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11 UNITED STATES DISTRICT COURT
12 CENTRAL DISTRICT OF CALIFORNIA

13 MANWIN LICENSING INTERNATIONAL)
14 S.A.R.L., a Luxembourg limited liability)
company (s.à.r.l.) and DIGITAL PLAY-)
15 GROUND, INC., a California corporation,)

16 Plaintiffs,

17 vs.

18 ICM REGISTRY, LLC, d/b/a .XXX, a)
Delaware limited liability corporation;)
19 INTERNET CORPORATION FOR)
ASSIGNED NAMES AND NUMBERS, a)
20 California nonprofit public benefit)
corporation; and Does 1-10,)

21 Defendants.

22 ICM REGISTRY, LLC, d/b/a .XXX, a)
Delaware limited liability corporation,)

23 Counterclaimant,

24 vs.

25 MANWIN LICENSING INTERNATIONAL)
26 S.A.R.L., a Luxembourg limited liability)
company (s.à.r.l.); DIGITAL PLAY-)
27 GROUND, INC., a California corporation,)
and Does 11-20,)

28 Counterdefendants.

CASE NO. CV 11-9514-PSG
(JCGx)

Honorable Philip S. Gutierrez

**COUNTERCLAIMANT
ICM REGISTRY, LLC'S
OPPOSITION TO
COUNTERDEFENDANTS'
MOTION TO DISMISS
FIRST AMENDED
COUNTERCLAIMS
PURSUANT TO RULE
12(b)(6)**

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I. INTRODUCTION

1
2 Contrary to the profoundly hypocritical arguments advanced by Plaintiffs
3 and Counterdefendants Manwin Licensing International, S.A.R.L. (“Manwin”) and
4 Digital Playground, Inc. (“Digital Playground”) (collectively, “Counter-
5 defendants”), Defendant and Counterclaimant ICM Registry, LLC (“ICM”) has
6 adequately pled its counterclaims. Specifically, for its antitrust claims, ICM
7 adequately pleads a relevant market of “search and access to adult entertainment
8 via websites.” First Amended Counter-claims (“FACC”) ¶¶ 50, 62, 66, 69, 71, 76,
9 79. This market definition is no more “ill-defined” than Counterdefendants’ own
10 in their Complaint of “.XXX defensive domain name registrations.” In fact, ICM’s
11 market definition is *more* specific and *better* pled. Unlike Counterdefendants’
12 market definition, ICM’s market definition accounts for cross-elasticity and
13 reasonable substitute products.

14 Moreover, contrary to Counterdefendants’ unsupported assertions, ICM need
15 *not* engage in a detailed market analysis in order to support its claims. In any event,
16 ICM has properly pled Manwin’s market and monopoly power in the relevant
17 market through direct evidence, namely, Manwin’s power to exclude entrants from
18 the relevant market and reduce output. *See, e.g.*, FACC ¶¶ 9, 17, 66.

19 Finally, Counterdefendants’ claims that ICM has failed to plead concerted
20 action ignores ICM’s well-pled allegations that Counterdefendants have engaged in
21 agreements with certain third parties in which the parties agree that they will not
22 compete for online search and access to adult entertainment via websites in .XXX.
23 *Id.* at ¶¶ 32, 35, 39-41, 43, 72, 98-99. These agreements have limited output in the
24 relevant market, and have prevented the proliferation of tube sites and affiliate sites
25 in .XXX. *See, e.g.*, FACC ¶¶ 52, 71.

26 For its remaining claims, ICM has pled sufficient facts to support its Lanham
27 Act, unfair competition, and tortious interference claims under the applicable
28 pleading standards. Moreover, none of ICM’s counterclaims are barred by the

1 *Noerr-Pennington* Doctrine or the California litigation privilege. Based on the
2 foregoing, and for the reasons set forth below, Counterdefendants’ motion should
3 be denied in its entirety.

