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9 UNITED STATES DISTRICT COURT
 10 CENTRAL DISTRICT OF CALIFORNIA
 11 WESTERN DIVISION

13 INTERNET BRANDS, INC., a Delaware
 corporation,

14 Plaintiff,

15 v.

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

19 Defendants.
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Case No. cv12-8088-SVW(RZx)

**NOTICE OF DEFENDANTS' SPECIAL
 MOTION TO STRIKE COUNTS I, III, AND
 IV OF PLAINTIFF'S COMPLAINT AND
 MOTION TO DISMISS COUNT II; SPECIAL
 MOTION TO STRIKE AND MOTION TO
 DISMISS; MEMORANDUM OF POINTS AND
 AUTHORITIES IN SUPPORT THEREOF**

**[CCP SECTION 425.16; FED. R. CIV.
 PROC. 12(b)(6)]**

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

Trial Date: Not yet set

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NOTICE OF MOTION AND MOTION

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD HEREIN:

PLEASE TAKE NOTICE that on November 5, 2012 at 1:30 p.m., or as soon thereafter as this special motion and motion may be heard in the above-entitled court, located at 312 Spring Street, Los Angeles, California in Courtroom 6, second floor, defendants William R. Holliday (“Ryan”) and Holliday IT Services, Inc. (“Holliday IT Services”) (collectively “Defendants”), will and hereby do: (1) specially move to strike Counts I, III, and IV of Plaintiff’s Complaint as a Strategic Lawsuit Against Public Participation (“SLAPP”) pursuant to California Code of Civil Procedure § 425.16; (2) move to dismiss Count II of Plaintiff’s Complaint pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure; and (3) move to recover fees and costs incurred in defending this SLAPP action pursuant to California Code of Civil Procedure § 425.16(c)(1). Defendants’ Special Motion to Strike and Motion to Dismiss are based on this Notice of Motion and Motion, the accompanying Memorandum of Points and Authorities, the Request for Judicial Notice, the Declarations of William R. Holliday, Sue Gardner, and Patrick P. Gunn, and accompanying exhibits filed therewith, all pleadings and papers on file in this matter, and upon such other matters as may be presented to the Court at the time of the hearing or otherwise.

This motion is made following the repeated efforts of counsel to meet and confer pursuant to Local Rule 7-3. (Declaration of Patrick P. Gunn, ¶¶ 2-7.) These efforts took place on the 21st, 24th, and 25th of September 2012. (*Id.*)

STATEMENT OF RELIEF SOUGHT

Defendants seek an order pursuant to California Code of Civil Procedure § 425.16 striking with prejudice Counts I, III, and IV of Plaintiff’s Complaint as a SLAPP. Defendants also seek an order pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure dismissing Count II of Plaintiff’s Complaint with prejudice for failure to state a claim upon which relief can be granted.

STATEMENT OF ISSUES TO BE DECIDED

1. Should Counts I, III, and IV of Plaintiff’s Complaint be stricken with prejudice because they violate California’s SLAPP statute?
2. Should Count II of Plaintiff’s Complaint be dismissed with prejudice because it

1 fails to state a claim upon which relief can be granted?

2 MEMORANDUM OF POINTS AND AUTHORITIES

3 **I. INTRODUCTION.**

4 The Complaint filed by Plaintiff Internet Brands, Inc. (“IB”) is a Strategic Lawsuit
5 Against Public Participation (“SLAPP”), a meritless action brought not to win, but to intimidate,
6 threaten, and ultimately silence persons engaged in speech that IB dislikes but the Constitution
7 protects.

8 IB is a corporation that owns over 100 websites, including the wiki-based¹ travel website
9 Wikitravel, the website at issue in this case. Moving defendant Ryan Holliday (“Ryan”)² is an
10 individual not employed by IB. A passionate traveler and wiki-enthusiast, Ryan is an unpaid
11 volunteer who has donated thousands of hours of his time to create, edit and curate content on
12 Wikitravel. As shown by this motion, IB has sued Ryan and another individual not because these
13 defendants committed any actionable wrong, but to punish them and stop them from
14 communicating with other volunteer users of Wikitravel about a proposal to start a new non-
15 commercial travel wiki not associated with IB.

16 Although IB styles its Complaint as one for trademark infringement and unfair
17 competition, its claims fail because IB has not alleged and cannot show Ryan has actually used a
18 trademark in commerce in a manner likely to cause confusion. Instead, IB’s claims against Ryan
19 rest – entirely – on allegations that Ryan was involved in sending emails to Wikitravel users
20 concerning the proposal to set up a new travel site allegedly called “Wiki Travel Guide.” As a
21 reading of these communications shows, to the extent they contain any “use” of a trademark at
22 all, such use is limited to referencing “Wikitravel” by name to distinguish it from a new travel site
23

24 ¹ As explained further in section II.A, a “wiki” is type of website where content is added,
25 modified or deleted by users.

26 ² IB has also named as defendant Ryan’s company, Holliday IT Services, Inc. (“Holliday IT
27 Services”). This is but an effort to further intimidate Ryan by attacking his livelihood, a point
28 made clear by IB’s failure to allege that this entity contributed in any manner to the conduct
challenged in the Complaint. Holliday IT Services joins Ryan in seeking the relief requested in
this motion.

1 being planned. This is known as a nominative use, and is permitted by law. Moreover, as shown
 2 by the declarations submitted in support of this motion, while efforts to create that new travel site
 3 are now underway, the site has not been named, and no site called “Wiki Travel Guide” exists.

4 IB’s state law claims for trademark infringement, state law unfair competition and civil
 5 conspiracy can and should be dismissed under California’s anti-SLAPP statute, Cal. Code Civ.
 6 Proc. (“CCP”) § 425.16, because they all arise from constitutionally protected speech and IB
 7 cannot demonstrate a probability of prevailing on the merits. IB’s remaining claim for an alleged
 8 violation of the Lanham Act rests on the same expressive conduct but is not subject to
 9 California’s anti-SLAPP statute since it arises under federal law. The claim should nonetheless
 10 be dismissed under Rule 12(b)(6) because it fails to allege any use of a mark in commerce or any
 11 factual basis for the naked legal conclusion that there exists a likelihood of confusion.

12 **II. SUMMARY OF FACTS AND RELEVANT ALLEGATIONS.**³

13 **A. Wikis and the Wiki Movement.**

14 This case is about “wikis.” A “wiki” is a website that allows and encourages its users to
 15 review and edit existing content, and to author entirely new material and post it to the site.
 16 (Declaration of Sue Gardner [hereinafter “Gardner Decl.”] ¶ 3.) To ensure that the wiki isn’t
 17 buried in irrelevant or inappropriate material (such as spam), and to block disruptive users,
 18 protect pages, and to ensure compliance with applicable policies, the community of wiki users
 19 appoints special members called “administrators” (most of whom are also “editors” in wiki-
 20 speak). (*Id.*)

21 Since their invention in the early 1990, wikis have proliferated as a tool for sharing
 22 information. The largest wiki in the world is Wikipedia, a free online encyclopedia with over 23
 23 million articles and 75,000 active contributors. (Gardner Decl. ¶ 2.)⁴ Wikipedia is operated and

24 _____
 25 ³ This background section pertains to the anti-SLAPP component of Defendants’ combined
 26 motion. A party moving under California’s anti-SLAPP statute may present facts outside of the
 pleadings. CCP § 425.16(b)(2).

