Wendy E. Giberti (SBN 268933)
wgiberti@igeneralcounsel.com
iGeneral Counsel P.C.
9595 Wilshire Blvd., Suite 900
Beverly Hills, CA 90212
Telephone: (310) 300-4082/Facsimile: (310) 300-8401

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

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

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

---

[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

---

[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.

---

[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.