4 **II. FACTUAL ALLEGATIONS**

5 Manwin’s dominance in the adult entertainment industry, and specifically
6 the market for search and access to online adult entertainment via websites was the
7 result of the paradigm shift that took place after 2005 when tube sites supplanted
8 affiliate sites as the primary mechanism to search and access online adult
9 entertainment. FACC ¶¶ 10-16. Manwin established dominance in the tube site
10 market by purchasing YouPorn.com, the most popular online tube site, as well as
11 other tube sites such as xTube.com, Pornhub.com, Extreme Tube, Sextube,
12 Gaytube and Spankwire¹ *Id.* at ¶ 15. Threatened by the potential impact the .XXX
13 TLD may have on Manwin’s search engine results and tube site traffic, Manwin
14 engaged in a series of anti-competitive and unlawful acts to prevent commercial-
15 ization of .XXX and stifle competition in the relevant market. *See generally id.* at
16 ¶¶ 19-46. Under the guise of a purportedly legitimate intellectual property
17 protection policy, Manwin conditioned involvement in its affiliate programs on a
18 boycott of .XXX (*id.* at ¶ 35), and colluded with other third parties to boycott
19 .XXX. *Id.* at ¶ 55. Moreover, Manwin has engaged in tying arrangements and
20 horizontal agreements between competitors, all in violation of the Sherman Act,
21 and has unlawfully interfered with ICM’s contract and prospective economic
22 advantage in violation of unfair competition law. *Id.* at ¶¶ 32, 33, 35, 37, 39, 40,
23 43, 55.

24 **III. ARGUMENT**

25 **A. ICM Adequately Alleges a Relevant Product Market**

26 Manwin’s argument that ICM has failed to plead a relevant market
27 completely ignores the commercial realities of the adult entertainment industry as

28 ¹ Counterdefendants are reported to operate and/or control other “tube” sites.

1 noted above, as well as the law of the Ninth Circuit. As set forth below, although
2 the Ninth Circuit does not require the relevant market to be pled with specificity,
3 ICM sufficiently pleads the relevant market for its antitrust counterclaims.

4 **1. Relevant Market Need Not Be Pled With Specificity and Need Only be**
5 **Facially Sustainable**

6 There is no requirement that a relevant market and power within that market
7 be “pled with specificity.” *Newcal Indus. v. Ikon Office Solutions*, 513 F.3d 1038,
8 1044-45 (9th Cir. 2008); see *Cost Management Services, Inc. v. Washington*
9 *Natural Gas Co.*, 99 F.3d 937, 950 (9th Cir. 1996). Therefore, Manwin’s
10 arguments that ICM’s relevant market definition is “ill-defined” is unfounded.
11 “An antitrust complaint will survive a Rule 12(b)(6) motion unless it is apparent
12 from the face of the complaint that the alleged market suffers a fatal legal defect.”
13 *Id.* “And since the validity of the “relevant market” is typically a factual element
14 rather than a legal element, alleged markets survive scrutiny under Rule 12(b)(6)
15 subject to factual testing by summary judgment or trial.” *Id.* (citing *See High*
16 *Technology Careers v. San Jose Mercury News*, 996 F.2d 987, 990 (9th Cir. 1993))
17 (market definition depends on “a factual inquiry into the commercial realities faced
18 by consumers”).

19 Instead, the proper inquiry on a motion to dismiss looks only to whether the
20 relevant market definition is “facially unsustainable.” *Id.* A “facially
21 unsustainable” relevant market definition exists where “the plaintiff fails to define
22 its proposed relevant market with reference to the rule of reasonable
23 interchangeability and cross-elasticity of demand, or alleges a proposed relevant
24 market that clearly does not encompass all interchangeable substitute products
25 even when all factual inferences are granted in plaintiff’s favor.” *William*
26 *Dominick v. Collectors Universe, Inc.*, 2012 U.S. Dist. LEXIS 141950, Case No.
27 2:12-cv-04782-ODW (CWx), at * 15 (C.D. Cal. Oct. 1, 2012).

28 Therefore, and as stated by this Court in its ruling on the prior 12(b)(6)

1 motions directed at Manwin’s own complaint, a complaint should not be dismissed
2 under Rule 12(b)(6) as “facially unsustainable” unless the defined relevant market
3 pled does not account for reasonable interchangeability or cross-elasticity of
4 demand. *See id.*; accord *Manwin Licensing S.A.R.L, et al. v. ICM Registry, LLC*,
5 No. CV 11-9514 PSG (JCx), 2012 U.S.Dist.LEXIS 125126, at *19 (C.D.Cal. Aug.
6 14, 2012) (a relevant market must “encompass the product at issue as well as all
7 economic substitutes for the product”).

