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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. CV12-08088 SVW (RZx)

REPLY IN SUPPORT OF DEFENDANTS' SPECIAL MOTION TO STRIKE AND MOTION TO DISMISS

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

Trial Date: Not yet set

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I. INTRODUCTION.

Plaintiff Internet Brands, Inc.'s ("IB") Opposition all but concedes that this action is a Strategic Lawsuit Against Public Participation ("SLAPP"). IB offers not a single piece of evidence to support its claims (as the SLAPP statute requires it to do), nor does it object to any of the evidence submitted by volunteer Ryan Holliday ("Ryan"). IB has also abandoned allegations that Ryan infringed on its mark by "engag[ing]" with a public message board; it now contends that the purported infringement is based on a "singular email" Ryan sent. Contrary to IB's arguments, the email concerned a matter of interest to the public at large, and does not constitute commercial speech by a "competitor," since Ryan is just a volunteer contributor. IB has equally failed to show how Ryan's email was likely to cause confusion, or why Ryan's reference to "Wikitravel" was anything but a nominative fair use. IB further admits that its Lanham Act claim should be dismissed because it was based on an "assumption" that proved false. Ryan's anti-SLAPP motion should be granted in its entirety, and IB's meritless suit dismissed with prejudice.

II. IB'S ALLEGATIONS FALL WITHIN THE PROTECTIONS OF THE ANTI-SLAPP STATUTE.

A. This Lawsuit has Nothing to do with the Choice of a Domain Name.

Citing *Bosley Medical Institute, Inc. v. Kremer*, 403 F.3d. 672 (9th Cir. 2005), IB first claims that the anti-SLAPP statute does not apply because it has alleged that "Defendants" used the term "Wikitravel," or a "confusingly similar" term, "in the naming of their competing website," and the "unauthorized use of [a] trademark as [a] domain name does not necessarily impair [a] defendant's free speech rights." (Opp'n at 2:27-3:13 (internal quotations omitted).) But IB's Complaint does not allege that Ryan used the term "Wikitravel" as part of any domain name.[1] Moreover, IB's Opposition brief expressly states that this lawsuit has nothing to do with the choice of a domain name, but rather, is based on Ryan's use of the term "Wikitravel" **in an email** he sent to other individuals:

> It should be noted from the outset that this lawsuit does not arise out of the creation of a potential competing website to Wikitravel . . . What the Complaint does allege is that Defendants **sent an email to some Wikitravel members**

[1] IB conflates the Wikimedia Foundation, a non-party, with defendant Ryan Holliday. This special motion was brought on behalf of Ryan and his company, Holliday IT Services, only.

> 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.

(*Id.* at 5:1-11 (emphasis added); *see also id.* at 8:6-8 ("This Court should also note that the specific activity for which Plaintiff is suing, Defendants' **singular email** attempt to deceive and steal Plaintiffs customers." (emphasis added)).)

Worse still, IB now admits that the Wikitravel trademark has not been used in any domain name, and that its prior claims – pertaining to an alleged "infringing website" called "Wiki Travel Guide" – were based on a mistaken "assumption." (Opp'n at 13:4-9 (acknowledging that there is no competing website called "Wiki Travel Guide or anything similar").)[2] IB further admits that, at the time it filed its Opposition, no "competing" website had been created, much less named. (*Id.* at 11 n.3 ("Plaintiff has of yet been unable to get any verification one way or another what the new Wikimedia website **is going to be** called." (emphasis added)).) Given this about face, IB now states that it will dismiss its allegations pertaining to the creation of an "infringing website" called "Wiki Travel Guide."

This case has nothing to do with the choice of a domain name, and IB has yet to identify the domain name of any website, much less one in competition with Wikitravel.

