

Wilmer Cutler Pickering Hale and Dorr LLP  
350 South Grand Ave., Suite 2100  
Los Angeles, CA 90071

1 WILMER CUTLER PICKERING  
2 HALE AND DORR LLP  
3 Andrea Weiss Jeffries (SBN: 183408)  
4 andrea.jeffries@wilmerhale.com  
5 Bethany Stevens (SBN: 245672)  
6 bethany.stevens@wilmerhale.com  
7 350 S. Grand Avenue, Suite 2100  
8 Los Angeles, CA 90071  
9 +1 (213) 443-5300  
10 +1 (213) 443-5400

11 J. Beckwith Burr (*pro hac vice*)  
12 becky.burr@wilmerhale.com  
13 Ali M. Stoettelwerth (*pro hac vice*)  
14 ali.stoettelwerth@wilmerhale.com  
15 Perry A. Lange (*pro hac vice*)  
16 perry.lange@wilmerhale.com  
17 1875 Pennsylvania Avenue NW  
18 Washington, DC 20006  
19 +1 (202) 663-6000  
20 +1 (202) 663-6363

21 Attorneys for Defendant  
22 ICM Registry, LLC

23 UNITED STATES DISTRICT COURT  
24 CENTRAL DISTRICT OF CALIFORNIA

25 MANWIN LICENSING,  
26 INTERNATIONAL S.A.R.L. and  
27 DIGITAL PLAYGROUND, INC.

28 Plaintiffs,

vs.

ICM REGISTRY, LLC, d/b/a .XXX;  
INTERNET CORPORATION FOR  
ASSIGNED NAMES AND NUMBERS;  
and DOES 1-10

Defendants.

Case No. CV 11-9514-PSG (JCGx)

**DEFENDANT ICM REGISTRY,  
LLC'S NOTICE OF MOTION AND  
MOTION TO STRIKE PLAINTIFFS'  
STATE LAW CAUSES OF ACTION  
PURSUANT TO CALIFORNIA  
CODE OF CIVIL PROCEDURE  
SECTION 425.16**

Date: April 2, 2012  
Time: 1:30 p.m.  
Place: Courtroom 880

Hon. Philip S. Gutierrez

**NOTICE OF MOTION AND MOTION**

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD, PLEASE TAKE NOTICE THAT:

At 1:30 p.m. on April 2, 2012, or as soon as the matter may be heard in the courtroom of the Honorable Philip S. Gutierrez, defendant ICM Registry, LLC (“ICM”), will and hereby does move pursuant to California Code of Civil Procedure Section 425.16 for an order striking Plaintiffs’ Fourth, Fifth, and Sixth Claims for Relief, and awarding ICM its reasonable attorneys’ fees. More specifically, ICM moves to strike Plaintiffs’ state law claims for violations of California’s antitrust statute, the Cartwright Act, Cal. Bus. & Prof. Code §§ 16700 *et seq.*, and California’s Unfair Competition Law, Cal. Bus. & Prof. Code §§ 17200 *et seq.*, on the grounds that such claims arise out of constitutionally-protected conduct, and thus qualify for protection under California’s anti-SLAPP statute, because the claims (1) arise out of ICM’s establishment of the .XXX top level domain through petitioning and other activities protected by the First Amendment, and (2) seek to enjoin the distribution of .XXX domain and its ability to serve as a forum for protected expression. Further, Plaintiffs will be unable to establish that their causes of action are likely to succeed on the merits because: (1) the deficiencies in Plaintiffs’ federal antitrust claims are fatal to their Cartwright Act claims and their claims under the “unlawful” and “unfair” prongs of the Unfair Competition Law, which are based on the very same allegations; (2) Plaintiffs have failed to allege any fraud on the public, as is required to prove their claim under the “fraud” prong of the Unfair Competition Law; and (3) Plaintiffs have failed to allege any injury sufficient to confer standing under the Unfair Competition Law.

This Motion is based on this Notice; the accompanying Memorandum of Points and Authorities; the Declaration of Stuart Lawley; the Declaration of Gregory Dumas;

Wilmer Cutler Pickering Hale and Dorr LLP  
350 South Grand Ave., Suite 2100  
Los Angeles, CA 90071

1 and such other authorities and argument as may be submitted in any reply at or before  
2 the hearing.

3 This Motion is made following the conference of counsel pursuant to Local  
4 Rule 7-3, which took place on January 4, 2012.

5  
6 Respectfully Submitted,

7 Dated: January 20, 2012

8 WILMER CUTLER PICKERING  
9 HALE AND DORR LLP

10 By: /s/ Andrea Weiss Jeffries

11 Andrea Weiss Jeffries

12 Attorneys for Defendant  
13 ICM Registry, LLC

14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28  
Wilmer Cutler Pickering Hale and Dorr LLP  
350 South Grand Ave., Suite 2100  
Los Angeles, CA 90071

Wilmer Cutler Pickering Hale and Dorr LLP  
350 South Grand Ave., Suite 2100  
Los Angeles, CA 90071

1 WILMER CUTLER PICKERING  
2 HALE AND DORR LLP  
3 Andrea Weiss Jeffries (SBN: 183408)  
4 andrea.jeffries@wilmerhale.com  
5 Bethany Stevens (SBN: 245672)  
6 bethany.stevens@wilmerhale.com  
7 350 S. Grand Avenue, Suite 2100  
8 Los Angeles, CA 90071  
9 +1 (213) 443-5300  
10 +1 (213) 443-5400

11 J. Beckwith Burr (*pro hac vice*)  
12 becky.burr@wilmerhale.com  
13 Ali M. Stoettelwerth (*pro hac vice*)  
14 ali.stoettelwerth@wilmerhale.com  
15 Perry A. Lange (*pro hac vice*)  
16 perry.lange@wilmerhale.com  
17 1875 Pennsylvania Avenue NW  
18 Washington, DC 20006  
19 +1 (202) 663-6000  
20 +1 (202) 663-6363

21 Attorneys for Defendant  
22 ICM Registry, LLC

23 UNITED STATES DISTRICT COURT  
24 CENTRAL DISTRICT OF CALIFORNIA

25 MANWIN LICENSING,  
26 INTERNATIONAL S.A.R.L. and  
27 DIGITAL PLAYGROUND, INC.

28 Plaintiffs,

vs.

ICM REGISTRY, LLC, d/b/a .XXX;  
INTERNET CORPORATION FOR  
ASSIGNED NAMES AND NUMBERS;  
and DOES 1-10

Defendants.

Case No. CV 11-9514-PSG (JCGx)

**MEMORANDUM OF POINTS AND  
AUTHORITIES IN SUPPORT OF  
DEFENDANT ICM REGISTRY,  
LLC'S MOTION TO STRIKE  
PLAINTIFFS' STATE LAW CAUSES  
OF ACTION PURSUANT TO  
CALIFORNIA CODE OF CIVIL  
PROCEDURE SECTION 425.16**

Date: April 2, 2012  
Time: 1:30 p.m.  
Place: Courtroom 880

Hon. Philip S. Gutierrez

Wilmer Cutler Pickering Hale and Dorr LLP  
350 South Grand Ave., Suite 2100  
Los Angeles, CA 90071

**Table of Contents**

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

I. INTRODUCTION ..... 1

II. FACTUAL BACKGROUND ..... 2

**A.** The Parties ..... 2

**1.** ICM ..... 2

**2.** ICANN ..... 6

**3.** Plaintiffs Manwin and Digital Playground ..... 7

**B.** Pre-Suit Interactions Between ICM and Manwin ..... 7

**C.** Public Interest in ICM’s .XXX Domain and This Lawsuit ..... 9

III. LEGAL STANDARDS ..... 10

IV. ARGUMENT ..... 13

**A.** Plaintiffs’ State Law Claims Arise Out of Protected Activity ..... 13

**1.** The State Law Claims Arise Out of ICM’s Protected  
        Petitioning Efforts to Establish the .XXX Domain. .... 13

**2.** The State Law Claims Seek to Enjoin — And Have Already  
        Chilled — Protected Expression ..... 16

**3.** The .XXX sTLD is an Issue of Public Interest ..... 19

**B.** Plaintiffs Cannot Establish a Likelihood of Success on the Merits ..... 21

**1.** Plaintiffs’ Cartwright Act Claims are Not Likely to Succeed. .... 21

**2.** Plaintiffs’ Unfair Competition Claim is Not Likely to  
        Succeed. .... 23

**a.** Plaintiffs’ Claim for “Illegal” and “Unfair” Business  
            Practices Falls with Their Failed Antitrust Claims. .... 23

**b.** Plaintiffs Have Not Alleged “Fraud” on the Public. .... 24

**c.** Plaintiffs Have Not Alleged a Loss of Money or  
            Property. .... 24

**C.** ICM is Entitled to Its Fees if It Prevails on this Motion ..... 25

**Wilmer Cutler Pickering Hale and Dorr LLP**  
350 South Grand Ave., Suite 2100  
Los Angeles, CA 90071

1 V. CONCLUSION.....25

2

3

4

5

6

7

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

26

27

28

Wilmer Cutler Pickering Hale and Dorr LLP  
350 South Grand Ave., Suite 2100  
Los Angeles, CA 90071

**Table of Authorities**

**Federal Cases**

1

2

3 *ACLU v. Reno*,  
217 F.3d 162 (3d Cir. 2000) ..... 18

4 *Am. Ad. Mgmt., Inc. v. Gen. Tel. Co.*,  
190 F.3d 1051 (9th Cir. 1999)..... 21

5

6 *Batzel v. Smith*,  
333 F.3d 1018 (9th Cir. 2003)..... 10, 11, 12

7 *Bell Atl. Corp. v. Twombly*,  
550 U.S. 544, 127 S.Ct. 1955, 167 L. Ed. 2d 929 (2007) ..... 22

8

9 *Bulletin Displays, LLC v. Regency Outdoor Advertising, Inc.*,  
448 F. Supp. 2d 1172 (C.D. Cal. 2006)..... 11, 13