8 **2. ICM Has Sufficiently Pled a Facially Sustainable Relevant Market**

9 As pled, ICM’s relevant market properly accounts for reasonable substitutes
10 and cross-elasticity of demand and is therefore facially sustainable. ICM’s
11 relevant market for its antitrust counterclaims is defined as “search and access to
12 adult entertainment via websites,” including tube sites and the relevant
13 substitutes—affiliate sites—which were the early predecessors of tube sites.
14 FACC ¶¶ 11, 13. Manwin’s motion simply mischaracterizes and (deliberately)
15 misstates ICM’s market allegations. Like tube sites, the essential purpose of these
16 sites is not to sell a product but to amass traffic that can then be marketed and sold
17 to others, namely content providers and advertisers. Thus, the relevant market pled
18 by ICM properly takes into account all reasonable substitutes such as affiliate sites,
19 or sites that operate like tube sites that provide search and access to adult
20 entertainment online via websites. FACC ¶¶ 52, 62, 69, 76.

21 **3. ICM Has Properly Pled Anti-competitive Effects Establishing Manwin’s**
22 **Market Power**

23 The Supreme Court has made clear that there are two ways of proving
24 market power. One is through direct evidence of anticompetitive effects. *See FTC*
25 *v. Indiana Fed’n of Dentists*, 476 U.S. 447, 460-61 (1986) (“the finding of actual,
26 sustained adverse effects on competition in those areas where IFD dentists pre-
27 dominated, viewed in light of the reality that markets for dental services tend to be
28 relatively localized, is legally sufficient to support a finding that the challenged

1 restraint was unreasonable even in the absence of elaborate market analysis.”) The
2 other way is by proving relevant product and geographic markets and showing that
3 the defendant’s share exceeds whatever threshold is important for the practice in
4 the case. *See, e.g., United States v. E.I. du Pont de Nemours & Co.*, 351 U.S. 377
5 (1956); *United States v. Grinnell Corp.*, 384 U.S. 563 (1966). Thus, “[as] a matter
6 of law, the absence of proof of market power does not justify a naked restriction on
7 price or output.” *Indiana Fed’n of Dentists*, 476 U.S. at 458 (emphasis added).
8 “Such a restriction requires some competitive justification even in the absence of a
9 detailed market analysis.” *Id.* “[P]roof of actual detrimental effects, such as
10 reduction of output, can obviate the need for an inquiry into market power, which
11 is but a surrogate for detrimental effects.” *Id.*

12 Here, ICM has properly pled the detrimental anti-competitive effects of
13 Manwin’s group boycott of .XXX. ICM has pled that Manwin has entered into
14 horizontal agreements with webmasters in its affiliate program to withhold from
15 these affiliates a particular good or service that they may desire, specifically the
16 right to register and use certain .XXX domain names. FACC ¶¶ 32, 35, 46, 55(c),
17 72. Such agreements limit consumer choice by impeding the “ordinary give and
18 take of the market place” and is anticompetitive. *See National Society of*
19 *Professional Engineers v. United States*, 435 U.S. 679, 692 (1978). Moreover,
20 reducing the output of .XXX domain name registrations has no pro-competitive
21 purpose but has detrimental effects, namely, a reduced output of quality controlled
22 goods and services². Therefore, ICM has properly pled direct evidence of
23 anticompetitive effects and need not engage in an elaborate market analysis.

24
25 ² As ICM stated in its counterclaims, .XXX is a sponsored TLD that effectively acts as a seal
26 program under the International Foundation for Online Responsibility (“IFFOR”), and like
27 IFFOR, is dedicated to combating images of child abuse and child pornography and protecting
28 the privacy, security and consumer rights of consenting adult consumers of online adult
entertainment. FACC ¶¶ 46,47. In reducing the output of .XXX domain name registrations,
Manwin is reducing the number of adult entertainment websites, specifically, websites for
searching and accessing adult entertainment online that meet the above specified quality control
criteria.