B. This Case Involves a Matter of Public Interest.

1. Ryan sent his email "in connection with" an issue of public interest.

Subdivision (e)(4) of the anti-SLAPP statute 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." CCP § 425.16 (emphasis added). IB argues that Subdivision (e)(4) is inapplicable because the "conduct" at issue here (Ryan's sending of an email) has no relation to the matter of public interest (the proposal to create a new,

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[2] It is unclear how IB can allege that Ryan violated the terms of the Creative Commons license by failing to give proper attribution to the creators of content that populated "Wiki Travel Guide," a website that did not exist. (*See* Compl. ¶ 34 ("the creation of 'Wiki Travel Guide' has been done without proper attribution to the original content creators, in clear violation of the . . . License").) This allegation also appears to have been made without factual basis. *See* Fed. R. Civ. P. 11.

ad-free travel wiki). (Opp'n at 5:11-14 ("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.")).

IB's position is refuted by the text of Ryan's email, which states:

> This email is being sent to you on behalf of Wikitravel administrators[3] 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 have already heard, Wikitravel's community is looking to migrate to the Wikimedia Foundation. **A really good and current overview of the process and reasons for the migration can be found in this FAQ: http://wikivoyage.org/general/Migration_FAQ**
>
> **If you have any questions, the talk page of that article will be the best place to ask them, in part so that other Wikitravellers with the same questions can read them too. If you prefer to ask a question privately, please feel free to give me or Peter (User:Peterfitzgerald) an email. Both of our emails are at the bottom of the Migration FAQ.**
>
> **Lastly, there is a Request for Comment regarding the proposal at Wikimedia's Meta site: http://meta.wikimedia.org/wiki/Requests_for_comment/Travel_Guide. I would welcome you to weigh in with your opinions there (if you haven't already). The proposal itself is here: http://meta.wikimedia.org/wiki/Travel_Guide.**
>
> -Ryan (Wikitravel **User**:Wrh2)

(Ryan Decl., ECF No. 8, ¶ 31, Exh. J (emphasis added).)[4]

The email was sent *in connection with* the proposed creation of a new, non-commercial travel wiki; indeed, its states that its sole purpose was to apprise others of this issue, and IB cannot reasonably dispute this. (*Id.*) Among other things, the email: (1) links to three different web pages that describe the proposal and the reasons for it; (2) provides information about where one can ask questions about the proposal; and (3) encourages readers to "weigh in with [their] opinions." (*Id.*)

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[3] Wikitravel administrators are volunteers; they are not employees or agents of IB. (Ryan Decl., ECF No. 8, ¶ 10.)

[4] IB omitted the bolded portions of the email from its Complaint. (Compl. ¶¶ 29-30.)

2. IB's narrow interpretation of "public interest" has been rejected by the Legislature and the Courts.

The Legislature has mandated that courts "'broadly' construe the anti-SLAPP statute to further the legislative goals of encouraging participation in matters of public significance and discouraging abuse of the judicial process." *Damon v. Ocean Hills Journalism Club*, 85 Cal. App. 4th 468, 473 (2000) (citing CCP § 425.16(a)). The subject at issue in Ryan's email is a proposal to migrate the content of the largest travel wiki in the world, comprising tens of thousands of articles donated by volunteers, from a site controlled by a narrow commercial interest to a new site hosted by the not-for-profit Wikimedia Foundation, the global leader in the dissemination of free knowledge, whose websites attract approximately 500 million unique visitors each month.

IB argues that this is not type of expressive activity the anti-SLAPP statute was designed to protect. IB cites *Damon* on this point because it involved "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." (Opp'n at 5:18-27.) But the instant case easily fits within *Damon*, as it involves an analogous scenario: a debate over whether a large online community of volunteers should continue to donate their time and effort to a website owned by a commercial entity bent on extracting private profit from their donated efforts, or switch to a website that will be free of advertisements.