10 *Cedars-Sinai Med. Ctr. v. Global Excel Mgmt.*,  
CV 09-3627 PSG AJW, 2009 WL 4730882 (C.D. Cal. Dec. 4, 2009)..... 20

11

12 *City of Lakewood v. Plain Dealer Pub. Co.*,  
486 U.S. 750, 108 S.Ct. 2138, 100 L. Ed. 2d 771 (1988) ..... 18

13 *Coalition for ICANN Transparency Inc. v. Verisign*,  
611 F.3d 495 (9th Cir. 2009)..... 22

14

15 *Ex parte Jackson*,  
96 U.S. 727 (1877) ..... 18

16 *FW/PBS, Inc. v. City of Dallas*,  
493 U.S. 215, 110 S. Ct. 596, 107 L. Ed. 2d 603 (1990) ..... 18

17

18 *Griswold v. Connecticut*,  
381 U.S. 479, 85 S. Ct. 1678, 14 L. Ed. 2d 510 (1965) ..... 18

19 *In re Apple iPod iTunes Antitrust Litig.*,  
796 F. Supp. 2d 1137 (N.D. Cal. 2011) ..... 23

20

21 *In re Toyota Motor Corp.*,  
790 F. Supp. 2d 1152 (C.D. Cal. 2011)..... 24

22 *Jacobsen v. Katzer*, No.  
C 06-01905 JSW, 2006 WL 3000473 (N.D. Cal. Oct. 20, 2006) ..... 16

23

24 *Kendall v. Visa U.S.A., Inc.*,  
518 F.3d 1042 (9th Cir. 2008)..... 22

25 *McGlinchy v. Shell Chem. Co.*,  
845 F.2d 802 (9th Cir. 1988)..... 23

26

27 *Mello v. Great Seneca Fin'l Corp.*,  
526 F. Supp. 2d 1024 (C.D. Cal. 2007)..... 12

28

Wilmer Cutler Pickering Hale and Dorr LLP  
 350 South Grand Ave., Suite 2100  
 Los Angeles, CA 90071

1 *Name.Space, Inc. v. Network Solutions, Inc.*,  
 202 F.3d 573 (2d Cir. 2000) ..... 17

2

3 *New.Net, Inc. v. Lavasoft*,  
 356 F. Supp. 2d 1090 (C.D. Cal. 2004)..... 25

4 *Nova Designs, Inc. v. Scuba Retailers Ass’n*,  
 202 F.3d 1088 (9th Cir. 2000)..... 23

5

6 *NYNEX Corp. v. Discon, Inc.*,  
 525 U.S. 128, 119 S.Ct. 493, 142 L. Ed. 2d 510 (1998) ..... 21

7 *PGMedia, Inc. v. Network Solutions, Inc.*,  
 51 F. Supp. 2d 389 (S.D.N.Y. 1999)..... 15

8

9 *Price v. Stossel*,  
 590 F. Supp. 2d 1262 (C.D. Cal. 2008)..... 11, 13

10 *Rebel Oil Co., Inc. v. Atlantic Richfield Co.*,  
 51 F.3d 1421 (9th Cir. 1995)..... 22

11

12 *Sentinel Communications Co. v. Watts*,  
 936 F.2d 1189 (11th Cir. 1991)..... 18

13 *Southern California Inst. of Law v. TCS Educ. Sys.*,  
 No. CV 10–8026 PSG (AJWx), 2011 WL 1296602 (C.D. Cal. Apr. 5,  
 14 2011)..... 23

15 *Stearns Airport Equip. Co., Inc. v. FMC Corp.*,  
 170 F.3d 518 (5th Cir. 1999)..... 22

16

17 *Tuck Beckstoffer Wines LLC v. Ultimate Distributors, Inc.*,  
 682 F. Supp. 2d 1003 (N.D. Cal. 2010) ..... 13

18 *U.S. v. Lockheed Missiles & Space Co., Inc.*,  
 190 F.3d 963 (9th Cir. 1999)..... 11

19

20 *U.S. v. Playboy Entertainment Group, Inc.*,  
 529 U.S. 803, 120 S. Ct. 1878, 146 L. Ed. 2d 865 (2000) ..... 18

21 *Verizon Comm’ns Inc. v. Law Offices of Curtis V. Trinko, LLP*,  
 540 U.S. 398, 124 S.Ct. 872, 157 L. Ed. 2d 823 (2004) ..... 22, 23

22

23 *Vess v. Ciba-Geigy Corp. USA*,  
 317 F.3d 1097 (9th Cir. 2003)..... 12

24 **State Cases**

25 *Barrett v. Rosenthal*,  
 40 Cal.4th 33, 51 Cal. Rptr. 3d 55 (Cal. 2006) ..... 17

26

27 *Chavez v. Whirlpool Corp.*,  
 93 Cal. App. 4th 363, 113 Cal. Rptr. 2d 175 (Cal. Ct. App. 2001)..... 23, 24

28



Wilmer Cutler Pickering Hale and Dorr LLP  
 350 South Grand Ave., Suite 2100  
 Los Angeles, CA 90071

1 *Clayworth v. Pfizer, Inc.*,  
 49 Cal. 4th 758, 111 Cal. Rptr. 3d 666 (Cal. 2010) ..... 24

2

3 *Committee on Children’s Television v. Gen. Foods. Corp.*,  
 35 Cal.3d 197, 197 Cal. Rptr. 783 (Cal. 1983) ..... 24

4 *Du Charme v. Int’l Bhd. of Elec. Workers, Local 45*,  
 110 Cal. App. 4th 107 (Cal. Ct. App. 2003) ..... 20

5

6 *DuPont Merck Pharm. co. v. Sup. Court*,  
 78 Cal. App. 4th 562, 92 Cal. Rptr. 2d 755 (Cal. Ct. App. 2000)..... 16

7 *Fontani v. Wells Fargo Investments, LLC*,  
 129 Cal. App. 4th 719, 28 Cal. Rptr. 3d 833 (Cal. Ct. App. 2005)..... 15

8

9 *Freeman v. San Diego Ass’n of Realtors*,  
 77 Cal. App. 4th 171, 91 Cal. Rptr. 2d 534 (Cal. Ct. App. 1999)..... 21

10 *Kibler v. Northern Inyo Cty. Local Hosp. Dist.*,  
 39 Cal.4th 192, 46 Cal. Rptr. 3d 41 (Cal. 2005) ..... 15

11

12 *Martinez v. Metabolife Int’l, Inc.*,  
 113 Cal. App. 4th 181, 6 Cal. Rptr. 3d 494 (Cal. Ct. App. 2003)..... 13

13 *Navellier v. Sletten*,  
 29 Cal. 4th 82, 124 Cal. Rptr. 2d 530 (Cal. 2002) ..... 12

14

15 *Nygaard, Inc. v. Uusi-Kerttula*,  
 159 Cal. App. 4th 1027, 72 Cal. Rptr. 3d 210 (Cal. Ct. App. 2008)..... 17, 19, 21

16 *Rivera v. First DataBank, Inc.*,  
 187 Cal. App. 4th 709, 115 Cal. Rptr. 3d 1 (Cal. Ct. App. 2010)..... 12

17

18 *Stewart v. Rolling Stone LLC*,  
 181 Cal. App. 4th 664, 105 Cal. Rptr. 3d 98 (Cal. Ct. App. 2010)..... 12

19 *Weaver v. Jordan*,  
 64 Cal.2d 235, 49 Cal. Rptr. 537 (Cal. 1966) ..... 18

20

21 **Federal Statutes**

22 15 U.S.C. § 1512..... 15

23 15 U.S.C. § 1525..... 15

24 42 U.S.C. § 1862..... 15

25 42 U.S.C. § 1870..... 15

26 **State Statutes**

27 Cal. Bus. & Prof. Code § 16700 ..... 1, 21

28 Cal. Bus. & Prof. Code § 17200 ..... 2, 23

Wilmer Cutler Pickering Hale and Dorr LLP  
350 South Grand Ave., Suite 2100  
Los Angeles, CA 90071

1 Cal. Bus. & Prof. Code § 17204 .....24

2 Cal. Civ. Proc. Code § 425.16 .....passim

3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

Wilmer Cutler Pickering Hale and Dorr LLP  
350 South Grand Ave., Suite 2100  
Los Angeles, CA 90071

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

## I. INTRODUCTION

California’s anti-SLAPP statute is designed to protect parties like Defendant ICM, who are targeted by meritless lawsuits brought to chill the exercise of rights protected by the First Amendment. Though thinly disguised as a complaint for antitrust violations, this lawsuit is nothing more than an attempt by Plaintiffs to shut down the .XXX top level Internet domain established and operated by ICM so that Plaintiffs can protect their substantial share of the online adult entertainment market. Indeed, this lawsuit comes as the latest in a long line of tactics by Plaintiff Manwin to try to control and profit from ICM, including first seeking to invest in ICM and later threatening ICM if it did not receive favorable treatment in the operation of .XXX.

However, the conduct alleged to justify this lawsuit to shut down the .XXX domain — (i) ICM’s establishment of the .XXX domain in accordance with the procedures promulgated by the Internet Corporation for Assigned Names and Numbers (“ICANN”), which coordinates management of the Internet Domain Name System pursuant to agreements with the Department of Commerce, and (ii) ICM’s operation of the .XXX domain registry to facilitate the dissemination of adult entertainment and to express values, goals, and interests in responsible business practices — are constitutionally protected courses of conduct, of substantial interest to the Sponsored Community, the broader adult entertainment community and the public at large. Indeed, the effect of this retaliatory lawsuit has been, and likely will continue to be, to stifle the free expression of ICM and the sponsored community it represents.

Moreover, Plaintiffs will be unable to establish that their causes of action are likely to succeed on the merits. Plaintiffs’ Cartwright Act claims are unlikely to succeed for the same reasons as are their Federal Antitrust Claims, as detailed in ICM’s concurrently filed Motion to Dismiss and discussed below. In short, Plaintiffs fail to plead any factual allegations plausibly suggesting the existence of antitrust injury or standing, anticompetitive conduct or any unlawful ICM-ICANN agreement.