1 **4. ICM Has Properly Pled Manwin’s Market Power by Direct Evidence**

2 ICM has also pled market power in the relevant market by direct evidence.
3 In *Toys “R” Us v. FTC*, 221 F.3d 928, 936-937 (7th Cir. 2000), the Seventh Circuit
4 applied the *Northwest Stationers*³ criteria to find that a toy retailer who engaged in
5 a group boycott but held only 20% market share in the relevant market nonetheless
6 had market power sufficient to violate federal antitrust laws. In that case, Toys-R-
7 Us argued unsuccessfully that the FTC could not demonstrate anticompetitive
8 effects in the market unless it first proved that it had a large market share. The
9 court disagreed, explaining that market share is only one way of estimating market
10 power, which can be established through direct evidence. *Id.* Thus, the plaintiff
11 was able to show Toys-R-Us’s market power when it showed that the toy retailer’s
12 group boycott resulted in reduced output, which in turn protected Toys-R-Us from
13 having to lower its prices to meet its competitors price levels. *Id.* Thus, plaintiffs
14 were able to show Toys-R-Us’s market power by direct anticompetitive effects. *Id.*

15 Similarly, here, ICM has pled the existence of a group boycott. This boycott
16 fits the criteria of a group boycott as outlined by the court in *Northwest Stationers*
17 since the boycott cuts off ICM’s access to its consumer base—i.e., affiliate site
18 operators—and has been instituted by Manwin, a dominant party in the relevant
19 market. FACC ¶¶ 32, 35, 39-41, 43, 72, 98-99. Moreover, the reduced output of
20 .XXX domain name registrations does not enhance overall efficiency in the
21 relevant market since it will reduce the number of websites that undergo the quality
22 control measures instituted by IFFOR, ICM’s sponsoring organization. *Id.* at ¶¶ 30,
23 36, 46, 47, 55(f). Further, and in any event, ICM has sufficiently pled Manwin’s
24 market power based on its dominant share of adult content websites, including tube

25 _____
26 ³ The Supreme Court in *Northwest Wholesale Stationers, Inc. v. Pacific Stationery & Printing*
27 *Co.*, 472 U.S. 284 (1985), determined that a group boycott was illegal *per se* if: (1) the
28 boycotting firm has cut off access to a supply, facility or market necessary for the boycotted firm
to compete; (2) the boycotting firm possesses a “dominant” position in the market (where
“dominant” is an undefined term, but plainly chosen to mean something different from antitrust’s
term of art “monopoly”); and (3) the boycott, cannot be justified by plausible arguments that it
was designed to enhance overall efficiency. *Id.* at 294.

1 sites. *Id.* at ¶¶ 9, 10-18, 28, 40, 52, 66. Accordingly, ICM has sufficiently
2 established Manwin’s market power through specific allegations of its market
3 share and the anticompetitive effects of Manwin’s group boycott.

4 **5. Counterdefendants Distort ICM’s Relevant Market Definition**

5 In their Motion, Counterdefendants grossly and intentionally misconstrue
6 ICM’s relevant market definition by asserting that it encompasses large search
7 engines such as Google, Yahoo!, and Bing. Counterdefendants then incorrectly
8 conclude that ICM’s relevant market definition fails because Manwin does not
9 have market power in this broad market. However, Counterdefendants’
10 interpretation of ICM’s relevant market definition is unreasonable because it does
11 not accurately account for cross-elasticity of demand or reasonable
12 interchangeability of products or services in the relevant market.

13 “Reasonable interchangeability of use refers to consumers ability to switch
14 from one product or service to another.” *America Online, Inc. v. GreatDeals.Net*,
15 49 F.Supp.2d 851, 858 (E.D. Va. 1999), *citing* ABA Section of Antitrust Law,
16 Antitrust Law Developments 500 (4th ed. 1997). This Court’s decision in
17 *LiveUniverse, Inc. v. MySpace, Inc.*, Case No. CV 06-6994 AHM (RZx), 2007
18 U.S.Dist. LEXIS 43739 (C.D.Cal. June 4, 2007), is instructive of reasonable
19 interchangeability. In *LiveUniverse*, this Court upheld a broad characterization of
20 the applicable relevant market “Internet-based social networking in the geographic
21 region of the United States,” since it properly identified a market consisting of
22 social networking sites and appropriate substitutes for those sites. *Id.* at *10-19.