27 ⁴ Examples of other wikis include judgepedia.org (collecting information about the federal and
 28 state bench), wookieepedia (for fans of the movie Star Wars), and scholarpedia.org (peer
 reviewed scientific articles).

1 supported by the Wikimedia Foundation, Inc. (sometimes referred to as “Wikimedia” or the
2 “Wikimedia Foundation”), a nonprofit charitable organization based in San Francisco, California.
3 (*Id.*) The Wikimedia Foundation also operates and promotes other websites using wiki software,
4 and owns the trademarks and infrastructure required to do so. (*Id.* at ¶ 4.) The largest of these
5 are Wiktionary (a free dictionary) and Wikimedia Commons (a repository of freely licensed
6 media content). (*Id.*)

7 All wikis operated by the Wikimedia Foundation use an open source software engine
8 called MediaWiki. (Gardner Decl. ¶ 4.) MediaWiki development was initiated by Wikimedia
9 volunteers, and the Wikimedia Foundation has since become the single largest contributor to
10 MediaWiki development. (*Id.*) The Wikimedia Foundation makes key improvements to the
11 software, operates the primary development infrastructure, organizes developer community
12 events, assesses and reviews bug reports, etc. (*Id.*) Like Wikipedia itself, MediaWiki is freely
13 usable under open source licensing terms, and hundreds of thousands of wikis globally are
14 powered by MediaWiki, including wikis hosted by Novell, Intel, and the United States
15 government. (*Id.*)

16 By supporting MediaWiki and making it freely available, the Wikimedia Foundation
17 supports its core mission: promoting the free and unrestricted sharing of information by
18 volunteers throughout the world through the development of open content, wiki-based projects.
19 (Gardner Decl. ¶ 5.)

20 **B. The Wikitravel Website.**

21 On or about July 2003, two individuals interested in travel registered the Internet domain
22 name www.wikitravel.org and created Wikitravel, a wiki aimed at creating a free, complete, up-
23 to-date and reliable worldwide travel guide.⁵ (Req. Judicial Notice [hereinafter “RJN”] Exh. A.)

24 As with most other wikis, since inception, all contributions to Wikitravel are made by
25

26 ⁵ Despite the name, Wikitravel has never had any association with the Wikimedia Foundation,
27 although it has, since inception, run on Wikimedia’s free, open-source MediaWiki software.
28 (Gardner Decl. ¶ 13.) Despite its lack of affiliation with the Wikimedia Foundation, IB describes
Wikitravel as “Wikipedia for travel.” (RJN Exh. P.)

1 editors and are licensed under the Creative Commons Attribution-ShareAlike License (“CC
2 License”). (See RJN Exh. B; Compl. ¶ 11.) Pursuant to the CC License, everyone who submits
3 or edits content gives others the right to copy, distribute, sell, or modify that content in any
4 manner they desire, subject to two simple requirements. (RJN Exh. B; Compl. ¶ 12.) The
5 primary restrictions are that anyone who distributes the content, or derives new work from it,
6 must (1) give proper attribution to the author; and (2) retain the work and any derivative works
7 under the same open license terms. (*Id.*) This means that so long as the author is credited,
8 anyone can copy, publish, distribute, or modify content for any purpose, commercial or non-
9 commercial. (*Id.*) Because all contributions to Wikitravel have been made pursuant to the CC
10 License, the owners of the Wikitravel website have never owned nor do they have exclusive
11 license rights to the content submitted or edited by volunteer editors or administrators. (*See id.*)

12 Ryan became an avid contributor to Wikitravel, eventually authoring hundreds of articles
13 and making 40,611 edits to the over 26,000 destination guides and other articles that appear on
14 the Wikitravel website. (Declaration of William R. Holliday [hereinafter “Ryan Decl.”] ¶ 5.)
15 Through these activities, Ryan enjoyed the widespread support and gratitude of the other users of
16 the Wikitravel site (the Wikitravel community), and in June, 2005, the community elected him to
17 become an administrator, a role which gave him special permissions to monitor the Wikitravel
18 website. (*Id.* at ¶¶ 6-7, Exh. A; RJN Exh. C.)

19 To be clear, Wikitravel administrators are not representatives of IB or Wikitravel. (Ryan
20 Decl. ¶¶ 9-10; see RJN Exh. D.) Rather they are representatives of the Wikitravel community
21 (meaning Wikitravel’s users and volunteer editors and administrators), and, per the terms
22 established by Wikitravel itself, serve at their own pleasure. (Ryan Decl. ¶¶ 9-10, Exh. A; RJN
23 Exh. C (“Administrators who know they don’t have the time or interest to continue as admins
24 should request to have their privileges revoked voluntarily.”).) The role of “administrator” is
25 bestowed via nomination and vote by the Wikitravel community, not by Wikitravel or IB. (*Id.*)

26 **C. Internet Brands Purchases the Wikitravel Domain Name and Servers.**

27 Sometime in 2006, the creators of the Wikitravel website sold the Wikitravel Internet
28 domain name (www.wikitravel.org), the “Wikitravel” trademark, and the servers used to operate

1 the website to IB, a private equity-backed company that operates over 100 websites oriented
2 around industry “verticals,” including travel. (RJN Exhs. A & Q.) IB did not acquire any
3 property rights or interests with respect to the volunteer editors and administrators who create,
4 curate, and edit the content which makes up the Wikitravel website because those editors and
5 administrators operate on a volunteer basis for the benefit of the wiki community. (Ryan Decl. ¶¶
6 9-10, Exhs. A & C; *see* RJN Exhs. B, C, and E.) Moreover, Wikitravel’s Terms of Use do not
7 purport to prohibit editors and administrators from contributing to other wikis, or from discussing
8 the creation or virtues of alternative sites. (Ryan Decl. ¶¶ 9-10, Exhs. A, B and C; RJN Exhs. C
9 & D.)

10 Similarly, with its purchase, IB did not acquire ownership of the content published on the
11 Wikitravel website since that content has at all times been governed by a CC license. (*See* RJN
12 Exh. B.) IB was able to continue to distribute and display the content on the servers it obtained
13 through the CC license and like all others was able to use and display it. (*See id.*)

14 To extract profits from the site’s donated content and the efforts of volunteer editors and
15 administrators, IB began displaying commercial advertisements on the site, something that had
16 not been done before. (Ryan Decl. ¶ 11.) This alienated and upset many volunteers, who became
17 concerned that the display of advertisements could undermine the website’s neutrality (*e.g.*, there
18 was concern that the presence of advertisements would taint what was supposed to be an unbiased
19 travel guide) and impede its community-centric mission. (*Id.* at ¶ 12.) Preferring ownership by a
20 non-commercial association, these administrators and editors decided to split from Wikitravel,
21 and in December 2006, they formed another wiki travel site called Wikivoyage.⁶ (*Id.* at ¶ 13.)
22 Wikivoyage initially populated its new website with nearly all of the German-language content
23 from the Wikitravel website, which is allowed under the CC License. (*Id.*; *see* RJN Exh. B.) In
24 wiki parlance, such splits are referred to as “forks.” (Ryan Decl. ¶ 14.)