IB also cites *Church of Scientology v. Wollersheim*, 42 Cal. App. 4th 628, 650 (1996), to suggest that Subdivision (e)(4) should be limited to "product liability suits," "real estate or investment scams," and cases of similar ilk. But *Church of Scientology* did not involve any such claim, yet the court still found that "the Church [wa]s a matter of public interest, as evidenced by media coverage and the extent of the Church's membership and assets." *Id.* at 651. Here too, extensive national media coverage,[5] and the extent of Wikitravel's membership (consisting of

[5] *See, e.g.*, http://www.nytimes.com/2012/09/10/business/media/once-a-profit-dream-wikitravel-now-bedevils-owner.html?pagewanted=all&_r=0; and http://blogs.telegraph.co.uk/technology/williamhenderson/100007556/wikitravel-versus-wikimedia-something-is-going-badly-wrong-with-the-free-content-movement/. This is but a sampling of the media coverage this dispute has

approximately 77,946 registered users), show that the proposed migration of over 26,000 articles and destination guides – constituting the combined efforts of thousands of volunteer editors – is a matter of public interest. (Ryan Decl., ECF No. 8, ¶¶ 34, 36.)[6]

In summary, *Damon*, *Church of Scientology*, and the other cases IB cites illustrate specific instances where the anti-SLAPP statute was applied; they do not purport to limit application of the anti-SLAPP statute in the manner suggested by IB.

3. The "Weinberg factors" do not support IB's position.

Defendant relies on *Weinberg v. Feisel*, 110 Cal. App. 4th 1122 (2003), in arguing that this case does not involve a matter of public interest. *Weinberg* involved allegations that the plaintiff, a "private, anonymous token collector," stole a token from the defendant, another "private, anonymous token collector." *Id.* at 1127-28, 1132. Thereafter, the defendant made a statement to "a small group of other private parties" in which he accused the plaintiff of stealing his token, and the plaintiff sued for defamation. *Id.* at 1132. Not surprisingly, the court found that these allegations did not constitute a matter of public interest for purposes of the anti-SLAPP statute. *Id.* ("defendant did not present any evidence to show that . . . their dispute was anything other than a private controversy").

In so holding, the court relied on two "guiding principles": (1) "a matter of public interest should be something of concern to a substantial number of people . . . a matter of concern to the speaker and a relatively small, specific audience is not a matter of public interest;" and (2) "**those charged with defamation** cannot, by their own conduct, create their own defense by making the claimant a public figure . . . A person cannot turn otherwise private information into a matter of public interest simply by communicating it to a large number of people."[7] *Id.* at 1132-33.

Neither principle helps IB. First, unlike *Weinberg*, the matter at issue here – the creation of a comprehensive, ad-free travel guide free to the public – is of interest to the public in general,

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generated. Ryan is happy to submit additional evidence on this issue should the Court request it.

[6] The Wikimedia Foundation itself has about 500 million unique visitors a month.

[7] IB misquotes this factor by omitting the first part of it (including the bolded portion) without any indication that it has done so. (Opp'n at 4:20-27.) This factor is specific to defamation cases and does not apply here.

and is particularly important to the thousands of volunteers whose contributed content will be migrated over to the proposed new site. Compare *Weinberg*, 110 Cal. App. 4th at 1127-28 (private dispute involving two individuals); *Rivero v. Am. Fed'n of State, Cnty. and Mun. Emps., AFL-CIO*, 105 Cal. App. 4th 913, 924 (2003) (private dispute involving nine individuals). Indeed, more than 690 members of the public (not just Wikitravel users) responded to the Wikimedia community's request for public comment to express their opinions as to whether such a travel guide should be created. (Gardner Decl., ECF No. 9, ¶ 9.) IB claims, without supporting evidence, that "[t]hese 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." (Opp'n at 6:15-19.) IB is wrong. Of the 690 individuals who responded to the RFC, 152 stated that they were opposed to the creation of a new travel guide. (Gardner Decl., ECF No. 9, ¶ 9.) IB's own representative, IBobi, was one of these individuals. (*Id.* at Exh. A ("Oppose" Item No. 145); RJN, Exh. L ("Oppose" Item No. 145).) In fact, he wrote a lengthy and impassioned opposition to the proposal at the RFC's main discussion page, and noted that the Wikitravel administrators who supported the migration "represent[] only one of several constituencies that have a stake in Wikitravel." (Ryan Decl., ECF No. 8, ¶ 17, Exh. F (Item No. 35); RJN, Exh. M (Item No. 35).)