Wilmer Cutler Pickering Hale and Dorr LLP  
350 South Grand Ave., Suite 2100  
Los Angeles, CA 90071

1 In addition, as ICANN's separate motion points out, Plaintiffs fail to identify an  
2 appropriately defined relevant product market. *See* ICANN Br. at Section III.C, pp.  
3 18-23.

4 The insufficiencies of Plaintiffs' antitrust claims also doom their ability to show  
5 a likelihood of success on their claims of "unlawful" and "unfair" practices under  
6 California's Unfair Competition Law, Business and Professions Code Section 17200  
7 *et seq.*, for the very same allegations underlie both sets of claims. Plaintiffs are  
8 similarly unlikely to prevail on their claims of "fraudulent" practices under Section  
9 17200 because they have failed to allege any fraud on the public, which is a necessary  
10 element of any such cause of action. Plaintiffs have also failed to allege any injury  
11 sufficient to confer standing under Section 17200, and their unfair competition claims  
12 fail for that independent reason as well.

13 This lawsuit is thus precisely the type of Strategic Lawsuit Against Public  
14 Participation that California's anti-SLAPP statute was enacted to prevent: a lawsuit  
15 aimed at freedom of expression that is unlikely to succeed on the merits. Accordingly,  
16 ICM respectfully requests that the Court grant ICM's Motion to Strike Plaintiffs' state  
17 law claims, and award ICM its reasonable attorneys' fees associated with this Motion.

18 **II. FACTUAL BACKGROUND**

19 **A. The Parties**

20 **1. ICM**

21 Defendant ICM Registry, LLC ("ICM") was incorporated in June 1999 for the  
22 purpose of introducing certain top level domains ("TLDs") into the Internet "root."  
23 *See* Declaration of Stuart Lawley ("Lawley Decl."), at ¶ 2. In 2000, ICM was one of  
24 three entities to submit unsuccessful applications to ICANN to create a ".XXX" TLD.  
25 Compl. (Docket No. 1) ¶ 30.<sup>1</sup> ICM's application was not selected by ICANN. In

26  
27 <sup>1</sup> As noted in the Complaint, a "TLD" or "Top Level Domain" is the  
28 alphanumeric field to the far right of a complain domain name, such as .com or .net.  
Compl. ¶ 20.

Wilmer Cutler Pickering Hale and Dorr LLP  
350 South Grand Ave., Suite 2100  
Los Angeles, CA 90071

1 2004, in response to ICANN’s open Request for Proposals (“RFP”) issued on  
2 December 15, 2003, ICM submitted a new proposal to create a .XXX “sponsored”  
3 TLD<sup>2</sup> (“sTLD”), in order to carve out a web space where members of the “Sponsored  
4 Community,” who shared the same values, goals and interests in responsible business  
5 practices, could self-identify and engage in adult-themed, erotic expression. *Id.* ¶ 31.<sup>3</sup>  
6 The vision behind the .XXX sTLD was to create not only an Internet forum for the  
7 dissemination of adult content, but one where website owners would also express their  
8 support for and commitment to certain values concerning transparency, consumer  
9 safety and privacy, and child protection. *See* Lawley Decl., ¶ 6. Specifically, ICM  
10 envisioned a web space where web users could easily find (or avoid) adult content,  
11 free of scams, malware, viruses, and child abuse images that have plagued other  
12 TLDs. *Id.*

13 As part of the sTLD application process, ICM was required to choose a policy-  
14 setting board to serve as the “sponsoring” organization for the sTLD. ICM chose the  
15 International Foundation for Online Responsibility (“IFFOR”). IFFOR includes a  
16 Policy Council, which is responsible for setting the policies for those websites that  
17 voluntarily choose to self-identify and operate in the .XXX space. *See id.*, at ¶ 8.  
18 IFFOR’s “Baseline Policies” are an expression of the values, goals, and interests of  
19 the Sponsored Community which include: combating child abuse images; facilitating  
20 user choice and parental control regarding access to online adult entertainment;  
21 promoting freedom of expression; and protecting the privacy, security, and consumer  
22 rights of consenting adult consumers of online adult entertainment goods and services.  
23 *Id.*, at ¶ 16. Collectively, the nine members of the IFFOR Policy Council identify and  
24

25 <sup>2</sup> As noted in the Complaint, an “sTLD” is a sponsored TLD, *i.e.*, a specialized  
26 TLD that has a sponsor. Compl. ¶ 21.

27 <sup>3</sup> *See also* Lawley Decl., at ¶ 6 (referring to  
28 <http://www.icmregistry.com/about/sponsored-community/>;  
<http://www.icann.org/en/tlds/agreements/xxx/icm-xxx-application-related-documents-en.htm>).

Wilmer Cutler Pickering Hale and Dorr LLP  
350 South Grand Ave., Suite 2100  
Los Angeles, CA 90071

1 represent the values, goals, and interests of the Sponsored Community, and of the  
2 .XXX web space as a whole. *Id.*

3 Although the 2004 sTLD process initiated by ICANN’s public RFP was  
4 completely open, ICM was the only applicant to seek approval of an adult-content  
5 oriented sTLD. *See id.*, at ¶ 9.<sup>4</sup> ICM’s 2004 sTLD application was rejected by  
6 ICANN. Compl. ¶ 33.

7 Thereafter, ICM petitioned ICANN in accordance with ICANN’s rules and  
8 regulations and otherwise acted lawfully to obtain approval of .XXX as a sTLD.  
9 According to the Complaint, ICM engaged in “lobbying efforts” intended to persuade  
10 (and that initially did persuade) ICANN that ICM had met ICANN’s criteria for  
11 identifying a defined sponsorship community that supported and would benefit from  
12 .XXX, and in June 2005 ICANN authorized its President and General Counsel to  
13 begin negotiations with ICM for the .XXX sTLD. *Id.* ¶¶ 35, 36. Subsequently,  
14 however, ICANN came under pressure from entities opposing the creation of a .XXX  
15 sTLD and reversed its position, resulting in the rejection of a proposed registry  
16 contract in May 2006. *Id.* ¶ 39. ICM took various steps in furtherance of approval of  
17 .XXX as a sTLD, including: issuing Freedom of Information Act (“FOIA”) requests  
18 to the Department of Commerce and the Department of State; filing a lawsuit against  
19 the Department of Commerce and the Department of State; and submitting a  
20 complaint to the ICANN ombudsman. *Id.* ¶ 38. Although the Complaint  
21 mischaracterizes ICM’s actions as having exerted “unlawful pressure” on ICANN,  
22 each act was entirely lawful. These steps failed, leading ICM to file a request for  
23 reconsideration of ICANN’s 2006 decision not to move forward with a registry  
24 agreement with ICM for operation of the .XXX sTLD pursuant to a process provided

25 <sup>4</sup> *See* Lawley Decl., at ¶ 9 (referring to  
26 <http://www.icann.org/en/announcements/advisory-31oct03.htm> (ICANN board  
27 resolution authorizing new sTLD RFP)). The process allowed multiple applicants to  
28 submit proposals for the same TLD. *See id.*, (referring to  
<http://www.icann.org/en/tlds/stld-apps-19mar04/stld-public-comments.htm> (showing  
multiple applications for .tel)). ICM had no input into the ICANN process. *Id.*

Wilmer Cutler Pickering Hale and Dorr LLP  
350 South Grand Ave., Suite 2100  
Los Angeles, CA 90071

1 under the ICANN Bylaws. Nonetheless, ICANN rejected ICM’s application to  
2 operate .XXX in March 2007. *Id.* ¶ 39.

3 Convinced that its position was legally sound, ICM continued to pursue .XXX  
4 as a sTLD under the ICANN Bylaws with the filing of an Independent Review  
5 Proceeding in June 2008, challenging ICANN’s rejections of ICM’s proposal and the  
6 .XXX sTLD in 2006 and 2007 as improper reversals of its decision to begin  
7 negotiations with ICM in June 2005. *Id.* ¶¶ 39, 40.<sup>5</sup> The Independent Review Panel  
8 vindicated ICM’s position, issuing a Declaration in February 2010 that ICANN had  
9 already, in June 2005, determined that ICM satisfied the sponsorship criteria and was  
10 therefore precluded by its own Bylaws from reopening the issue. *Id.* ¶ 40. In March  
11 2011, ICANN finally signed a contract making ICM the registry operator for .XXX.  
12 *Id.* ¶ 42. Although Plaintiffs’ Complaint contains numerous inaccuracies and  
13 mischaracterizations regarding ICM’s so-called “lobbying efforts,” the foregoing  
14 essential facts relating to the ultimate approval by ICANN of the .XXX sTLD are not  
15 in dispute.<sup>6</sup>

16 Prior to executing the ICANN contract, ICM developed the “Founders  
17 Program.” In December 2010, a few months after the decision to proceed with the  
18 .XXX sTLD was made by ICANN, the Founders Program was formally launched and  
19 was available to leading companies within the online adult entertainment industry.  
20 Under the Founders Program, early registrants could secure and develop .XXX  
21 domain names prior to the general registration of .XXX domains by members of the  
22 adult entertainment industry who desired to participate in the Sponsored Community.  
23 *See* Lawley Decl. at ¶ 18. Provisions of the “Founders” contract mandated that .XXX

24 <sup>5</sup> ICANN’s Independent Review Proceeding is a non-binding arbitral process that  
25 permits a person materially affected by a decision or action by the ICANN Board to  
26 request an independent review of a decision or action he or she asserts is inconsistent  
27 with the ICANN Articles of Incorporation or Bylaws. *See* Lawley Decl., at ¶ 13.

28 <sup>6</sup> Records of all of the relevant meetings, agreements, reports, policies,  
procedures and other documents relating to the approval and launch of .XXX are  
publicly available on the websites of Defendant ICANN, ICM, and IFFOR. *See*  
Lawley Decl., at ¶ 15.