25 Forks are a fundamental aspect of operating under a CC license, and are entirely lawful;
26 there is nothing devious or sinister about them. IB acknowledges this in one of its own policies:

27 ⁶ Wikivoyage is not, and has never been, affiliated with Wikimedia. It, like Wikitravel, was
28 created by private parties independent of Wikimedia. (Gardner Decl. ¶ 13.)

1 It may occur that some editor or group of editors challenges one or
 2 another policy for Wikitravel, and we can't come to terms with a
 3 compromise that works for everyone. If that person or persons just
 4 can't live with the policy, but wants to try something else, it's
 5 possible that we have a project fork. A project fork means that the
 6 editors take the content of Wikitravel and create a new wiki – or
 conceivably, another kind of collaborative Web site – and continue
 developing the content there. **This is, of course, entirely
 compatible with our copyleft.**⁷

7 (Ryan Decl. ¶ 10, Exh. C (emphasis added); RJN Exh. E (emphasis added).)

8 Despite the departure of a substantial number of volunteer administrators to Wikivoyage,
 9 many remained at Wikitravel and continued to donate their time and effort to ensure the
 10 continued viability of the site. (Ryan Decl. ¶ 15.) Defendant Ryan was among them. (*Id.*)

11 **D. Deterioration of the Wikitravel Website and Talk of a New Wiki Project.**

12 In the years that followed the fork (representing the time period of approximately 2006 to
 13 2012), most (if not all)⁸ of the remaining volunteer administrators of Wikitravel, including
 14 Defendant Ryan, became increasingly dissatisfied with IB's operation of the Wikitravel website.
 15 (Ryan Decl. ¶¶ 16-17.) Their concerns primarily centered around two issues: (1) lack of support
 16 and website maintenance by IB (including failure to address bug reports, lack of new features,
 17 and failure to run and support the most recent versions of MediaWiki); and (2) the perception that
 18 IB was excessively focused on "monetizing" the content of the Wikitravel website – content
 19 which was the product of thousands of hours of uncompensated volunteer effort. (*Id.*) Many of
 20 Wikitravel's most active *non-administrator users* – including most (if not all) of the users that
 21 commented on the subject – shared in this dissatisfaction. (*Id.* at ¶ 18.) Collectively, these
 22 individuals agreed that the best course of action was to create a new travel wiki, much like
 23 Wikivoyage's administrators had done years earlier when they left Wikitravel to form
 24 Wikivoyage. (*Id.* at ¶ 19.) Such sentiments led defendant James Heilman, a user of the
 25 Wikitravel website, to contact the Wikimedia Foundation on or about March 10, 2012 to gauge its

26 ⁷ As noted previously, "copyleft" is another name for a CC License.

27 ⁸ When polled, all 42 responding administrators voted in favor of the proposed fork. (Ryan Decl.
 28 ¶ 17, Exhs. F.)

1 interest in sponsoring a new wiki “project” dedicated to travel. (Gardner Decl. ¶ 6.)

2 **E. The Wikimedia Community Starts an RFC.**

3 The Wikimedia Foundation’s websites are created and maintained by a global community
4 of volunteers, who make decisions about the scope and content of the sites using a consensus
5 decision-making process. (Gardner Decl. ¶ 7.) As such, the decision of whether to create a
6 Wikimedia travel site lay with the Wikimedia community. (*Id.*) Thus, James Heilman began
7 drafting a proposal on March 11, 2012, to determine whether there was general community
8 support for a new wiki project dedicated to travel. (*Id.*) Ultimately, an official community
9 request for comment (“RFC”) was launched on June 28, 2012, on www.meta.wikimedia.org, a
10 Wikimedia Foundation website, to gauge overall community interest in expanding the
11 Wikimedia-owned family of websites to include such a project. (*Id.*, Exh. A; RJN Exh. L.) The
12 RFC requested input on the following:

13 That we as the Wikimedia community ask the Wikimedia
14 Foundation to approve a Travel Guide project and allocate
15 resources to support any technical aspects of starting this new
16 project. The project would combine efforts of free knowledge
17 travel sites, some of which (e.g., Wikivoyage) want to migrate
completely with their content and communities to the new travel
guide project and others (e.g. Wikitravel) whose community of
editors wish to join the Wikimedia movement.

18 (*Id.*)

19 As of June 2012, comments posted in response to the preliminary RFC showed that the
20 community was overwhelmingly in favor of the creation of a new wiki travel project. (Gardner
21 Decl. ¶ 8.) On or about July 13, 2012, the Wikimedia community, at the Wikimedia Foundation
22 Board’s request, extended the RFC for an additional six weeks to ensure that all interested
23 stakeholders had an opportunity to comment, including IB. (*Id.*)

24 **F. The Debate Over a New Travel Wiki Heats Up, and IB Threatens Volunteer
Administrators and Users with Legal Action.**

25 The proposed creation of a new travel wiki led to lively debate, some of which Ryan
26 participated in, and much of which took place on publicly-accessible pages of the Wikitravel
27 website itself. (Ryan Decl. ¶ 21.) IB’s commercial interests were opposed to the creation of a
28

1 new site, (*id.* at ¶ 22), presumably because the departure of a large group of its most active
 2 volunteer contributors could result in a lowering in the quality of its own site, and indirectly
 3 impact revenues earned from advertisers. Through its representative “IBobi” (real name Paul
 4 O’Brian), IB objected to such debate taking place on the Wikitravel website, and sought to censor
 5 it. (*Id.* at ¶ 22; *see* RJN Exh. F.) IB instructed administrators and users not to express opinions
 6 about the proposal on the Wikitravel website. (Ryan Decl., ¶ 22.) It later began blocking access
 7 for users who expressed support for the proposal, and deleting comments from those who were
 8 viewed as promoting it.⁹ (*Id.* at ¶ 22; RJN Exh. F.) As a result of this censorship, much of the
 9 debate moved to other forums, including: (1) comments posted on other publicly-accessible
 10 websites; and (2) private communications, including email communications, between Wikitravel
 11 volunteer administrators and users. (Ryan Decl. ¶ 23.)

12 But IB sought to stifle debate in these new forums as well. (Ryan Decl. ¶ 24.) On August
 13 21, 2012, IB posted messages on its site threatening to sue Ryan and six other individuals (four
 14 volunteer administrators and two volunteer users) if they continued to “communicat[e] directly
 15 with members of Wikitravel.” (*Id.*) The full text of IB’s legal threat read as follows:

16 Please be advised your recent actions communicating directly with
 17 members of Wikitravel could put you in violation of numerous
 18 federal and state laws. We strongly urge you to cease and desist all
 19 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.

20 (*Id.*, Exhs. G & H; RJN Exh. G.)

21 **G. IB Files This SLAPP Suit and Falsely Asserts that Defendants are Operating
 a Competing Wiki Site.**

22 On August 28, 2012, one week after unilaterally terminating Ryan’s privileges as an
 23 administrator, IB filed the instant lawsuit in Los Angeles County Superior Court against
 24 individuals Ryan Holliday and James Heilman. IB’s lawsuit is careful not to name the
 25 Wikimedia Foundation, even though IB suggests the Foundation is likely behind the efforts to
 26 create an “infringing website.”¹⁰ (Compl. ¶ 22.) Instead, IB attacked the individual volunteers,

27 ⁹ These acts violated Wikitravel’s own policies. (Ryan Decl. Exh. C.)