IB nevertheless contends that the matter at issue is limited to a "narrow and select audience" and is therefore not of public concern. But IB's own pleadings, and its own response to the RFC, contradict this assertion. (*See, e.g.*, Compl. ¶ 10 (alleging that "Wikitravel is one of the largest and most popular travel information website [sic] in the world, known worldwide by its tradename."); *id.* at ¶ 29 ("on August 18, 2012, Holliday improperly and wrongfully emailed **at least several hundred** of [sic] Wikitravel members, purporting to be from Wikitravel . . . Upon information and belief, **the number emailed is far greater**." (emphasis added)).) Moreover, as noted, this matter affects a "large number of people beyond the direct participants." *See World Fin. Grp., Inc. v. HBW Ins. & Fin. Servs., Inc.*, 172 Cal. App. 4th 1561, 1573 (2009). Indeed, the individuals who participated in the debate were not only discussing the benefits of a non-commercial and better-supported travel guide for their own purposes; they were discussing

these issues for the benefit of anyone who currently uses or will use travel content stored on a wiki. (Gardner Decl., ECF No. 9, Exh. A ("Support" Item Nos. 23, 25, 27, 42, etc.)

But even if this case only affected a small number of people (and it clearly does not), Ryan's email would still be protected by the anti-SLAPP statute because it was intended to encourage participation by members of the public in an ongoing debate of public significance. *See, e.g., World Fin. Grp.*, 172 Cal. App. 4th at 1572-73 (even "where [an] issue is of interest only to a limited, but definable portion of the public, such as a private group, organization, or community," a constitutionally protected activity may "satisfy the public issue/issue of public interest requirement" if it "occur[s] in the context of an ongoing controversy, dispute or discussion, such that it warrants protection by a statute that embodies the public policy of encouraging *participation* in matters of public significance." (italics in original)).

Second, this case is not like *Weinberg*, where the defendant decided to broadcast a private, two person dispute to a wider audience.[8] *See Weinberg*, 110 Cal. App. 4th at 1133-34 (holding that the defendant's decision to air a private, two person dispute in a community newsletter did not turn the parties' private dispute into a public one); *see also Rivero*, 105 Cal. App. 4th at 926 (same). The matter at issue here affected a large number of people at its inception, before the RFC process began (in March 2012) and before Ryan sent his email five months later (in August 2012). (Gardner Decl., ECF No. 9, ¶ 7; Holliday Decl., Exh J.) Thus, the RFC could not have been an "after the fact" attempt to turn a private dispute into a public one. (*See* Opp'n at 6:24-27.) And it is of no consequence that "Wikimedia . . . asked or attempted to involve large portions of the public in this dispute by launching the RFC." *Id.*[9]

4. This is not a commercial dispute between two competing businesses.

Lastly, IB seeks to avoid the anti-SLAPP statute by characterizing this matter as a commercial dispute between two competing businesses, even though Ryan is an individual volunteer. Not surprisingly, the cases IB relies on all involve private business disputes between

[8] This particular "Weinberg factor" only applies in defamation cases, as noted above.

[9] IB again conflates Wikimedia with the defendants in this case. Wikimedia did not issue the RFC in question, its community members did. (Gardner Decl., ECF No. 9, ¶ 7.)

business competitors. *See, e.g.*, *World Fin. Grp.*, 172 Cal. App. 4th at 1564 ("The complaint primarily alleges that defendants . . . misappropriated WFG's trade secrets and utilized confidential information to solicit WFG's associates and customers . . . WFG is a corporation that provides insurance, pension, and financial services to businesses and individuals . . . HBW is WFG's direct competitor."); *TYR Sport Inc. v. Warnaco Swimwear Inc.*, 679 F. Supp. 2d 1120, 1128 (C.D. Cal. 2009) (antitrust dispute between two companies that "both design and manufacture high-end swimwear and accessories sold to competitive swimmers"). The instant case is not remotely similar.