Wilmer Cutler Pickering Hale and Dorr LLP  
350 South Grand Ave., Suite 2100  
Los Angeles, CA 90071

1 domains contain unique content and not merely direct users to alternate TLDs. *See id.*  
2 at ¶ 18 & Ex. 1. Membership in the Sponsored Community remains open to those  
3 who did not participate in the Founders Program. A commitment to the IFFOR  
4 Baseline Policies described above is a material component of membership in the  
5 Sponsored Community. *See* Lawley Decl., at ¶ 16 (referring to IFFOR policies  
6 available at <http://www.iffor.org/baseline-policies>).

7 Thus far, ICM has accepted over one hundred thousand .XXX domain name  
8 registrations. *Id.*, at ¶ 21. Accordingly, ICM is positioned to enable and facilitate the  
9 expressive activities of thousands of registrants who have chosen to become members  
10 of the Sponsored Community through their registration of .XXX domains and  
11 concomitant agreement to abide by best practices and policies developed by the  
12 IFFOR policy council. These registrants have expressed — and will continue to  
13 express through their use of a .XXX domain name — not only their interest in sharing  
14 adult-oriented content on the Internet, but also their interest in fostering a web  
15 environment designed to protect viewers’ privacy and minimize viewers’ exposure to  
16 viruses, malware, and child abuse images. *See id.*, at ¶ 21.

17 **2. ICANN**

18 As alleged in the Complaint, ICANN is a non-profit corporation, created in  
19 response to a policy directive of the Department of Commerce regarding  
20 administration of the Domain Name System, and selected by the Commerce  
21 Department to coordinate the introduction of new top level domains and enter into  
22 agreements with TLD registry operators. Compl. ¶ 6. The Complaint alleges that  
23 ICANN performs duties previously performed by the United States government, and  
24 operates under agreements with and authority delegated by the Department of  
25 Commerce. *Id.* ¶¶ 24, 25. It carries out its delegated authority with input from a  
26 Governmental Advisory Committee, whose membership is open to all national  
27 governments. *Id.* ¶ 27. ICANN continues to carry out its authority under both a joint  
28



Wilmer Cutler Pickering Hale and Dorr LLP  
350 South Grand Ave., Suite 2100  
Los Angeles, CA 90071

1 “Affirmation of Commitments” agreement, and a contract with the Department of  
2 Commerce. *See* Lawley Decl., at ¶ 3 (referring to  
3 [http://www.ntia.doc.gov/files/ntia/publications/affirmation\\_of\\_commitments\\_2009.pdf](http://www.ntia.doc.gov/files/ntia/publications/affirmation_of_commitments_2009.pdf)  
4 f; [http://www.ntia.doc.gov/files/ntia/publications/ianacontract\\_081406.pdf](http://www.ntia.doc.gov/files/ntia/publications/ianacontract_081406.pdf)).

### 5 **3. Plaintiffs Manwin and Digital Playground**

6 Plaintiffs Manwin Licensing, International s.a.r.l. (“Manwin”) and Digital  
7 Playground, Inc. (“Digital Playground” and, together with Manwin, “Plaintiffs”) are  
8 adult content providers. Manwin is alleged to own and license one of the largest  
9 portfolios of “premium adult-oriented website domain names and trademarks,”  
10 including the “YouPorn.com” domain name and all “Playboy” on-line and television  
11 content. Compl. ¶ 4. The Complaint alleges Digital Playground “is a world leader in  
12 adult-oriented filmmaking and interactive format,” and is the operator of  
13 “digitalplayground.com.” *Id.* ¶ 5. Since filing the Complaint, Manwin has announced  
14 its acquisition of Digital Playground. *See* Lawley Decl., at ¶ 35.

### 15 **B. Pre-Suit Interactions Between ICM and Manwin**

16 ICM had substantial interactions with Manwin prior to the filing of the instant  
17 lawsuit, beginning in July 2010. Initially, Manwin’s Managing Partner, Fabian  
18 Thylmann (“Thylmann”), contacted Stuart Lawley (“Lawley”) to express an interest  
19 in investing in ICM. ICM indicated that it was not seeking new investors at that time.  
20 *See* Lawley Decl., at ¶ 22 & Ex. 2. This interaction was perhaps the catalyst for  
21 Manwin’s efforts to intimidate ICM, culminating in the filing of the instant suit.

22 Manwin’s pre-filing acts included:

- 23 • An October 2010 threat by Thylmann to file suit against ICM if ICANN  
24 approved the .XXX sTLD, after complaining that Manwin saw the  
25 introduction of the .XXX sTLD as a threat to its dominance over the  
26 adult Internet industry, including its operation of “tube” sites that

Wilmer Cutler Pickering Hale and Dorr LLP  
350 South Grand Ave., Suite 2100  
Los Angeles, CA 90071

1 predominantly consist of content posted by users from various sources.  
2 *See id.* at ¶ 23; Declaration of Greg Dumas (“Dumas Decl.”), at ¶ 5.

- 3 • A December 2010 rejection of ICM’s invitation to participate in the  
4 above-described Founders Program with the comment that .XXX was  
5 “useless . . . if it comes to market.” *See* Dumas Decl., at ¶ 6 & Ex. 1.<sup>7</sup>
- 6 • A June 2011 letter threatening to file wholly unsupported Lanham Act  
7 claims against the registry if ICM did not unilaterally take action to  
8 prevent third parties from registering any .XXX domain name that  
9 infringed on Manwin’s purported trademarks, “or any similar misleading  
10 names.” *See* Lawley Decl., at ¶ 24 & Ex. 3.<sup>8</sup>
- 11 • September and October 2011 threats to sue ICM if certain of Manwin’s  
12 demands regarding ICM’s operation of .XXX domains were not met,  
13 including: allocating a minimum of several thousand .XXX domain  
14 names to Manwin free of charge; committing to prevent IFFOR from  
15 making any policies that ban or restrict the operation of “tube” sites  
16 consisting of content posted by users from various sources on .XXX  
17 domains; granting across-the-board discounts on all .XXX domain  
18 registrations; and operating certain ‘premium’ or high value domain  
19 names, such as “tube.xxx,” through a revenue sharing arrangement  
20 between Manwin and ICM. *See id.* at ¶ 29; Dumas Decl., at ¶¶ 7-11.
- 21 • Claims that it would create its own adult industry trade organization. *See*  
22 Lawley Decl., at ¶ 29; Dumas Decl., at ¶ 11.

23 ICM engaged in negotiations on Manwin’s September and October 2011  
24 demands regarding desired .XXX names, and expected discussions to continue. *See*

25 <sup>7</sup> By contrast, Digital Playground affirmatively sought to be included in ICM’s  
26 Founders Program and provided a list of .XXX domains it wished to utilize, however,  
27 no agreement was finalized prior to the deadline for participation in the program. *See*  
28 Dumas Decl., at ¶ 4.

<sup>8</sup> ICM responded with a letter outlining the total absence of any legal basis for  
such a lawsuit. Lawley Decl., at ¶ 24 & Ex. 4.

Wilmer Cutler Pickering Hale and Dorr LLP  
350 South Grand Ave., Suite 2100  
Los Angeles, CA 90071

1 Lawley Decl., at ¶ 32; Dumas Decl., at ¶ 12. Instead, Manwin unilaterally broke off  
2 negotiations with ICM and filed the instant lawsuit. *See* Lawley Decl., at ¶ 33.

3 Since filing this action, Manwin’s desire to silence ICM and quash the .XXX  
4 sTLD has become even more transparent. Manwin recently announced a ban on all  
5 speech distributed via any .XXX domain by its affiliates and promoters. Thylmann  
6 asserted that, “The [instant] lawsuit was just the beginning” and that “[t]hrough this  
7 ban, we hope to make a strong statement against the .XXX domain.” *Id.*, at ¶ 34  
8 (referring to <http://www.xbiz.com/news/141694>). These statements on their face —  
9 particularly when coupled with Manwin’s course of conduct over the past 15 months  
10 — make it clear that the instant suit was brought to prevent members of the Sponsored  
11 Community from engaging in expressive activity by registering domain names in  
12 .XXX and offering expressive content, and to prevent ICM from engaging in activities  
13 that further the exercise of free speech via the .XXX domain.

14 **C. Public Interest in ICM’s .XXX Domain and This Lawsuit**

15 The public interest in the creation of the .XXX domain has been overwhelming,  
16 and the public’s fascination with the launch of ICM’s .XXX sTLD far exceeds that of  
17 any other sTLD. *See* Lawley Dec. at ¶ 37. ICM estimates that over 2,000 news  
18 articles were published during the week that .XXX launched. Prior to that, many  
19 more thousands of articles were published around the globe as the .XXX domain went  
20 from idea to reality on the Internet. *Id.*, at ¶ 38. The press coverage heralded the  
21 benefits of the new registry and the underlying IFFOR policies, noting that the launch  
22 of .XXX “betokens the [adult entertainment] industry’s new respectability.” *Id.*  
23 (referring to <http://www.economist.com/node/21530956>). Articles highlighted the  
24 registry’s “added security measures,” “making it easier for parents to block [adult]  
25 content” and “easier for consumers to avoid stumbling upon a porn website” (*see id.*  
26 (referring to [http://www.sfgate.com/cgi-bin/article.cgi?f=/g/a/2011/12/05/  
27 businessinsiderofficial-porn-domain.DTL](http://www.sfgate.com/cgi-bin/article.cgi?f=/g/a/2011/12/05/businessinsiderofficial-porn-domain.DTL))), as well as its focus on child protection  
28

Wilmer Cutler Pickering Hale and Dorr LLP  
350 South Grand Ave., Suite 2100  
Los Angeles, CA 90071

1 (*id.* (referring to [http://www.irishtimes.com/newspaper/finance/2011/0923/](http://www.irishtimes.com/newspaper/finance/2011/0923/1224304574041.html)  
2 1224304574041.html)). Just two weeks ago, *CircleID* (an online news and opinion  
3 site for the Internet community) named the .XXX approval and launch as the second  
4 biggest domain name story of 2011, and noted that the registry “has made concerted  
5 efforts to protect the rights of brand owners” and already contained over 100,000  
6 registrations. *Id.* (referring to [http://www.circleid.com/posts/20120105\\_2011\\_](http://www.circleid.com/posts/20120105_2011_domain_name_year_in_review_top_10_biggest_domain_stories/)  
7 [domain\\_name\\_year\\_in\\_review\\_top\\_10\\_biggest\\_domain\\_stories/](http://www.circleid.com/posts/20120105_2011_domain_name_year_in_review_top_10_biggest_domain_stories/)).

