves off to promote the competing website and disparage the Wikitravel website, is not protected activity. *Id.* The similarity between the instant case and *World Financial* is obvious: Plaintiff has alleged that a competitor has sought to interfere with its customer base.[2]

This Court should also note that the specific activity for which Plaintiff is suing, Defendants' singular email attempt to deceive and steal Plaintiff's customers, collapses down to what *Weinberg* referred to as "a mere effort to gather ammunition for another round of [private] controversy." The email in question simply seeks to drum up support for this private dispute and sway the balance of user frequency between the sites, and is exclusively related to private business competition.

Defendants bear the initial burden of establishing that the case involves protected free speech. If they do not meet that burden, their Motion fails. *See Mindy's Cosmetics,* 611 F.3d. at 595. Yet, the only legal support they offer for the proposition that their alleged misstatements are a matter of "public interest" actually holds to the contrary. Defendants rely almost exclusively on this cropped quote from *Wilbanks v. Wolk,* 121 Cal.App.4th 883 (2004): "consumer information [that] affects a large number of persons...generally is viewed as information concerning a matter of public interest." However, the cropped quote misrepresents the holding of *Wilbanks*, and its inapplicability to the instant action.

In *Wilbanks*, the defendant "had studied the industry, has written books on it, and ...her web site provides consumer information about it, including educating consumers about the potential for fraud...[defendant] identifies the

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[2] There is also a parallel between the defendant in *World Financial* trying to get the plaintiff's employees to join its enterprise and Defendants here trying to get the content creators and moderators (who admittedly, are not employees of Plaintiff) to join Defendants' new travel site enterprise.

brokers she believes have engaged in unethical or questionable practices, and provides information for the purpose of aiding visitors and investors to choose between brokers. The information provided by [defendant] on this topic...was more than a report of some earlier conduct or proceeding; it was consumer protection information." *Id.* at 800.

Contrary to Defendants' urging, under the *Wilbanks* standard they cite, their alleged misstatements are clearly not "public interest" speech. First, the defendant in *Wilbanks* was a third-party "public watchdog", offering opinion and criticism to interested consumers as a public service. The statements at issue were these kinds of "public interest" speech because they were these types of "watchdog" warnings and opinions. By contrast, here, Defendants are expressly not offering opinions and criticisms in the offending misstatements; they are simply making statements about the wikitravel.org website that are alleged to have been deliberately misleading. It is a commercial dispute. Thus, as *Wilbanks* makes clear, since Defendants here were simply conveying alleged mis-information at most about their own business practices but at least about those of Internet Brands, and were not acting as "public watchdogs" offering opinions and warnings, then the statements in question – the subject of the claims -- are not a topic of widespread public interest in the way that the "watchdog" criticism and opinions were in *Wilbanks*. Thus, under *Wilbanks* and similar cases in its cohort, this merely commercial activity does not – and cannot -- meet the definition of "public interest" without violating the very standards Defendants are supposed to be upholding *Id.* at 898. *See All One God Faith, Inc. v. Organic and Sustainable Industry Standards, Inc.*, 183 Cal.App.4th 1186, 1210 (2010) (holding that that case was inapposite from *Wilbanks* because where speech was commercial speech and sought to promote its members' general business interest, there was no "true third-party endorsement or criticism, in the nature of consumer protection information").

Second, the statements by the defendant in *Wilbanks* "were not simply a report of one broker's business practices, of interest only to that broker and those who had been affected by those practices" but rather was designed to help the general public with broker selection amongst a vast array of possibilities. *Wilbanks* at 900. In comparison, Defendants' alleged misstatements here are of interest only to the customers and potential customers of the Wikitravel website and/or Defendants' competing website; this is a business dispute where one competing entity (Wikimedia) has misspoken about, and unlawfully maligned, its competitor's (Internet Brands) website. It is not any more than that, as a matter of fact or law.

Finally, the only other case cited by Defendants on the "public interest" issue, *Global Telemedia Intern., Inc. v. Doe 1,* 132 F.Supp.2d. 1261 (C.D. Cal. 2001) is also inapposite. In that case, defendants were not "in any business that could be said to be competing with Plaintiffs. They were speaking not as competitors, but simply as investors." *Id.* at 1266. Here, Defendants are speaking directly as competitors as they are spearheading the formation of a competing travel website. Furthermore, the plaintiff there was a publicly traded company with thousands of investors, which Internet Brands is not. And moreover, the statements at issue there involved negative evaluations of the performance of the company as a whole and the CEO. The court there stated "a publicly traded company with many thousands of investors is of public interest because its successes or failures will affect not only individual investors, but in the case of large companies, potentially market sectors or the markets as a whole." Clearly, the Wikitravel web page, and any potentially competing site, are not of this nature. Finally, Defendants contention that "the fact that a chat-room dedicated [to the plaintiff] has generated over 30,000 postings further indicates that the company is of public interest" (*Id.* at 1265) is of no avail. The fact that Wikitravel and Wikivoyage users have generated a large volume of articles and guides (Motion, p. 16) is not indicative of a public interest in the issue at the center of this case; unlike the posts (which are discussing

the company and its performance-the area of public interest) these articles simply discuss travel locations objectively—they are totally silent as to the alleged area of public interest, which is the creation of a competing travel website and whether users of either site can migrate content under their licenses (which "issue") is not even in dispute, making it no issue at all.

C. PLAINTIFF WILL BE ABLE TO PREVAIL ON ITS CLAIMS

Since Defendants have not met their burden of showing that the action arises from their rights of free speech, the Motion should be denied and an inquiry by the Court as to whether Plaintiff will prevail on its claims is unnecessary. However, even if this Court were to find that there was a public interest and anti-SLAPP protection may be applicable Plaintiff will be able to prevail on its claims and the Motion should still be denied.