First, there is no competing website here. IB admits this, and has not identified a single piece of evidence that indicates otherwise. *See* supra, Section II.A. Second, Ryan is an individual volunteer,[10] not a business or business "competitor." IB attempts to obscure this fact by conflating Ryan with the Wikimedia Foundation to make it appear as if this is a dispute between two businesses. (Opp'n at 10:5-9 ("this is a business dispute where **one competing entity (Wikimedia)** has misspoken about, and unlawfully maligned, its competitor's (Internet Brands) website.").)[11] It is not. (*See id.* at 1:19-20 (describing Ryan as a "would be" business competitor").)

Third, IB attempts to frame this matter as a dispute over "customers" to try and fit it within the line of cases identified above. (*See, e.g.*, Opp'n at 8:6-8 ("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**" (emphasis added)); *id.* at 6:14-15 ("Wikimedia is an entity in the business of operating and promoting websites, and the users who frequent these websites are its **customers**." (emphasis added)); *id.* at 11:13-14.) But there are no "customers" involved here: the individuals who read and edit the content on the Wikitravel website do not

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[10] IB's Complaint does not make a single allegation about Ryan's company, Holliday It Services. (*See* Mem. P. & A., ECF No. 6, at n.2.) Holliday IT Services is not involved in the wiki business; it provides web development services to online companies. (Ryan Decl., ECF No. 8, ¶ 4.)

[11] It was IB's decision to file this lawsuit, and IB chose not to sue the Wikimedia Foundation, the entity that will create and operate the new travel guide. It instead chose to sue two individual volunteers to intimidate them and scare others who would otherwise be inclined to support the creation of a new travel guide. These are hallmarks of a SLAPP suit.

purchase anything from IB, and IB does not sell them anything.[12] Nor has IB presented any evidence to the Court that indicates otherwise. Moreover, Ryan – a volunteer who will not profit financially from a new travel wiki – does not operate a competing business, and therefore has no reason to "steal" customers and nothing to offer them. To the extent IB's allegation is directed at the Wikimedia Foundation, it, again, is not a party to this lawsuit or motion.

Fourth, the case law, including one of the cases cited by IB, refutes IB's novel interpretation of commercial speech. *See All One God Faith, Inc. v. Organic & Sustainable Indus. Standards, Inc.*, 183 Cal. App. 4th 1186, 1206-07 (2010) (setting forth the factors that distinguish commercial and non-commercial speech). Ryan, "the speaker," is not engaged in "the production, distribution, or sale of goods or services," at least not with respect to a travel wiki. *Id.* The "intended audience," the recipients of Ryan's email, are not likely to be actual or potential buyers or customers of any goods or services offered by Ryan. *Id.* And the factual content of Ryan's email does not "consist[] of representations of fact about the business operations, products, or services" of Ryan, and was not made for the purpose of "promoting sales of, or other commercial transactions in [Ryan's] products or services." *Id.*

Finally, IB's self-serving characterization of its case carries no weight. *All One God Faith*, 183 Cal. App. 4th at 1200 ("The anti-SLAPP statute's definitional focus is not the form of the plaintiff's cause of action but, rather, the defendant's activity that gives rise to his or her asserted liability—and whether that activity constitutes protected speech or petitioning . . . [t]he trial court must instead focus on the substance of the plaintiff's lawsuit in analyzing the first prong of a special motion to strike." (internal quotations omitted)); *see also Church of Scientology*, 42 Cal. App. 4th at 652 ("Considering the purpose of the [anti-SLAPP] provision, expressly stated, the nature or form of the action is not what is critical but rather that it is against a person who has exercised certain rights").