8 Despite this favorable press confirming the immense public interest in .XXX,  
9 Plaintiffs’ Complaint has caused present and potential future .XXX registrants to be  
10 concerned about the future of the .XXX domain name registry. *Id.* at ¶ 38. ICM  
11 believes that the mere existence of the lawsuit has caused end users, and registrars  
12 with whom ICM does business, to question the continued viability of the .XXX  
13 domain. *Id.* ICM further fears that untold numbers of potential customers may have  
14 reconsidered their initial decision to register a .XXX domain name based on the relief  
15 requested by Plaintiffs in this lawsuit. *Id.*

### 16 III. LEGAL STANDARDS

17 In 1992, the California legislature enacted Section 425.16 of the California  
18 Code of Civil Procedure to provide for pre-trial dismissal of “SLAPPs,” or “Strategic  
19 Lawsuits Against Public Participation.” Cal. Civ. Proc. Code § 425.16; *see also*  
20 *Batzel v. Smith*, 333 F.3d 1018, 1023-24 (9th Cir. 2003) (“The anti-SLAPP statute was  
21 enacted to allow for early dismissal of meritless first amendment cases aimed at  
22 chilling expression through costly, time-consuming litigation.”). In particular, the  
23 anti-SLAPP statute provides a mechanism for a special motion to strike a SLAPP  
24 complaint, stating:

25 A cause of action against a person arising from any act of  
26 that person in furtherance of the person’s right of petition or  
27 free speech under the United States or California

Wilmer Cutler Pickering Hale and Dorr LLP  
350 South Grand Ave., Suite 2100  
Los Angeles, CA 90071

1 Constitution in connection with a public issue shall be  
2 subject to a special motion to strike, unless the court  
3 determines that the plaintiff has established that there is a  
4 probability that the plaintiff will prevail on the claim.  
5 Cal. Civ. Proc. Code § 425.16(b)(1). A special motion to strike under California’s  
6 anti-SLAPP statute may be brought in federal court and applied to state law claims.  
7 *See Price v. Stossel*, 590 F. Supp. 2d 1262, 1266 (C.D. Cal. 2008) (“[I]t is beyond  
8 dispute that the California anti-SLAPP motion is available in federal court.”) (citing  
9 *U.S. v. Lockheed Missiles & Space Co., Inc.*, 190 F.3d 963, 970-73 (9th Cir. 1999));  
10 *Bulletin Displays, LLC v. Regency Outdoor Advertising, Inc.*, 448 F. Supp. 2d 1172,  
11 1180 (C.D. Cal. 2006) (applying anti-SLAPP statute to plaintiffs’ state common law  
12 and statutory claims).

13 A court analyzing an anti-SLAPP motion to strike applies a two-pronged test.  
14 First, the moving party bears the initial burden of making “a *prima facie* showing that  
15 the plaintiff’s suit arises from an act by the defendant made in connection with a  
16 public issue in furtherance of the defendant’s right to free speech under the United  
17 States or California Constitution.” *See Batzel*, 333 F.3d at 1024. The statute broadly  
18 defines protected activities to include: “(1) any written or oral statement or writing  
19 made before a legislative, executive, or judicial proceeding, or any other official  
20 proceeding authorized by law, (2) any written or oral statement or writing made in  
21 connection with an issue under consideration or review by a legislative, executive, or  
22 judicial body, or any other official proceeding authorized by law, (3) any written or  
23 oral statement or writing made in a place open to the public or a public forum in  
24 connection with an issue of public interest, or (4) any other conduct in furtherance of  
25 the exercise of the constitutional right of petition or the constitutional right of free  
26 speech in connection with a public issue or an issue of public interest.” Cal. Civ.  
27 Proc. Code § 425.16(e).

28

Wilmer Cutler Pickering Hale and Dorr LLP  
350 South Grand Ave., Suite 2100  
Los Angeles, CA 90071

1 In determining whether the suit arises from protected conduct, the Court should  
2 be guided by a number of overarching principles. *First*, a 1997 amendment to Section  
3 425.16 mandates courts to “broadly” construe application of this section. *See* Cal.  
4 Civ. Proc. Code § 425.16(a). *Second*, it is irrelevant whether plaintiffs intended to  
5 chill the defendant’s speech or conduct furthering speech by filing the Complaint, so  
6 long as the claims arise out of protected conduct. *See Navellier v. Sletten*, 29 Cal. 4th  
7 82, 88, 124 Cal. Rptr. 2d 530 (Cal. 2002) (“a defendant that satisfies its initial burden  
8 of demonstrating the targeted action is one arising from protected activity faces no  
9 additional requirement of proving the plaintiff’s subjective intent”); *Vess v. Ciba-*  
10 *Geigy Corp. USA*, 317 F.3d 1097, 1110 (9th Cir. 2003) (“The defendant need not  
11 show that the plaintiff’s suit was brought with the intention to chill the defendant’s  
12 speech; the plaintiff’s ‘intentions are ultimately beside the point.’”).<sup>9</sup> *Finally*, in  
13 deciding whether the Plaintiffs’ claims are “arising from” or “based on” acts in  
14 furtherance of speech, the Court should consider “the pleadings, and supporting and  
15 opposing affidavits stating the facts upon which the liability or defense is based.” *Id.*;  
16 § 425.16(b). Importantly, this prong is not to be evaluated “solely through the lens of  
17 plaintiff’s cause of action.” *See Rivera v. First DataBank, Inc.*, 187 Cal. App. 4th  
18 709, 716, 115 Cal. Rptr. 3d 1 (Cal. Ct. App. 2010), *reh’g denied* (Sept. 15, 2010)  
19 (*quoting Stewart v. Rolling Stone LLC*, 181 Cal. App. 4th 664, 105 Cal. Rptr. 3d 98  
20 (Cal. Ct. App. 2010), *as modified on denial of reh’g* (Feb. 24, 2010)).

21 Once the defendant establishes that the action qualifies for treatment under  
22 Section 425.16, the burden shifts to the plaintiff to demonstrate “a reasonable  
23 probability” that it will prevail on its claim. *See Batzel*, 333 F.3d at 1024. To carry its  
24 burden, a plaintiff must demonstrate that the complaint is *both* (i) legally sufficient,  
25 and (ii) supported by facts sufficient to sustain a favorable judgment. *Mello v. Great*  
26 *Seneca Fin’l Corp.*, 526 F. Supp. 2d 1024, 1029 (C.D. Cal. 2007). “A plaintiff cannot

27 <sup>9</sup> Nonetheless, as described above, ICM *does* demonstrate in this Motion plaintiff  
28 Manwin’s vindictive intent and motivations leading up to the filing of this action.



1 rely solely on the allegations set forth in his pleadings, nor may the court simply  
2 accept those allegations. Instead, a plaintiff must present competent and admissible  
3 evidence showing that he probably will prevail.” *Price*, 590 F. Supp. 2d at 1266  
4 (internal quotations and citations omitted).

#### 5 IV. ARGUMENT

##### 6 A. Plaintiffs’ State Law Claims Arise Out of Protected Activity

7 “Anti-SLAPP motions challenge particular causes of action, rather than  
8 individual allegations or theories supporting a cause of action.” *Bulletin Displays*,  
9 448 F. Supp. 2d at 1180. To determine if the challenged conduct is constitutionally  
10 protected under the anti-SLAPP statute, the court evaluates the “principal thrust or  
11 gravamen” of the claim. *Tuck Beckstoffer Wines LLC v. Ultimate Distributors, Inc.*,  
12 682 F. Supp. 2d 1003, 1015 (N.D. Cal. 2010) (citing *Martinez v. Metabolife Int’l, Inc.*,  
13 113 Cal. App. 4th 181, 193, Cal. Rptr. 3d 494 (Cal. Ct. App. 2003)).

14 Here, the gravamen of Plaintiffs’ state law claims concerns protected activity  
15 because: (1) the claims arise out of ICM’s establishment of the .XXX domain through  
16 petitioning and other protected activities; and (2) the claims seek to shut down the  
17 expression of and a forum for free speech. With regard to (2), Plaintiffs’ request to  
18 enjoin the .XXX domain would serve to thwart not only the ability of the .XXX  
19 domain to serve as a forum for the dissemination of adult-oriented free speech, but  
20 also the ability of members of the Sponsored Community to express their support for  
21 responsible website practices through use of the .XXX domain tag, which *itself*  
22 represents and expresses these responsible practices.

##### 23 1. The State Law Claims Arise Out of ICM’s Protected Petitioning 24 Efforts to Establish the .XXX Domain

25 There can be little doubt that this lawsuit stems from ICM’s constitutionally  
26 protected efforts to petition ICANN for approval of the .XXX domain. Plaintiffs  
27 affirmatively state as much in the second paragraph of their Complaint, which reads:  
28

Wilmer Cutler Pickering Hale and Dorr LLP  
350 South Grand Ave., Suite 2100  
Los Angeles, CA 90071

1 “In this lawsuit, YouPorn and Digital Playground seek redress for monopolistic  
2 conduct, price gouging, and anti-competitive and unfair practices, broadly harming  
3 competition, and consumers, *and arising out of the establishment of .XXX*, a new  
4 Top-Level Domain Name intended for adult-oriented content.” Compl. ¶ 2.