Here, Plaintiff's trademark infringement and unfair business practices claims are based on allegations that Defendants emailed Plaintiff's customers and users and by virtue of referring to themselves using Plaintiff's Wikitravel trademark, deceived them into believing that Plaintiff's website was either shutting down or migrating to Wikimedia.[3] The email (detailed in Paragraph 30 of the Complaint), which stated it "is being sent...on behalf of Wikitravel administrators" stated in particular that "the Wikitravel community is looking to migrate to the Wikimedia Foundation." Defendants argue that (1) using the trademark Wikitravel in describing the community was nominative use; and (2) since Holliday was himself a Wikitravel administrator and the email included a FAQ about the migration and listed Ryan as a Wikitravler user, there was nothing misleading or no likelihood of confusion.

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[3] Defendants claim there is no website being operated as Wiki Travel Guide. Plaintiff has of yet been unable to get any verification one way or another what the new Wikimedia website is going to be called. Plaintiff reserves the right to discuss additional trademark infringement claims relating to same at the hearing.

Neither of these arguments is sufficient to support granting the Motion, especially considering the limited "minimal merit" that Plaintiff must show. (See **Section IIA** above for discussion on applicable standards). Simply put, both arguments are far too speculative to declare that no jury could find for Plaintiff. For instance, a jury could find that Plaintiff's statements regarding the "Wikitravel community" could just have easily be interpreted by the recipients of the email to refer to the Wikitravel website itself as it did to particular users of the website. This is especially true since Defendants did not state that **some** members or users of the Wikitravel website were looking to migrate, but made the blanket statement about the "Wikimedia community," which would seem to imply or encompass **every user** of the Wikitravel site, which was simply not the case. In short, Defendants' nominative use argument fails because his words were not in fact describing the "Wikimedia community," they were only describing the intentions of him and some other users. *See Toyota Motor Sales, U.S.A., Inc. v. Tabari,* 610 F.3d. 1171, 1175-1176 (9th Cir. 2010) (holding that for nominative fair use defense to apply, the product must have been readily identifiable without use of the mark and the defendant must not have falsely suggested that he was sponsored or endorsed by the trademark holder").

Similarly, just because Defendants' user info and the FAQ appeared in the email so that some readers may have believed that it was being sent by a user/administrator and not Plaintiff or its representatives, this does not in any way necessitate the conclusion that the alleged mis-statements about the "migrating of the Wikitravel community" to the new site must be interpreted as meaning that only some users were migrating rather than a complete cessation of Plaintiff's Wikitravel website, which the email implied was "broken". Determining what users interpreted statements to mean will require discovery, of course. All Defendants have done is raise a potential factual dispute, which is inappropriate for resolution on this Motion.

III.

PLAINTIFF WILL DISMISS ITS FEDERAL LANHAM ACT CLAIM, BUT REQUESTS THAT THE DISMISSAL BE WITHOUT PREJUDICE

Plaintiff's Lanham Act claim was primarily predicated on the assumption that Defendants were starting a new Wiki travel site called Wiki Travel Guide, which would infringe Plaintiff's Wikitravel trademark. Defendants' Motion now includes numerous statements and declarations that there is no website called Wiki Travel Guide or anything similar. Plaintiff is willing to take Defendants at their word and dismiss the claim. However, Plaintiff requests that the dismissal be without prejudice so that if Defendants (or others affiliated with Defendants) do end up operating a site called Wiki Travel Guide or anything else that similarly infringes Plaintiff's mark, Plaintiff can pursue its Lanham Act claim.

IV.

CONCLUSION

This case was filed because of allegedly misleading conduct by individuals. These are fact questions. Talking publicly about the conduct later does not make the original, commercial conduct "free speech" or a "public issue". Neither does inventing after the fact a non-existent dispute about license terms and trying to "backdoor" that alleged dispute into this narrow, commercial dispute. The allegations should be elevated on their merits following discovery. Plaintiff respectfully requests that the Court deny Defendants' Motion. Furthermore, Plaintiff asks this Court to dismiss its Lanham Act claim without prejudice.

DATED: October 12, 2012 iGeneral Counsel, P.C.

By: _____
Wendy E. Giberti
Attorneys for Plaintiff Internet Brands, Inc.

PROOF OF SERVICE
(FRCP 5)

I am a citizen of the United States and a resident of the State of California. I am employed in San Francisco County, State of California, in the office of a member of the bar of this Court, at whose direction the service was made. I am over the age of eighteen years, and not a party to the within action. My business address is Cooley LLP, 101 California Street, 5th Floor, San Francisco, California 94111-5800. On November 05, 2012 I served the documents described below in the manner described below:

1. **PLAINTIFF WIKIMEDIA FOUNDATION INC.'S OPPOSITION TO DEMURER**

☒ (BY OVERNIGHT MAIL) I am personally and readily familiar with the business practice of Cooley LLP for collection and processing of correspondence for overnight delivery, and I caused such document(s) described herein to be deposited for delivery to a facility regularly maintained by FEDEX for overnight delivery.

☐ (BY ELECTRONIC MAIL) I am personally and readily familiar with the business practice of Cooley LLP for the preparation and processing of documents in portable document format (PDF) for e-mailing, and I caused said documents to be prepared in PDF and then served by electronic mail to the parties listed below.

on the following part(ies) in this action:

Wendy Evelyn Giberti
iGeneral Counsel, P.C.
9595 Wilshire Blvd., Suite 900
Beverly Hills, CA 90212
Phone: (310) 300-4082
Fax: (310) 300-8401
Email: wgiberti@igeneralcounsel.com
Attorneys for Plaintiff
Internet Brands, Inc.

Executed on November 05, 2012, at San Francisco, California.

Rita Atie