III. IB HAS FAILED TO MEET ITS BURDEN UNDER PRONG TWO OF THE SLAPP ANALYSIS.

IB has opposed Ryan's anti-SLAPP motion without rebutting any of Ryan's evidence or

[12] The same is true of the individuals who read and edit the content on the wiki sites operated by the non-party, non-profit Wikimedia Foundation (none of which are currently dedicated to travel).

submitting a single piece of evidence to support its own allegations. IB suggests that its burden requires only that it establish that the claim has "minimal merit," but admits that this requires that it "state *and substantiate* a legally sufficient claim." (Opp'n at 2 (quoting *Mindy's Cosmetics, Inc. v. Dakar*, 611 F.3d 590, 598-99 (9th Cir. 2010) (emphasis added)).) IB cannot escape dismissal by quoting a legal standard in the abstract. As the authorities make clear, IB "must demonstrate that the complaint is both legally sufficient and supported by a sufficient prima facie showing of facts to sustain a favorable judgment if the evidence submitted by the plaintiff is credited." *Dakar*, 611 F.3d at 599 (quoting *Wilson v. Parker, Covery & Chidester*, 28 Cal. 4th 811, 821 (2002) (emphasis added)). Because IB has no evidence to be "credited," the only evidence to be considered in determining whether IB has "established a probability that he or she will prevail on the claim" is the evidence submitted by Ryan. CCP § 425.16. That evidence shows that IB has failed to meet its burden.

A. IB Fails To Make a Prima Facie Showing of Trademark Infringement.

1. IB has failed to present *any* evidence showing a likelihood of confusion.

To prevail on a claim for common law trademark infringement, IB must show that Ryan's use of the Wikitravel trademark created a likelihood of confusion. *See, e.g., Wood v. Apodaca*, 375 F. Supp. 2d 942, 947-48 (N.D. Cal. 2005). IB has offered no evidence on this point. Instead, IB offers only the opinion of counsel that a "potential factual dispute" exists regarding likelihood of confusion. (Opp'n at 12:27.) This naked conclusion is insufficient in the context of a SLAPP analysis. Moreover, all of the facts on the record establish unequivocally that Ryan's email to Wikitravel users could not have created a likelihood of confusion. The evidence shows that: (1) Ryan sent the email in his capacity as a Wikitravel user and listed his personal email address as the sender, (Ryan Decl., ECF No. 8 ¶ 31, Exh. J); (2) the email was sent in accordance with Wikitravel's own policies, (*id.* at ¶ 33, Exh. N); (3) the email stated that it was coming from Wikitravel administrators and spoke on behalf of community members, not the Wikitravel website, (*id.* at. ¶ 31, Exh. J); (4) Wikitravel administrators are not representatives, employees, or agents of Wikitravel but rather are representatives of the Wikitravel community, (*id.* at ¶¶ 9, 10, Exh. A); and (5) the email provided several external links which clearly explained that the new

site was not going to be hosted by Wikitravel, *(id.* at ¶ 32, Exhs. K, L and M). The only evidence before the Court supports a single conclusion: the email Ryan sent posed no risk of confusion to its recipients. IB has presented no evidence that supports an alternative view.

2. IB Has Not Rebutted Ryan's Defense of Nominative Fair Use.

"[T]rademark law recognizes a defense where the mark is used only 'to describe the goods or services of a party, or their geographic origin.'" *New Kids on the Block v. News Am. Publ'g., Inc.*, 971 F.2d 302, 306 (9th Cir. 1992) (quoting 15 U.S.C. § 1115(b)(4)). Here, Ryan's email contains the only alleged use of the Wikitravel mark, yet the text of that email, and the web pages it links to, support only one conclusion: the use of the Wikitravel trademark was done as a reference to the Wikitravel website itself, and such use is nominative fair use. (Ryan Decl. ¶ 31, Exhs. J, K, L and M.) IB offers no evidence to contradict Ryan's nominative fair use defense, nor does it object to any of Ryan's evidence. IB merely states in conclusory fashion that Ryan's use of the mark is not nominative.[13] This is insufficient.[14]

B. IB Has Abandoned its Unfair Competition and Civil Conspiracy Counts.

Ryan's moving papers established that IB's California unfair competition claim was subject to dismissal because the common law trademark and Lanham Act claims upon which it is based lack merit. *See Cel-Tech Comm'ns Inc. v. Los Angeles Cellular Tel. Co.*, 20 Cal. 4th 163,