5 According to the Complaint, .XXX was established as result of the following,  
6 complained-of conduct:

- 7 • ICM’s application to ICANN for approval of the .XXX domain (*id.* ¶¶ 30-33);
- 8 • ICM’s “lobbying efforts” to ICANN seeking approval of the .XXX domain (*id.*  
9 ¶¶ 35, 36);
- 10 • ICM’s “improper pressure” on ICANN, including FOIA requests directed to the  
11 Department of Commerce and the Department of State, a lawsuit filed against  
12 the Department of Commerce and the Department of State, and a request for  
13 reconsideration filed with and later withdrawn from ICANN (*id.* ¶¶ 38, 39); and
- 14 • ICM’s filing and pursuit of an “Independent Review Proceeding” challenging  
15 ICANN’s rejection of the .XXX domain (*id.* ¶¶ 40, 41).

16 This “establishment” conduct clearly falls within the ambit of the anti-SLAPP  
17 statute for two independent reasons.

18 **First**, such conduct consists of “written or oral statement[s] or writing[s] made  
19 before a[n] . . . official proceeding authorized by law” and/or communications “made  
20 in connection with an issue under consideration or review by . . . [an] official  
21 proceeding authorized by law.” *See* Cal. Civ. Proc. Code § 425.16(e)(1) – (2). In  
22 keeping with the California Legislature’s mandate to “broadly” construe the anti-  
23 SLAPP statute, courts have interpreted Section 425.16 to cover “other proceedings”  
24 authorized by law, even where conducted by private parties. Accordingly, courts have  
25 afforded anti-SLAPP protection to proceedings before quasi-governmental bodies,  
26 such as proceedings before the private National Association of Securities Dealers (*see*  
27 *Fontani v. Wells Fargo Investments, LLC*, 129 Cal. App. 4th 719, 728-31, 28 Cal.



Wilmer Cutler Pickering Hale and Dorr LLP  
350 South Grand Ave., Suite 2100  
Los Angeles, CA 90071

1 Rptr. 3d 833 (Cal. Ct. App. 2005) (disapproved of on other grounds in *Kibler v.*  
2 *Northern Inyo Cty. Local Hosp. Dist.*, 39 Cal.4th 192, 46 Cal. Rptr. 3d 41 (Cal.  
3 2005))), and to medical peer review proceedings before private hospitals (*see Kibler*,  
4 39 Cal.4th at 203).

5 Here, ICANN proceedings qualify as “official proceedings” within the meaning  
6 of Section 425.16. ICANN is alleged to perform duties previously performed by the  
7 United States government, and to operate under authority delegated by the Department  
8 of Commerce. *See* Compl. ¶¶ 6, 24, 25. ICANN’s grant of authority from the  
9 Department of Commerce stems from the National Science Foundation’s (“NSF”)  
10 original statutory authority to manage the domain name system and to transfer its  
11 authority to other governmental bodies. *See* 42 U.S.C. §§ 1862(g) and 1870; *see also*  
12 *PGMedia, Inc. v. Network Solutions, Inc.*, 51 F. Supp. 2d 389, 393-403 (S.D.N.Y.  
13 1999) (discussing history of the Internet and domain name system, and the transfer of  
14 the NSF’s authority to the Department of Commerce).<sup>10</sup> Because its authority stems  
15 from the United States government, ICANN proceedings thus fall within the scope of  
16 the protections afforded by Sections 425.16(e)(1) and (2). *See Fontani*, 129 Cal. App.  
17 4th at 728-31 (finding privately-funded NASD was an “official” body because it acted  
18 “under the general aegis of the Securities and Exchange Commission”).

19 Courts have also construed Section 425.16 to reach activities incidental to  
20 “other proceedings,” including: communications “preparatory to or in anticipation of”  
21 a proceeding (*see Fontani*, 129 Cal. App. 4th at 731; *see also Jacobsen v. Katzer*, No.

22 <sup>10</sup> In 1992, Congress granted the NSF authority to permit commercial activity on  
23 the Internet. *See* Section 4(9) of the Scientific and Advanced Technology Act of  
24 1992, Pub. L. No. 102-476, 106 Stat. 2297, 2300 (1992) (codified at 42 U.S.C. §  
25 1862(g)). Pursuant to the National Science Foundation Act of 1950, 42 U.S.C. §  
26 1870, the NSF contracted with various third parties under that authority, and, in 1998,  
27 it transferred its authority and the responsibility for administering its third-party  
28 contracts to the Department of Commerce. *See PGMedia*, 51 F. Supp. 2d at 399.  
Thereafter, the Department of Commerce delegated authority to ICANN through a  
series of agreements described in Section II.A.2 above, stemming from the  
Department’s general authority under 15 U.S.C. §§ 1512 (authority to foster, promote,  
and develop foreign and domestic commerce) and 1525 (authority to enter into joint  
projects with nonprofit, research, or public organization on matters of mutual interest).

Wilmer Cutler Pickering Hale and Dorr LLP  
350 South Grand Ave., Suite 2100  
Los Angeles, CA 90071

1 C 06-01905 JSW, 2006 WL 3000473, at \*7 (N.D. Cal. Oct. 20, 2006) (finding FOIA  
2 request protected activity where made in anticipation of legal action)); and “lobbying  
3 and other activities seeking to influence” proceedings (*see DuPont Merck Pharm. co.*  
4 *v. Sup. Court*, 78 Cal. App. 4th 562, 566, 92 Cal. Rptr. 2d 755 (Cal. Ct. App. 2000)).  
5 Hence, the categories of ICM’s conduct identified by Plaintiffs as the basis for their  
6 claims — all of which concern ICM’s alleged communications before ICANN  
7 proceedings, or in connection with an issue under consideration or review by ICANN  
8 proceedings — are all properly protected by the anti-SLAPP statute.

9 **Second**, ICM’s alleged petitioning conduct is protected as “other conduct in  
10 furtherance of the exercise of the constitutional right of petition or the constitutional  
11 right of free speech in connection with a public issue or an issue of public interest.”  
12 *See* Cal. Civ. Proc. Code § 425.16(e)(4). As described in the previous paragraphs,  
13 Plaintiffs’ state law claims stem from ICM’s petitioning of ICANN to establish the  
14 .XXX registry — petitioning plainly conducted in furtherance of ICM’s exercise of its  
15 constitutional rights of petition and free speech. This conduct is thus protected under  
16 Section 425.16(e)(4) so long as it is “in connection with a public issue or an issue of  
17 public interest.” As described in greater detail in Section IV.A.3 below, ICM’s efforts  
18 to establish .XXX satisfy this “public interest” requirement.

19 **2. The State Law Claims Seek to Enjoin — And Have Already Chilled**  
20 **— Protected Expression**

21 The true thrust of Plaintiffs’ state law claims is further revealed by the primary  
22 relief sought in each claim in the Complaint, including the state law claims that are the  
23 subject of the instant Motion — a sweeping request to “enjoin[] the .XXX TLD  
24 altogether.” *See* Compl. ¶¶ 114, 120, 126. Plaintiffs are taking aim at both a specific  
25 *form* of speech, *i.e.*, registration of a website in a top level domain that expresses the  
26 goals, values, and interests in responsible web practices, as well as an entire *avenue* of  
27 protected speech on the Internet, *i.e.*, a sTLD for the expression of adult-oriented  
28

Wilmer Cutler Pickering Hale and Dorr LLP  
350 South Grand Ave., Suite 2100  
Los Angeles, CA 90071

1 content. Stated differently, Plaintiffs’ claims “arise out of” ICM’s creation of a  
2 unique space on the Internet where domain registrants can *both* express their support  
3 for responsible web practices *and* distribute erotic, adult-themed entertainment. *See*  
4 Compl. ¶¶ 30, 60.

5 ICM’s challenged conduct comprises expression protected by Section  
6 425.16(e)(3) and (4) because: it is (i) conduct in furtherance of free speech, (ii) made  
7 in an online “public forum” and, as described in the following section, (iii) “in  
8 connection with an issue of public interest.” *See* Cal. Civ. Proc. Code § 425.16(e)(3)  
9 & (4); *see also* *Nygaard, Inc. v. Uusi-Kerttula*, 159 Cal. App. 4th 1027, 1039, 72 Cal.  
10 Rptr. 3d 210 (Cal. App. 2008) (quoting *Barrett v. Rosenthal*, 40 Cal.4th 33, 41, n.4, 51  
11 Cal. Rptr. 3d 55 (Cal. 2006)) (“Web sites accessible to the public . . . are ‘public  
12 forums’ for purposes of the anti-SLAPP statute.”).

13 ICM’s establishment and operation of the .XXX registry is “conduct in  
14 furtherance of free speech” because .XXX domain registration is *itself* expression  
15 protected by the First Amendment. *See Name.Space, Inc. v. Network Solutions, Inc.*,  
16 202 F.3d 573, 585-86 (2d Cir. 2000) (explaining that certain gTLDs “could indeed  
17 amount to protected speech,” particularly where used for an expressive purpose  
18 “comprising communicative messages by the author and/or operator of the website in  
19 order to influence the public’s decision to visit that website”). By registering a .XXX  
20 domain name, a registrant is not merely signing up for another means of distributing  
21 adult content online. Rather, the use of the .XXX extension expresses the registrant’s  
22 endorsement of the IFFOR policies (see Section II.A.1, above). That is, by having a  
23 .XXX presence on the web, the registrant communicates his support for responsible  
24 website practices such as the agreement not to distribute child abuse images as well as  
25 the use of software that minimizes viewers’ exposure to computer viruses and  
26 malware. *See* Lawley Decl., at ¶ 21. By voluntarily choosing to distribute adult  
27 content or services on a .XXX site, the website owner is telling the world that the  
28

Wilmer Cutler Pickering Hale and Dorr LLP  
350 South Grand Ave., Suite 2100  
Los Angeles, CA 90071

1 IFFOR policies are important to that business as well as to the online Sponsored  
2 Community. Thus, the .XXX extension is inherently expressive, and is distinct from  
3 the dissemination of adult content or services that already occurs, and will continue to  
4 occur, via other domains.