28 ¹⁰ On September 5, 2012, the Wikimedia Foundation filed a suit for Declaratory Judgment against

1 doubtless calculating that these persons would not have the resources to defend themselves and
 2 that suing them would intimidate others who would otherwise be inclined to voice support for a
 3 new travel wiki.

4 IB's claims against Ryan – for common law trademark infringement, unfair competition
 5 under the Lanham Act and California Business and Professions Code 17200, and civil conspiracy
 6 and/or unfair competition – rest on allegations that Ryan was part of a “scheme” to “create the
 7 illusion that [sic] Wikitravel Website was substantially ‘broken.’” (Compl. ¶¶ 21, 25.) Ryan is
 8 alleged to have done this to promote the creation of a new site that would “combine the
 9 Wikitravel Website . . . into a Wikimedia Foundation website that would be called ‘Wiki Travel
 10 Guide.’” (*Id.* at ¶¶ 21-22.) Although it stops short of saying so directly, IB's implication is that a
 11 website called WikiTravel Guide has been created. Any such implication, however, is false. No
 12 such travel site has been created, nor has Ryan created or operated a competing wiki site.
 13 (Gardner Decl. ¶¶ 11-12; Ryan Decl. ¶ 28.)

14 In any event, a close reading of the Complaint shows that Ryan is alleged to have
 15 undertaken only two acts in furtherance of this “scheme.”

16 First, Ryan is alleged to have “engaged” with a *public* emailing list¹¹ in which the
 17 following statement was made (by someone not identified): “I’m more concerned that now that
 18 we’re discussing this in a more-or-less public forum that they could get wind of it and start
 19 actively resisting. They could make things a bit more difficult, though there are XML back-ups
 20 out there which we could fall back on.” (Compl. ¶ 25; Ryan Decl. ¶ 29, Exh. I.)

21 Second, IB alleges that Ryan “improperly and wrongfully emailed at least several hundred
 22 of [sic] Wikitravel members, purporting to be from Wikitravel and informing members that the

23 IB in San Francisco Superior Court seeking a judicial determination on various issues, including
 24 that Wikitravel cannot prevent the sharing or copying of content generated under the CC License.
 25 *See Wikimedia Found., Inc. v. Internet Brands, Inc.*, No. CGC-12-523971 (S.F. Super. Ct., filed
 Sept. 5, 2012). (Gardner Decl. ¶ 14.)

26 ¹¹ The Complaint refers to the email mailing list as an “email thread.” (Compl. ¶ 25.) Whatever
 27 the label assigned, emails posted to the mailing list appear on a publicly-accessible web page that
 28 is viewable by anyone. (Ryan Decl. ¶ 30.) The mailing list or “email thread” is akin to an
 Internet chat room.

1 Wikitravel Website was ‘migrating’ to the Wikimedia foundation.” (Compl. ¶ 29; Ryan Decl. ¶
2 31, Exh. J.) IB cherry-picks certain portions of the email at issue in order to create a misleading
3 impression. (*See id.* ¶ 30 (quoting only portions of the email in question).) However, the full text
4 of the email reads as follows:

5 This email is being sent to you on behalf of Wikitravel
6 **administrators** since you have put some real time and effort into
7 working on Wikitravel. We wanted to make sure that you are up to
8 date and in the loop regarding big changes in the community that
9 will affect the future of your work!

10 As you may have already heard, Wikitravel’s **community** is
11 **looking to** migrate to the Wikimedia Foundation. A really good
12 and current overview of the process and reasons for the migration
13 can be found in this FAQ:
14 http://wikivoyage.org/general/Migration_FAQ

15 If you have any questions, the talk page of that article will be the
16 best place to ask them, in part so that other Wikitravellers with the
17 same questions can read them too. If you prefer to ask a question
18 privately, please feel free to give me or Peter (User:Peterfitzgerald)
19 an email. Both of our emails are at the bottom of the Migration
20 FAQ.

21 Lastly, there is a Request for Comment regarding the proposal at
22 Wikimedia’s Meta site:
23 [http://meta.wikimedia.org/wiki/Requests_for_comment/Travel_Gu](http://meta.wikimedia.org/wiki/Requests_for_comment/Travel_Guide)
24 [ide](http://meta.wikimedia.org/wiki/Requests_for_comment/Travel_Guide). I would welcome you to weigh in with your opinions there (if
25 you haven’t already). The proposal itself is here:
26 http://meta.wikimedia.org/wiki/Travel_Guide.

27 -Ryan (Wikitravel User:Wrh2)

28 (Ryan Decl. ¶ 31, Exh. J (emphasis added).)

IB contends that these two allegations support an award of monetary relief against Ryan and Holliday IT Services – a company owned by him with no alleged involvement in any of the complained of acts. (Compl., at 9.) IB also seeks “punitive damages” against both these defendants. (*Id.*)

H. The Wikimedia Foundation Decides to Sponsor a New Travel Wiki Based on Community Support.

In light of overwhelming community support for a new travel project, as reflected by the

1 RFC results, the Wikimedia Foundation Board announced, on September 6, 2012 – nine days
2 after IB filed its lawsuit – that it intended to move forward with the creation of a new wiki project
3 dedicated to travel. (Gardner Decl. ¶ 10, Exh., B.) The Board’s statement read, in pertinent part:

4 Through the RFC, it is clear our community has reached consensus
5 in favor of the creation of a travel guide. The Board supports the
6 community decision to create a dedicated project for the collection
7 of free multilingual travel resources. We believe there is an
8 enormous amount of space for multiple wiki-based projects with
9 travel content and welcome the contributions of community
10 members from around the world . . . As a project supported by the
11 Wikimedia Foundation, it will be subject to the movement vision,
12 mission, and values, as well as the Foundation Terms of Use and
13 Privacy Policy. However, like all other Wikimedia projects, the
14 community of contributors is responsible for the management and
15 creation of the content, policies, rules, and governance of the new
16 project. The community will be responsible for organizing the
17 travel guide project, and once they have put all of the necessary
18 pieces together and provided them to the Foundation staff, the
19 Wikimedia Foundation will make the necessary technical
20 adjustments to support the site. We look forward to a new project
21 and appreciate the community taking the initiative to make this
22 possible.

23 (Id.)

24 As of the date of this filing, the new Wikimedia Foundation-supported website has not yet
25 been created and no name for it has been chosen. (Gardner Decl. ¶ 12.)

26 **III. COUNTS I, III, AND IV OF THE COMPLAINT SHOULD BE SPECIALLY STRICKEN
27 PURSUANT TO CALIFORNIA’S ANTI-SLAPP STATUTE.**

28 **A. The anti-SLAPP Statute and Its Purpose.**

Subdivision (a) of the anti-SLAPP statute sets forth the Legislature’s reason for enacting
the statute:

[T]here has been a disturbing increase in lawsuits brought
primarily to chill the valid exercise of the constitutional rights of
freedom of speech and petition for the redress of grievances. The
Legislature finds and declares that it is in the public interest to
encourage continued participation in matters of public significance,
and that this participation should not be chilled through abuse of
the judicial process.