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[13] IB cites *Toyota Motor Sales, U.S.A., Inc. v. Tabari*, 610 F.3d 1171, 1175-76 (9th Cir. 2010), for the proposition that Ryan's use was not nominative, but *Toyota* directly supports Ryan's nominative fair use defense. The court in *Toyota* found that the defendant's use of the Lexis trademark was nominative when used in a URL because it was used to describe Lexis and it was unlikely to cause confusion. *Id.* at 1181-82. In finding the use nominative, the *Toyota* court noted that the defendants had not used terms like "authorized" or "official" when describing their connection to the protected brand. *Id.* at 1182. Similarly, here Ryan did not claim to be a representative, employee, or agent of Wikitravel. He wrote as a member of the Wikitravel community. Further, the *Toyota* court recognized that additional information may be considered in a nominative use analysis. The *Toyota* Court noted that "reasonable consumers . . . would immediately see the disclaimer and would promptly be disabused of any notion that the [defendants] website is sponsored by Toyota." *Id.* Likewise, here Ryan provided links in the email which made clear that any move was not sponsored by the Wikitravel website and the community planned to "leave the website Wikitravel."

[14] To be clear, at this juncture Ryan does not bear the burden of establishing nominative fair use; the burden rests squarely on IB to produce evidence sufficient to show likelihood that it can prevail on its claims. *Dakar*, 611 F.3d at 595.

180 (1999). Likewise, Ryan established that IB's civil conspiracy claim was not a stand alone cause of action, but rather a theory of vicarious liability. *See Okun v. Super. Ct. (Maple Props.)* 29 Cal. 3d 442, 454 (1981). IB does not challenge Ryan's showing that the California unfair competition and civil conspiracy claims are subject to dismissal under the anti-SLAPP statute. In fact, IB does not even mention these claims in its Opposition. By abandoning these claims, IB concedes that they are without merit and subject to dismissal. *Cf. In re TFT-LCD (Flat Panel) Antitrust Litig.*, 586 F. Supp. 2d 1109, 1131 (N.D. Cal. 2008) (failure to address argument in motion to dismiss constitutes "abandon[ment]" and warrants dismissal with prejudice).

IV. IB'S LANHAM ACT CLAIM SHOULD BE DISMISSED WITH PREJUDICE.

IB's Lanham Act claim illustrates the frivolous nature of its entire lawsuit. IB based the claim on Ryan's alleged use of the name "Wiki Travel Guide" in the creation of a website by the same name. (Compl. ¶¶ 22-24.) Ryan has established that no website called "Wiki Travel Guide" had ever been created. Had IB or its counsel bothered to type the website into the address bar of their browser they could have uncovered this fact for themselves.[15] Instead, IB elected to file a lawsuit and assert a federal claim against Ryan and his wholly unrelated business Holliday IT Services. IB now admits that its Lanham Act claim was not based in fact but rather was "predicated on the assumption that Defendants were starting a new Wiki travel site called Wiki Travel Guide."[16] (Opp'n at 13:4-5.) Now IB requests that the Court dismiss its Lanham Act claim *without* prejudice.

V. CONCLUSION.

For all of the above reasons, Defendants respectfully request that the Court specially strike Counts I, III, and IV of IB's Complaint and dismiss Count II, all with prejudice.[17]

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[15] Apparently someone (not defendants and not the Wikimedia Foundation) has purchased the wikitravelguide.com URL and, as of October 8, 2012, there is a website being hosted at that URL.

[16] IB's admission that it had no factual basis for asserting its Lanham Act claim runs afoul of Federal Rule of Civil Procedure 11.

[17] Given that IB has admitted having no basis for pursuing its Lanham Act claim, Ryan believes he is entitled to attorney's fees incurred defending this claim. *See Boney v. Boney Servs. Inc.*, 127 F.3d 821, 827 (9th Cir. 1997) (attorney's fees available where Lanham Act claim is groundless, unreasonable, vexatious, or pursued in bad faith); *see also* 15 U.S.C. § 1117(a) (permitting reasonable attorney fees to the prevailing party in exceptional Lanham Act cases).

Dated: October 22, 2012

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