5 Moreover, the .XXX sTLD provides a forum for, and thus facilitates the  
6 distribution of, adult-oriented content. As such, the establishment and operation of the  
7 .XXX sTLD is thus clearly protected by the First Amendment. *See generally U.S. v.*  
8 *Playboy Entertainment Group, Inc.*, 529 U.S. 803, 120 S. Ct. 1878, 146 L. Ed. 2d 865  
9 (2000); *ACLU v. Reno*, 217 F.3d 162 (3d Cir. 2000); *FW/PBS, Inc. v. City of Dallas*,  
10 493 U.S. 215, 110 S. Ct. 596, 107 L. Ed. 2d 603 (1990); *Griswold v. Connecticut*, 381  
11 U.S. 479, 482, 85 S. Ct. 1678, 14 L. Ed. 2d 510 (1965) (“The right of freedom of  
12 speech and press includes not only the right to utter or to print, but the right to  
13 distribute, the right to receive, the right to read . . . .”); *Weaver v. Jordan*, 64 Cal.2d  
14 235, 240-42, 49 Cal. Rptr. 537 (Cal. 1966) (“Inasmuch as the rights of free speech and  
15 press are worthless without an effective means of expression, the guaranty extends to  
16 both the content of the communication and the means employed for its  
17 dissemination”).

18 Attacks such as Plaintiffs’ here, directed toward instrumentalities that aid in the  
19 distribution of protected speech, have been routinely rejected under free speech  
20 principles. For example, courts have protected “the right to distribute and circulate  
21 newspapers through the use of newsracks [under] the first amendment.” *Sentinel*  
22 *Communications Co. v. Watts*, 936 F.2d 1189, 1196 (11th Cir. 1991); *City of*  
23 *Lakewood v. Plain Dealer Pub. Co.*, 486 U.S. 750, 768, 108 S.Ct. 2138, 100 L. Ed. 2d  
24 771 (1988), quoting *Ex parte Jackson*, 96 U.S. 727 (1877) (the “activity” of  
25 circulating newspapers is constitutionally protected and the “[l]iberty of circulating is  
26 as essential to [freedom of expression] as liberty of publishing; indeed, without the  
27 circulation, the publication would be of little value”). While the news rack may not be  
28

Wilmer Cutler Pickering Hale and Dorr LLP  
350 South Grand Ave., Suite 2100  
Los Angeles, CA 90071

1 inherently expressive, it facilitates the distribution of protected speech, and thus falls  
2 within the ambit of First Amendment protection. So too here, where the venue for  
3 free expression is an online variant, as ICM’s function as the Registry for .XXX  
4 necessarily involves ICM “circulating” protected speech in the digital realm.

5 If Plaintiffs’ injunction request were successful, there would be no .XXX  
6 websites and the aforementioned means of expression would be silenced. As an initial  
7 matter, ICM’s own protected online speech would be stifled. ICM maintains a  
8 presence at www.icm.xxx where it posts expressive content and other media,  
9 including statements about the formation of the .XXX sTLD. *See* Lawley Decl., at  
10 ¶ 36. More broadly, the free expression of thousands of registrants now using a .XXX  
11 domain name would be, and has already been, chilled. To date, over one hundred  
12 thousand .XXX domain names have been registered by companies and members of  
13 the public that have elected to align themselves with the goals, values, and interests of  
14 the Sponsored Community. *See id.*, at ¶ 6. The mere existence of the subject lawsuit  
15 and Manwin’s request to enjoin operation of the .XXX registry is believed to have  
16 caused real concern among ICM’s customers and potential customers. *See id.*, at ¶ 39.  
17 In short, this is precisely the type of SLAPP lawsuit the statute was intended to  
18 discourage. The Court should grant ICM’s motion to strike.

19 **3. The .XXX sTLD is an Issue of Public Interest**

20 Consistent with “other proceedings,” courts have construed the anti-SLAPP  
21 statute’s “public issue/interest” requirement broadly to reach “any issue in which the  
22 public is interested.” *See Nygard*, 159 Cal. App. 4th at 1042 (emphasis in original).  
23 Here, certainly, the outlet of expression created by ICM via .XXX has been an issue of  
24 interest to the Sponsored Community, the broader online adult-entertainment  
25 community and the public at large.

26 The interest by the Sponsored Community is not merely an interest in .XXX as  
27 a forum for the expression of adult-oriented content, though that is certainly an  
28



Wilmer Cutler Pickering Hale and Dorr LLP  
350 South Grand Ave., Suite 2100  
Los Angeles, CA 90071

1 important aspect of the expression to which the .XXX domain is directed. .XXX has  
2 garnered the interest of the Sponsored Community on another level, as a means for  
3 each registrant who obtains and uses its .XXX domain for an active site to express its  
4 endorsement of the domain’s values — values including combating child abuse  
5 images, facilitating user choice and parental control regarding access to online adult  
6 entertainment, promoting freedom of expression, and protecting the privacy, security,  
7 and consumer rights of consenting adult consumers of online adult entertainment  
8 goods and services. For anti-SLAPP purposes, this specialized interest by the  
9 Sponsored Community is sufficient for ICM’s challenged conduct to satisfy the “in  
10 connection with a public issue or an issue of public interest” requirement. *See*  
11 *Cedars-Sinai Med. Ctr. v. Global Excel Mgmt.*, CV 09-3627 PSG AJW, 2009 WL  
12 4730882, at \*10 (C.D. Cal. Dec. 4, 2009) (citing *Du Charme v. Int’l Bhd. of Elec.*  
13 *Workers, Local 45*, 110 Cal. App. 4th 107, 1 Cal. Rptr. 3d 501 (Cal. Ct. App. 2003)).

14 Yet, the public interest in the .XXX sTLD extends beyond the Sponsored  
15 Community. As explained above, both the broader adult entertainment community  
16 and the general public have taken an interest in the unique .XXX domain and have  
17 made ICM’s conduct in creating this venue for responsible erotic speech an issue of  
18 global significance. *See* Section II.C, above. Plaintiffs’ own Complaint confirms the  
19 widespread public interest in the .XXX sTLD. Compl. ¶¶ 3(g), 74 (admitting that  
20 major news outlets such as *USA Today*, *Reuters*, *XBIZ*, and *PC World* have reported  
21 on ICM’s activities). ICM’s website provides a collection of current articles  
22 concerning the .XXX sTLD published by national and international outlets such as  
23 *The Economist*, *ADWEEK*, *irishtimes.com*, *AVN*, *c/net*, *CBS News*, and the *Chicago*  
24 *Tribune*. All of those publications have published articles concerning the .XXX sTLD  
25 within the past several months. Just last week, *CircleID* (an online news and opinion  
26 website for the Internet community) named the .XXX approval and launch as the  
27 second biggest domain name story of 2011. *See* Lawley Decl., at ¶ 38. The full list of  
28

Wilmer Cutler Pickering Hale and Dorr LLP  
350 South Grand Ave., Suite 2100  
Los Angeles, CA 90071

1 media coverage pertaining to .XXX includes thousands of articles from around the  
2 world. *Id.* ICM’s conduct in furtherance of its own speech and that of others is thus  
3 clearly an “issue in which the public is interested,” and it is entitled to anti-SLAPP  
4 protection. *See Nygard*, 159 Cal. App. 4th at 1042.

5 **B. Plaintiffs Cannot Establish a Likelihood of Success on the Merits**

6 Because Plaintiffs’ state law claims arise out of ICM’s exercise of its protected  
7 First Amendment rights as demonstrated above, the burden shifts to the Plaintiffs to  
8 demonstrate a “realistic probability” that they will prevail on their claims. Cal. Civ.  
9 Proc. Code § 425.16(b)(1). As set forth below and described in detail in ICM’s  
10 concurrently filed Motion to Dismiss, Plaintiffs are unable to carry their burden.

11 **1. Plaintiffs’ Cartwright Act Claims are Not Likely to Succeed**

12 Plaintiffs’ Fourth and Fifth claims concerning an alleged combination in  
13 violation of California’s antitrust statute, the Cartwright Act, Cal. Bus. & Prof. Code  
14 § 16700, fail for the simple reason that the Complaint fails to allege legally sufficient  
15 federal antitrust claims in the First through Third claims for relief.<sup>11</sup> As described in  
16 detail in ICM’s concurrently filed Motion to Dismiss, Plaintiffs’ federal antitrust  
17 claims fail for a number of reasons, including the following:

- 18 • Plaintiffs fail to allege antitrust injury, *i.e.*, injury to competition or to  
19 consumers (as opposed to themselves), *see e.g., NYNEX Corp. v. Discon, Inc.*,  
20 525 U.S. 128, 137, 119 S.Ct. 493, 142 L. Ed. 2d 510 (1998), and/or any injury  
21 to themselves resulting from unlawful conduct on the part of ICM or ICANN,  
22 *see Am. Ad. Mgmt., Inc. v. Gen. Tel. Co.*, 190 F.3d 1051, 1055 (9th Cir. 1999),  
23 and accordingly do not have standing.

24  
25  
26 <sup>11</sup> Unlike the Sherman Act, the Cartwright Act does not apply to unilateral  
27 conduct. *See Freeman v. San Diego Ass’n of Realtors*, 77 Cal. App. 4th 171, 183, 200  
28 n.32, 91 Cal. Rptr. 2d 534 (Cal. Ct. App. 1999) (“The Cartwright Act bans  
combinations but does not have any parallel to Sherman Act section 2’s antimonopoly  
provisions.”).