CCP § 425.16(a); *see also City of Los Angeles v. Animal Def. League*, 135 Cal. App. 4th 606, 628
n.19 (2006) (“The purpose of [the anti-SLAPP statute] is . . . to give relief, including financial

1 relief in the form of attorney's fees and costs, to persons who have been victimized by meritless,
 2 retaliatory SLAPP lawsuits because of their participation in matters of public significance.”
 3 (citation and quotation omitted)); *Metcalf v. U-Haul Int'l., Inc.*, 118 Cal. App. 4th 1261, 1264
 4 (2004) (“The anti-SLAPP statute arose out of legislative concern that large private interest
 5 plaintiffs were using meritless tort actions to deter or punish individual activists who opposed
 6 their views.”).

7 The Court of Appeal has explained that:

8 The favored causes of action in SLAPP suits are defamation,
 9 various business torts such as interference with prospective
 10 economic advantage, nuisance and intentional infliction of
 11 emotional distress. [Citation.] Plaintiffs in these actions typically
 12 ask for damages which would be ruinous to the defendants. (See,
 13 e.g., *Protect Our Mountain v. District Court, supra*, 677 P.2d at p.
 14 1364 [developer sought \$10 million compensatory and \$30 million
 15 punitive damages]; [Citation].) SLAPP suits are brought to obtain
 16 an economic advantage over the defendant, not to vindicate a
 17 legally cognizable right of the plaintiff. [Citation.] Indeed, one of
 18 the common characteristics of a SLAPP suit is its lack of merit.
 19 [Citation.] But lack of merit is not of concern to the plaintiff
 because the plaintiff does not expect to succeed in the lawsuit, only
 to tie up the defendant's resources for a sufficient length of time to
 accomplish plaintiff's underlying objective. [Citation.] Thus,
 while SLAPP suits “masquerade as ordinary lawsuits” the
 conceptual features which reveal them as SLAPP's are that they
 are generally meritless suits brought by large private interests to
 deter common citizens from exercising their political or legal
 rights or to punish them for doing so.

20 *Wilcox v. Superior Court*, 27 Cal. App. 4th 809, 816 (1994), overruled on other grounds by
 21 *Equilon Enterprises v. Consumer Cause, Inc.*, 29 Cal.4th 53, 68 n.5 (2002); see also *Briggs v.*
 22 *Eden Council for Hope & Opportunity*, 19 Cal.4th 1106, 1125-26 (1999) (citing *Wilcox* with
 23 approval).

24 **B. Legal Standards Applicable to an anti-SLAPP Motion.**

25 Under the anti-SLAPP statute, a defendant may move to strike a cause of action that seeks
 26 to impose liability based on the defendant's exercise of its right of free speech in connection with
 27 issues of public interest. The statute provides that any such cause of action is subject to being
 28 stricken unless the plaintiff can establish that there is a probability that it will prevail on the

1 claim. CCP § 425.16(b). Federal courts in the Ninth Circuit may apply California's anti-SLAPP
2 statute to claims arising under California law. *See United States ex rel. Newsham v. Lockheed*
3 *Missiles & Space Co., Inc.*, 190 F.3d 963 (9th Cir. 1999).

4 Application of the anti-SLAPP statute involves two stages of analysis. First, the
5 defendant must make a *prima facie* showing "that the challenged cause of action is one arising
6 from protected activity. A defendant meets this burden by showing that the act underlying the
7 plaintiff's cause fits one of the categories spelled out in [the statute]." *Navellier v. Sletten*, 29
8 Cal. 4th 82, 88 (2002). Upon the defendant's showing, the burden shifts to the plaintiff to either
9 show a "probability that [it] will prevail on the claim," or face dismissal. CCP § 425.16(b);
10 *Matson v. Dvorak*, 40 Cal. App. 4th 539, 578 (1995). To meet its burden, the plaintiff must
11 "demonstrate that the [claim] is *both* legally sufficient and supported by a sufficient *prima facie*
12 showing of facts to sustain a favorable judgment if the evidence submitted by the plaintiff is
13 credited." *Matson*, 40 Cal. App. 4th at 578 (emphasis added). If the plaintiff contends that the
14 conduct underlying the cause of action is not protected under the anti-SLAPP statute, it must
15 establish this as a matter of law as part of demonstrating the legal sufficiency of its claim. *See*
16 *Gov. Gray Davis Comm. v. Am. Taxpayers Alliance*, 102 Cal. App. 4th 449, 459-60 (2002). If the
17 plaintiff cannot meet the legal *and* factual burden to show a probability of success, the claim must
18 be stricken. CCP § 425.16; *Simmons v. Allstate Ins. Co.*, 92 Cal. App. 4th 1068, 1073 (2001) (it
19 is improper to grant leave to amend a SLAPP complaint); *Flores v. Emerich & Fike*, No. 1:05-
20 CV-0291 OWW DLB, 2006 WL 2536615, at *7-*10 (E.D. Cal. Aug. 31, 2006); *Roe v. Doe*, Case
21 No. C 09-0682 PJH, 2009 WL 1883752, at *15 (N.D. Cal. June 30, 2009).

22 In ruling on a motion to strike under the anti-SLAPP statute, the Court is to consider
23 matters outside of the pleadings, including the "the facts upon which the liability or defense is
24 based." CCP § 425.16(b)(2) ("In making its determination, the court **shall** consider the pleadings,
25 and supporting and opposing affidavits stating the facts upon which the liability or defense is
26 based." (emphasis added)).

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C. IB’s Claims Are Subject to the Anti-SLAPP Statute Because They Arise from Protected Speech Activity.

IB’s First, Third and Fourth Counts against Ryan rest entirely on two factual allegations. As demonstrated below, both allegations fall within the anti-SLAPP statute’s zone of protected expressive activity and IB cannot meet its burden to show it is likely to prevail on these claims. Consequently, the First, Third, and Fourth Counts should be stricken.

1. Ryan’s “Engage[ment]” with a Public Mailing List is Expressive Conduct Protected Under the Anti-SLAPP Statute.

IB first alleges that Ryan “engaged” with a public mailing list upon which an allegedly offending statement was published.¹² (Compl. ¶ 25.) The Complaint does not explain what the word “engaged” means in this context, nor does it allege that Ryan authored the allegedly offending statement. But even assuming Ryan did make the statement (and he did not),¹³ such conduct would fall within the protections of the anti-SLAPP statute.

Protected conduct under the anti-SLAPP statute includes “any written or oral statement or writing made in a place open to the public or a public forum in connection with an issue of public interest.” CCP § 425.16(e)(3). Here, the allegedly offending statement was published to a publicly-accessible mailing list that is viewable by anyone who wishes to view it. (Ryan Decl. ¶ 30, Exh. I.) Mailing lists of this type are “public forums” for the purposes of the anti-SLAPP statute. *Barrett v. Rosenthal*, 40 Cal.4th 33, 41 n.4 (2006) (websites accessible to the public, such as Internet “newsgroups,” are “public forums” for purposes of the anti-SLAPP statute); *Ampex Corp. v. Cargle*, 128 Cal. App. 4th 1569, 1576 (2005) (websites that are accessible free of charge to any member of the public where members of the public may read the views and information

¹² As noted earlier, the statement read as follows: “I’m more concerned that now that we’re discussing this in a more-or-less public forum that they could get wind of it and start actively resisting. They could make things a bit more difficult, though there are XML back-ups out there which we could fall back on.” (Ryan Decl. ¶ 29, Exh. I.)