Wilmer Cutler Pickering Hale and Dorr LLP  
350 South Grand Ave., Suite 2100  
Los Angeles, CA 90071

- 1 • Plaintiffs do not allege an unlawful ICM/ICANN conspiracy, but describe only  
2 unilateral conduct and conduct contradicted by the .XXX registry contract. *See*  
3 *Kendall v. Visa U.S.A., Inc.*, 518 F.3d 1042, 2047 (9th Cir. 2008) (Section 1  
4 claim requires “a contract, combination or conspiracy among two or more  
5 persons . . . distinct business entities”).
- 6 • The Complaint does not plausibly suggest any anticompetitive or predatory  
7 conduct, but alleges: (i) a purported lack of “competitive bidding” that is both  
8 factually unsupported and legally insufficient, *see Verisign*, 611 F.3d at 503  
9 (observing that competitive bidding is not required for Sherman Act claim); (ii)  
10 pricing practices and service “restrictions” that are not unlawful, *see Verizon*  
11 *Comm’ns Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 124 S.Ct.  
12 872, 157 L. Ed. 2d 823 (2004) (charging monopoly prices is not itself  
13 unlawful); and (iii) “lobbying efforts” and “litigation tactics” that are not  
14 predatory and, in any event, immunized by *Noerr-Pennington*. *See e.g., Stearns*  
15 *Airport Equip. Co., Inc. v. FMC Corp.*, 170 F.3d 518 (5th Cir. 1999).
- 16 • Plaintiffs base their Section 2 monopolization and attempted monopolization  
17 claims against *both* ICM and ICANN in the same markets, as opposed to the  
18 unilateral conduct which must underlie such claims. *See Rebel Oil Co., Inc. v.*  
19 *Atlantic Richfield Co.*, 51 F.3d 1421, 1443 (9th Cir. 1995) (“To pose a threat of  
20 monopolization, *one firm alone* must have the power to control market output  
21 and exclude competition”) (emphasis added).
- 22 • The alleged existence of governmental oversight over ICANN’s activities  
23 relating to the domain name system weigh against antitrust enforcement and  
24 court intervention in this case. *See Trinko*, 540 U.S. at 406, 411-12.<sup>12</sup>

25 <sup>12</sup> Plaintiffs’ antitrust claims fail for the additional reason that Plaintiffs do not  
26 identify an appropriately defined relevant product market, as discussed in detail in  
27 Section III.C of ICANN’s separately filed Motion to Dismiss. Specifically, Plaintiffs’  
28 alleged relevant market definitions fail because (i) the .XXX defensive registration  
market allegations, Compl. ¶¶ 55-58, wrongly suggest that each .XXX domain name  
can *itself* be a relevant market, *see e.g., Coalition for ICANN Transparency Inc. v.*



Wilmer Cutler Pickering Hale and Dorr LLP  
350 South Grand Ave., Suite 2100  
Los Angeles, CA 90071

1 “Cartwright Act claims raise basically the same issues as do Sherman Act  
2 claims.” *McGlinchy v. Shell Chem. Co.*, 845 F.2d 802, 811 n.4 (9th Cir. 1988); *see*  
3 *also Chavez v. Whirlpool Corp.*, 93 Cal. App. 4th 363, 369, 113 Cal. Rptr. 2d 175,  
4 179 (Cal. Ct. App. 2001) (noting the similar language and common objectives of the  
5 Cartwright and Sherman Acts, and recognizing the persuasiveness of federal authority  
6 in interpreting the Cartwright Act). Accordingly, as is commonly the case with such  
7 pendant Cartwright Act claims, the defects in Plaintiffs’ federal antitrust claims doom  
8 their California antitrust analogues as well. *See, e.g., Nova Designs, Inc. v. Scuba*  
9 *Retailers Ass’n*, 202 F.3d 1088, 1092 (9th Cir. 2000) (“Our disposition of [Plaintiff]’s  
10 Sherman Act claims disposes of its claims under the California Cartwright Act.”);  
11 *Southern California Inst. of Law v. TCS Educ. Sys.*, No. CV 10–8026 PSG (AJWx),  
12 2011 WL 1296602, at \*10 (C.D. Cal. Apr. 5, 2011) (same).

13 **2. Plaintiffs’ Unfair Competition Claim is Not Likely to Succeed**  
14 **a. Plaintiffs’ Claim for “Illegal” and “Unfair” Business Practices**  
15 **Falls with Their Failed Antitrust Claims**

16 In their Sixth claim for relief, Plaintiffs allege that Defendants’ conduct is  
17 “illegal” and “unfair” within the meaning of California’s Unfair Competition Law  
18 (“UCL”), Cal. Bus. & Prof. Code §§ 17200 *et seq.* Compl. ¶¶ 123, 124. As described  
19 in the previous section, Plaintiffs’ federal antitrust claims are facially invalid. This is  
20 fatal to Plaintiffs’ claim under the “illegal” prong of the UCL, as Plaintiffs have not  
21 pleaded any unlawful conduct. The failure of the federal antitrust claims is also fatal  
22 to Plaintiffs’ claim under the UCL’s “unfair” prong because the claim is based on the  
23 same allegations as the (legally insufficient) antitrust claims. *See In re Apple iPod*  
24 *iTunes Antitrust Litig.*, 796 F. Supp. 2d 1137, 1147 (N.D. Cal. 2011) (“[I]f the ‘same  
25 *Verisign*, 611 F.3d 495, 508 (9th Cir. 2009) (rejecting that a market should be defined  
26 in terms of a single domain name), and (ii) the affirmative registration market  
27 allegations, Compl. ¶¶ 59-61, are speculative, conclusory, and hypothetical. *See Bell*  
28 *Atl. Corp. v. Twombly*, 550 U.S. 544, 550, 127 S.Ct. 1955, 167 L. Ed. 2d 929 (2007)  
 (“factual allegations must be enough to raise a right to relief above the speculative  
 level”).

Wilmer Cutler Pickering Hale and Dorr LLP  
350 South Grand Ave., Suite 2100  
Los Angeles, CA 90071

1 conduct is alleged to be both an antitrust violation and an ‘unfair’ business act or  
2 practice for the same reason,’ then the ‘determination that the conduct is not an  
3 unreasonable restraint of trade necessarily implies that the conduct is not ‘unfair’ to  
4 consumers.’”) (quoting *Chavez*, 93 Cal. App. 4th at 375).

5 **b. Plaintiffs Have Not Alleged “Fraud” on the Public**

6 Plaintiffs will also be unable to demonstrate a likelihood of success on their  
7 claim under the “fraud” prong of the UCL. A business practice is “fraudulent” within  
8 the meaning of the UCL if “members of the public are likely deceived.” *See Comm.*  
9 *on Children’s Television v. Gen. Foods. Corp.*, 35 Cal.3d 197, 214, 197 Cal. Rptr. 783  
10 (Cal. 1983), *abrogated on other grounds* by Prop. 64 (Gen. Elec. (Nov. 2, 2004)).

11 Here, Plaintiffs base their “fraudulent” business practice claim on ICM’s alleged  
12 “conduct in misleading ICANN” and allegations regarding ICM’s petitioning efforts  
13 to obtain approval of the .XXX sTLD. Compl. ¶¶ 32-45, 125. Plaintiffs’ allegation is  
14 thus, at most, that *ICANN* was likely to be deceived by ICM’s conduct; Plaintiffs  
15 nowhere allege that ICM’s action did or were likely to deceive any member of the  
16 public. Plaintiffs’ claim for “fraudulent” business practices thus must fail.

17 **c. Plaintiffs Have Not Alleged a Loss of Money or Property**

18 Plaintiffs’ Sixth claim fails for the additional and independent reason that  
19 Plaintiffs have not alleged that they have “suffered injury in fact and ha[ve] lost  
20 money or property as a result of the unfair competition,” as is required by the UCL.  
21 *See* Cal. Bus. & Prof. Code § 17204; *In re Toyota Motor Corp.*, 790 F. Supp. 2d 1152,  
22 1168 (C.D. Cal. 2011); *Clayworth v. Pfizer, Inc.*, 49 Cal. 4th 758, 788, 111 Cal. Rptr.  
23 3d 666 (Cal. 2010) (explaining that recent amendments to § 17204 were intended to  
24 “confine standing to those actually injured by a defendant’s business practices and to  
25 curtail the prior practice of filing suits on behalf of clients who have not used the  
26 defendant’s product or service, viewed the defendant’s advertising, or had any other  
27 business dealing with the defendant . . . .”) (internal quotations omitted).

Wilmer Cutler Pickering Hale and Dorr LLP  
350 South Grand Ave., Suite 2100  
Los Angeles, CA 90071

1 Here, Plaintiffs have painted a sky-is-falling picture whereby companies,  
2 including Plaintiffs, “may need” to register .XXX domains, and companies “may  
3 need” to use the same dispute resolution policies that other TLDs employ, such as the  
4 Uniform Domain-Name Dispute-Resolution Policy (“UDRP”). *See* Compl. ¶ 70.  
5 Plaintiffs have also loudly complained about the price of registering .XXX domain  
6 names. *See id.* ¶¶ 64, 76. Yet neither Manwin nor DP alleges that it has made any  
7 attempt to affirmatively register any .XXX domain names and they concede that  
8 owners of valid trademarks (which Plaintiffs assert they possess) have had no problem  
9 obtaining defensive registrations. *See id.* ¶ 68. Thus Plaintiffs allege at most that they  
10 do not want to register domain names — not that they have suffered any monetary  
11 loss as a result. *See id.* ¶ 80. This concession is fatal to their UCL claim.

12 **C. ICM is Entitled to Its Fees if It Prevails on this Motion.**

13 Under section 425.16(c), a defendant who prevails on any portion of an anti-  
14 SLAPP motion to strike is entitled to recover its attorneys’ fees. *See New.Net, Inc. v.*  
15 *Lavasoft*, 356 F. Supp. 2d 1090, 1115 (C.D. Cal. 2004). ICM has incurred attorneys’  
16 fees in preparing and filing this Motion to Strike. *See* Lawley Decl., at ¶ 40. Thus,  
17 should ICM prevail on this motion, it is entitled to recover its reasonable attorneys’  
18 fees incurred in the amount to be determined by the Court.

19 **V. CONCLUSION**

20 For these reasons, ICM respectfully moves the Court to strike Plaintiffs’ state  
21 law claims for relief with prejudice, and award ICM its attorneys’ fees and costs.

22 Respectfully Submitted,

23 Dated: January 20, 2012

24 WILMER CUTLER PICKERING  
25 HALE AND DORR LLP

26 By: /s/ Andrea Weiss Jeffries

27 Andrea Weiss Jeffries

28 Attorneys for Defendant  
ICM Registry, LLC