¹³ Defendant Heilman did not make this statement either, which is quite obvious given that the statement’s author is identified as someone else. (Ryan Decl. ¶ 29, Exh. I.) Thus, IB is seeking to hold the defendants liable for a statement made by a third party non-defendant simply because the defendants are members of a publicly-accessible mailing list to which an allegedly offensive statement was published.

1 posted, and post their own opinions, meet the definition of a public forum for purposes of the
 2 anti-SLAPP statute); *see Global Telemedia Int'l., Inc. v. Doe 1*, 132 F. Supp. 2d 1261, 1265 (C.D.
 3 Cal. 2001) (applying anti-SLAPP statute to messages posted on Internet message board);
 4 *Kronemyer v. Internet Movie Data Base, Inc.*, 150 Cal. App. 4th 941, 950 (2007) (same); *D.C. v.*
 5 *R.R.*, 182 Cal. App. 4th 1190, 1226 (2010) (same).

6 Moreover, Ryan is alleged to have “engaged” with the mailing list in connection with a
 7 proposal to create a new travel wiki whose contents would be developed, edited, and curated by
 8 the public, and that would benefit and be free to the public. (Compl. ¶ 25; Gardner Decl. ¶ 7,
 9 Exh. A.) Thus, the engagement concerned an issue of public interest. *See Wilbanks v. Wolk*, 121
 10 Cal. App. 4th 883, 898-899 (2004) (“Consumer information [that] affects a large number of
 11 persons. . . generally is viewed as information concerning a matter of public interest.”). Indeed,
 12 more than 690 members of the public responded to the Wikimedia community’s request for
 13 public comment to express their opinions – both pro and con – as to whether such a travel guide
 14 should be created. (Gardner Decl. ¶ 9; *Wilbanks*, 121 Cal. App. 4th at 898-899 (a consumer’s
 15 statements about the quality of a seller’s products and service and her unhappiness with them is
 16 protected). Additionally, more than 80,000 registered users currently utilize similar travel guides
 17 operated by Wikitravel and Wikivoyage. (Ryan Decl. ¶¶ 34-35, Exhs. O & P.) These users have
 18 an interest in the creation of a complementary, new travel guide that will be non-commercial in
 19 nature and supported by the Wikimedia Foundation’s team of technical experts. Further, many of
 20 these users have contributed content to the more than 38,000 articles and destination guides
 21 currently available on the Wikitravel and Wikivoyage sites. (*Id.* at ¶¶ 36-37, Exhs. O & P); *see*
 22 *Global Telemedia Int'l.*, 132 F. Supp. 2d at 1265 (“The fact that a chat-room dedicated to [the
 23 plaintiff] has generated over 30,000 postings further indicates that the company is of public
 24 interest.”). These individuals have an interest in the proposed migration of this content – which
 25 they created and donated – to a new travel site sponsored by the Wikimedia Foundation.¹⁴ Thus,

26 ¹⁴ The public has an interest in more granular issues as well, including, but not limited to, the
 27 following: (1) whether the public would be better served if a wiki travel site is free of corporate
 28 influence and/or commercial advertisements; (2) whether Wikimedia would be able to provide
 better technical support for such a site than IB, given that Wikimedia developed the software

1 Ryan's engagement with the mailing list falls within the anti-SLAPP statute.

2 **2. Ryan's Email to Wikitravel Members is Expressive Conduct Protected**
 3 **Under the Anti-SLAPP Statute.**

4 IB's second allegation pertains to an email Ryan sent to a smaller group of Wikitravel
 5 members that informed them that the "Wikitravel[] community is looking to migrate to the
 6 Wikimedia Foundation." (Compl. ¶ 30.) This email is also protected by the anti-SLAPP statute,
 7 specifically by Subdivision (e)(4), which does not require that the conduct at issue occur "in a
 8 place open to the public or a public forum." Subdivision (e)(4) protects any "conduct in
 9 furtherance of the exercise of the constitutional right of petition or the constitutional right of free
 10 speech in connection with a public issue or an issue of public interest." Consequently, private
 11 emails fall within the scope of its protections so long as they concern a "public issue or an issue
 12 of public interest." *Integrated Healthcare Holdings, Inc. v. Fitzgibbons*, 140 Cal. App. 4th 515,
 13 521-23 (2006) (applying anti-SLAPP statute to a private email sent by defendant because the
 14 email concerned a matter of public interest – the financial condition of a corporation that operated
 15 the only trauma care center in Orange County); *Hailstone v. Martinez*, 169 Cal. App. 4th 728, 736
 16 (2008) ("subdivision (e)(4) [of section 425.16] applies to private communications concerning
 17 issues of public interest") (citation omitted). Ryan's email to Wikitravel members concerns
 18 issues of public interest because it pertains to the same issues identified above (*e.g.*, the proposed
 19 creation of a new travel guide whose contents would be developed, edited, and curated by the
 20 public, and that would benefit and be free to the public). Indeed, the very purpose of Ryan's
 21 email was to inform its recipients about these issues, and to direct those recipients to other
 22 materials that described the issues in more detail. (Ryan Decl. ¶¶ 31-32.)

23 **D. IB Will Not be Able to Prevail on its Claims.**

24 Having shown that IB's claims arise from protected activity, the burden shifts to IB to

25 upon which wikis operate, and given that, as a community driven nonprofit, Wikimedia's sole
 26 focus would be on website upkeep as opposed to monetization; and (3) whether public discussion
 27 of creating a new travel site proposal would cause IB to block access to content that does not
 28 belong to it, that was contributed by the public, and that may be freely copied under a CC
 License.

1 show a probability that it will prevail on its claims. IB cannot make such a showing.

2 1. **IB Cannot Make a *Prima Facie* Showing of Common Law Trademark**
3 **Infringement.**

4 IB has larded its Complaint with conclusory allegations that Ryan and Heilman were
5 engaged in a “scheme” to gain control of Wikitravel’s traffic, content, and volunteer contributors.
6 (Compl. ¶ 25; *see also id.* at ¶¶ 22, 23, 26, 31, 32.) Looking past the bluster, the Complaint
7 contains but two factual allegations concerning Ryan’s conduct, namely the email
8 communications discussed above. *See Section III.C supra.* As a matter of law, these allegations
9 do not amount to trademark infringement.

10 IB cannot meet its burden of “demonstrat[ing] that the [trademark claim] is *both* legally
11 sufficient and supported by a sufficient prima facie showing of facts to sustain a favorable
12 judgment if the evidence submitted by the plaintiff is credited.” *Matson*, 40 Cal. App. 4th at 578
13 (emphasis added). This is true for two reasons. First, the only use of the Wikitravel trademark
14 alleged in the Complaint is a descriptive, nominative use. (*See* Compl. ¶ 30.) Second, to prevail
15 on a claim for common law trademark infringement, IB must show that Ryan’s use of the
16 Wikitravel trademark created a likelihood of confusion. *See Wood v. Apodaca*, 375 F. Supp. 2d
17 942, 947-48 (N.D. Cal. 2005). Here, the alleged use of the Wikitravel trademark posed no
18 likelihood of confusion.

19 “[T]rademark law recognizes a defense where the mark is used only to describe the goods
20 or services of a party, or their geographic origin.” *New Kids on the Block v. Nesw Am. Publ’g.,*
21 *Inc.*, 971 F.2d 302, 306 (9th Cir. 1992) (quoting 15 U.S.C. § 1115(b)(4)) (internal quotations
22 omitted). If a defendant uses the mark to refer to the trademarked good or service itself, “the
23 burden then reverts to the plaintiff to show likelihood of confusion.” *Toyota Motor Sales, U.S.A.,*
24 *Inc. v. Tabari*, 610 F.3d 1171, 1183 (9th Cir. 2010); *see also KP Permanent Make-UP, Inc. v.*
25 *Lasting Impression I, Inc.*, 543 U.S. 111, 118 (2004). Here, the only allegation pertaining to
26 “use” of the Wikitravel trademark is found in paragraph 30 of the Complaint, which describes the
27 email Ryan sent to users of Wikitravel. IB alleges that Ryan’s email uses the Wikitravel
28 trademark three times: (1) “This email is being sent to you on behalf of the Wikitravel

1 administrators;” (2) “since you have put some real time and effort into working on Wikitravel;”
 2 and (3) “As you may already have heard, Wikitravel’s community. . . .” These are not, on their
 3 face, uses of Wikitravel as a trademark, but rather references to the Wikitravel website itself.
 4 This is a nominative use, and is not actionable: “**nominative** use of a mark – where the only word
 5 reasonably available to describe a particular thing is pressed into service – lies outside the
 6 strictures of trademark law.” *Id.* at 308.

7 Nor can IB show that Ryan’s email references to the Wikitravel website created a
 8 likelihood of confusion. IB alleges Ryan “purported to be from Wikitravel” in his email and
 9 “clearly intended to confuse Wikitravel Website participants into thinking the Wikitravel Website
 10 is migrating to Wikimedia.” (Compl. ¶ 31.) The email is not reasonably susceptible to IB’s
 11 interpretation. Ryan states that the email is being sent on behalf of Wikitravel “administrators”¹⁵
 12 (of which Ryan was one), and identifies its sender as “Ryan,” a “Wikitravel User” (which Ryan
 13 was). (Ryan Decl. ¶ 31, Exh. J (emphasis added).) Further, the email’s “from” line lists “Wrh2”
 14 (Ryan’s Wikitravel username) and Ryan’s return email address as a Gmail address (not a
 15 Wikitravel email address). (*Id.*) Finally, to prevent any confusion, the email directs the reader,
 16 by hyperlink, to three different web pages that thoroughly describe the proposed migration and
 17 the reasons for the proposal. (*Id.* at ¶¶ 31-32, Exh. J.) The linked web pages explain that this
 18 would involve the creation of a new website unaffiliated with Wikitravel or IB. (*Id.* at ¶ 32, Exhs.
 19 K, L and M; RJN Exhs. K & N.) For example, the “FAQ” referenced in the email states:

20 Wikitravel’s **administrators** have agreed unanimously to **leave**
 21 **the website Wikitravel, hosted by Internet Brands**, and to create
 22 a **new** site with the same content . . . unfortunately, we have not
 23 been able to contact the greater Wikitravel community very
 24 effectively to keep them aware of these changes and proposals,
 because **Internet Brands has not permitted the use of**
Wikitravel to promote open discussion of this project. . .

25 ¹⁵ As noted above, Wikitravel “administrators” are not representatives of IB, but rather are
 26 representatives of the Wikitravel community (consisting of Wikitravel’s users and volunteer
 27 editors and administrators). *See*, Section II.B., *supra*. Wikitravel administrators are not under
 28 any legal obligation to refrain from moving to a new or competing wiki site, or from talking about
 the creation or virtues of such a site. *See*, Section II.C., *supra*. Wikitravel administrators are free
 to leave Wikitravel at any time and contribute their time and effort to other competing wikis. *Id.*

1 (Ryan Decl. ¶ 32, Exh. K (emphasis added); RJN Exh. K (emphasis added).)

2 In light of these facts, IB cannot make a prima facie showing of trademark infringement,
3 and thus Count I of the Complaint should be dismissed under the anti-SLAPP statute.¹⁶

4 **2. IB Cannot Make a *Prima Facie* Showing of Unfair Competition.**

5 IB also premises its California Unfair Competition cause of action on the “use of Internet
6 Brands’ Wikitravel Trademark.” (Compl. ¶ 50). California’s unfair competition law “borrows
7 violations of other laws and treats them as unlawful practices that the unfair competition law
8 makes independently actionable,” *Cel-Tech Comm’ns Inc. v. Los Angeles Cellular Tel. Co.*, 20
9 Cal. 4th 163, 180 (1999) (internal quotations and citations omitted). Here, IB alleges both
10 common law trademark infringement and a violation of the Lanham Act. IB does not allege that
11 defendants violated any other laws in the complaint.¹⁷ Because each of the other causes of action
12 asserted against defendants fails, defendants are not liable for violation of Cal. Bus. & Prof. Code
13 § 17200.

14 As discussed above in Section III.D.1, IB cannot make a *prima facie* showing of common
15 law trademark infringement because it cannot show any non-nominative use of a protected mark,
16 nor can it show any likelihood of confusion. Nor can IB rest its state law unfair competition
17 claim upon violations of the Lanham Act, since, as shown in section IV.B, below, IB has not
18 alleged a cognizable Lanham Act claim. Count III of the Complaint should thus also be
19 dismissed under the anti-SLAPP statute.

20 **3. IB Cannot Make a *Prima Facie* Showing of Civil Conspiracy.**

21 Conspiracy itself is not a separate cause of action; rather, it is a theory of vicarious
22 liability under which certain defendants may be held liable for torts committed by others. *See*
23

24 ¹⁶ To the extent IB argues that Ryan’s use of the “Wikitravel” trademark is likely to cause
25 confusion between Wikitravel and “Wiki Travel Guide,” the argument fails. Again, there is no
26 website called “Wiki Travel Guide.” The Wikimedia Foundation has decided to support the
creation of a travel wiki, but such site is not yet operating and no name has been selected.
(Gardner Decl. ¶¶ 11-12).

27 ¹⁷ As discussed in Section III.D.3, civil conspiracy is not a separate cause of action but rather a
28 theory of vicarious liability.

1 *Okun v. Super.Ct. (Maple Props.)* 29 Cal.3d 442, 454 (1981); *Berg & Berg Enters, LLC v.*
 2 *Sherwood Partners, Inc.*, 131 Cal. App. 4th 802, 823 (2005). The complaint must allege acts that
 3 would have given rise to a tort cause of action without the conspiracy. Without such allegations,
 4 the conspiracy allegations are meaningless. *See Manor Inv. Co., Inc. v. F.W. Woolworth Co.*, 159
 5 Cal. App. 3d 586, 595 (1984) (disapproved on other grounds in *Applied Equip. Corp. v. Litton*
 6 *Saudi Arabia Ltd.*, 7 Cal.4th 503, 521 (1994)).

7 As discussed in Sections III.D.1 & 2 above and Section IV.B, below, IB has failed to
 8 allege facts that give rise to liability for common law trademark infringement or violations of the
 9 Lanham Act. Further, “[t]he concept of vicarious liability has no application to actions brought
 10 under the unfair business practices act.” *Emery v. Visa Int’l. Serv. Ass’n.*, 95 Cal. App. 4th 952,
 11 960 (2002) (quoting *People v. Toomey*, 157 Cal. App. 3d 1, 14 (1984)). “A defendant’s liability
 12 must be based on his personal participation in the unlawful practices and unbridled control over
 13 the practices that are found to violation section 17200.” *Id.* Because IB has not alleged any
 14 underlying tort upon which it is likely to prevail, Count IV for civil conspiracy should be
 15 dismissed under the anti-SLAPP statute.

16 **IV. MOTION TO DISMISS FEDERAL CLAIMS UNDER RULE 12(b)(6).**

17 **A. Applicable Standard Under F.R.C.P. 12(b)(6).**

18 IB’s sole remaining claim, for violation of the Lanham Act § 43(a), is no more meritorious
 19 than the state law claims and should be dismissed pursuant to Federal Rule of Civil Procedure
 20 12(b)(6).

21 Under Rule 12(b)(6) of the Federal Rules of Civil Procedure, a complaint may be
 22 dismissed for failure to state a claim on which relief may be granted. On such a motion, a court
 23 must accept well-pleaded factual allegations as true, *Cahill v. Liberty Mut. Ins. Co.*, 80 F.3d 336,
 24 337-38 (9th Cir. 1996), but not those that are unwarranted deductions of fact based on
 25 unreasonable inferences or conclusory statements. *Sprewell v. Golden State Warriors*, 266 F.3d
 26 979, 988 (9th Cir. 2001). A court may dismiss a claim under Rule 12(b)(6) when “there is no
 27 cognizable legal theory or an absence of sufficient facts alleged to support a cognizable legal
 28 theory.” *Navarro v. Block*, 250 F.3d 729, 732 (9th Cir. 2001). Under Rule 12(b)(6), though “all

1 material allegations of the complaint are accepted as true,” *id.*, “labels and conclusions, and a
 2 formulaic recitation of the elements of a cause of action” cannot defeat dismissal, *Bell Atl. Corp.*
 3 *v. Twombly*, 550 U.S. 544, 555 (2007). “[A] complaint must contain sufficient factual matter,
 4 accepted as true, to ‘state a claim to relief that is plausible on its face.’ A claim has facial
 5 plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable
 6 inference that the defendant is liable for the misconduct alleged.” *Ashcroft v. Iqbal*, 556 U.S.
 7 662, 678 (2009) (quoting *Twombly*, 550 U.S. at 570). In ruling on a 12(b)(6) motion, the Court
 8 may consider not only documents attached to the complaint, but also documents whose contents
 9 are alleged in the complaint and thus incorporated by reference. *See Coto Settlement v.*
 10 *Eisenberg*, 593 F.3d 1031, 1038 (9th Cir. 2010). The incorporation by reference document allows
 11 the court to consider the full text of a document that the complaint quotes only in part. *In re Stac*
 12 *Elects. Secs. Litig.*, 89 F.3d 1399, 1405, n.4 (9th Cir. 1996).

13 **B. IB Has Failed to Properly Allege a Cause of Action Under Section 43(a) of the**
 14 **Lanham Act.**

15 “A claim under section 43(a) of the Lanham Act requires two elements: (1) a valid,
 16 protectable proprietary interest in the trade name; and (2) that defendant’s use of the name creates
 17 a “‘likelihood of confusion’” in the general public.” *GSC Logistics, Inc. v. Star Galaxy Logistics,*
 18 *Inc.*, No. C 09-5886 SBA, 2010 U.S. Dist. LEXIS 34076, *5 (N.D. Cal.) (citing *New West Corp.*
 19 *v. NYM Co. of Cal., Inc.*, 595 F.2d 1194, 1198-1202 (9th Cir. 1979)). “To establish an unfair
 20 competition claim under section 43(a) [of the Lanham Act], a plaintiff must establish that the
 21 defendant is using a mark confusingly similar to a valid, protectable trademark of the plaintiff.”
 22 *Mastro’s Rests. LLC v. The Dominick Grp. LLC*, No. CV 11-1996-PHX-PGR, 2012 U.S. Dist.
 23 LEXIS 80200, *6 (Dist. Ariz.) (quoting *Brookfield Commc’ns, Inc. v. West Coast Entertm’t*
 24 *Corp.*, 174 F.3d 1036, 1046 (9th Cir. 1999)).

25 In Count II, IB alleges in conclusory terms that Ryan’s “unauthorized use of a mark
 26 confusingly similar to Internet Brands’ Wikitravel trade name and trademarks” is “likely to cause
 27 confusion.”¹⁸ (See Compl. ¶¶ 42-44.) IB fails to allege with specificity what “mark” Ryan is

28 ¹⁸ The Court should dismiss the claim as to defendant Holliday IT Services on the independent

1 “using,” the manner he is using it, or how such “use” is likely to cause confusion. IB may not
2 survive dismissal by simply reciting the elements of a Lanham Act claim without supporting
3 factual allegations. *See Twombly*, 550 U.S. at 555. For this reason alone, Count II of the
4 Complaint must be dismissed for failure to state a claim.

5 IB does seem to imply that the mark used is “Wiki Travel Guide.” At one point in its
6 Complaint, IB labels “Wiki Travel Guide” as “the Infringing Website.” (Compl. ¶ 22.) But even
7 if this implication is accepted, IB’s claim fails. IB has not alleged that Ryan has ever used the
8 “mark” “Wiki Travel Guide” in any context, at any time, for any purpose. And IB does not allege
9 that “Wiki Travel Guide” has ever been used “in commerce” as required by the statute. 15 U.S.C.
10 § 1125(a)(1) (“[a]ny person who, on or in connection with any goods or services, or any container
11 for goods, uses in commerce any word, term, name, symbol, or device . . .”). Finally, even if IB
12 had alleged use in commerce, which it has not, there can be no likelihood of confusion based on
13 the facts alleged. IB does not claim that a site called Wiki Travel Guide is operating or that a
14 consumer has the opportunity to choose it as a competing travel information service. Of course,
15 IB does not allege any of these things because, again, **no site called Wiki Travel Guide exists.**

16 For the reasons stated above, IB’s Lanham Act cause of action is without merit and must
17 be dismissed for failure to state a claim.

18 **V. CONCLUSION.**

19 For all of the above reasons, Defendants respectfully request that the Court specially strike
20 Counts I, III, and IV of IB’s Complaint with prejudice, and that the Court dismiss Count II of
21 IB’s Complaint with prejudice.

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25 ground that the complaint fails to allege any action taken by Holliday IT services in any capacity.
26 The only allegation concerning Holliday IT services is an unsupported legal conclusion that it is
27 the “alter ego” of Ryan. *Iqbal*, 556 U.S. at 678 (quoting *Twombly*, 550 U.S. at 570). IB does not
28 allege any act or omission by Holliday IT Services nor does it explain why the Court should
perform the novel reverse piercing of the corporate veil from individual to corporation. The only
inference that can be drawn from the inclusion of Holliday IT Services is that IB is attempting to
ratchet up the financial leverage of its SLAPP suit by threatening Ryan’s livelihood.

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