23 Analogous to Counterdefendants’ criticism here, the *LiveUniverse*
24 defendants argued unsuccessfully that the market for “Internet-based social
25 networking sites” was not a “plausible” market for purposes of the Sherman Act
26 since it failed to account for other kinds of social networking that are
27 interchangeable, such as online dating sites and AOL Internet connectivity
28 services. *Id.* This Court rejected this argument, finding that online dating and

1 internet connectivity were unlikely to fill the void created by the departure of
2 MySpace and were thus not interchangeable with internet-based social networking.
3 *Id.* Thus, the Court upheld the plaintiff’s relevant market definition as properly
4 pled and encompassing all reasonable substitutes.

5 Here, as in *LiveUniverse*, ICM’s market definition takes into account
6 interchangeability and reasonable substitutes such as affiliate sites, but not search
7 engines, the Internet, or any other broad category that is not a reasonable substitute
8 for the products and services in the relevant market based upon the commercial
9 realities in the relevant market. Just as users of MySpace would not fill the void
10 created by the departure of MySpace by joining an online dating site or other
11 Internet connectivity sites, the shutdown of adult content tube sites would not
12 result in an exodus *en masse* to Yahoo!, Google or Bing. Instead, tube site surfers
13 would migrate to sites that function like tube sites, such as the affiliate sites.

14 Likewise, *LiveUniverse* forecloses Counterdefendants’ argument that adult
15 content non-tube sites are reasonable substitutes for tube sites. Whereas the
16 essential function of tube sites and affiliate sites is to amass traffic and then sell or
17 market that traffic to third parties, the essential purpose of non-tube sites is to sell
18 adult entertainment content and get subscriptions. Since the essential purpose of
19 tube sites and non-tube sites are different, non-tube sites are not reasonable
20 substitutes for tube sites in the relevant market. For these reasons, the relevant
21 market definition pled by ICM is proper and facially sustainable.

22 **ICM Adequately Alleges Harm to Competition through Manwin’s**
23 **Horizontal Agreements**

24 Congress designed the Sherman Act as a “consumer welfare prescription.”
25 *See Reiter v. Sonotone Corp.*, 442 U.S. 330, 343 (1979). Injury to competition
26 requires a showing of actual detrimental competitive effects such as output
27 decreases, price increases, harm to the quality of goods or other effects that impact
28 the efficiency of the market. *Les Shockley Racing v. National Hot Rod Assn.*, 884

1 F.2d 504, 508 (9th Cir. 1989); *Theme Promotions, Inc. v. News Am. FSI, Inc.*, Case
2 No. C-97-4617-VRW, 1998 U.S. Dist. LEXIS 23561, * 21 (N.D. Cal. Aug. 7, 1998).

3 Allegations that a defendant harmed competition in the relevant market are
4 adequate allegations of antitrust injury. *Coal. for ICANN Transparency, Inc. v.*
5 *Verisign*, 611 F.3d 495, 502 (9th Cir. 2010). Agreements between competitors in
6 the same market (referred to as “horizontal agreements”) injure competition.
7 *Brantley v. NBC Universal, Inc.*, 675 F.3d 1191, 1198 (9th Cir. 2012) citing *United*
8 *States v. Brown*, 936 F.2d 1042, 1045 (9th Cir. 1991). “For example, a horizontal
9 agreement that allocates a market between competitors and restrict[s] each
10 company’s ability to compete for the other’s business may injure competition.” *Id.*

11 As discussed above, ICM has sufficiently alleged that Manwin’s anti-
12 competitive activities have resulted in output restrictions on adult entertainment
13 websites within the .XXX domain, thereby preventing existing and potential
14 competitors from competing in online search and access to adult entertainment via
15 websites, and resulting in poorer quality product options within that market. In
16 reducing the output of .XXX domain name registrations, Manwin is reducing the
17 number of adult entertainment websites in the relevant market that meet the quality
18 control standards prescribed by IFFOR to the detriment of both consumers and
19 purveyors of goods and services in that market. Thus, Manwin’s anticompetitive
20 activities have resulted in poorer quality goods in the relevant market and harmed
21 competition.

22 Moreover, the alleged horizontal agreements that Manwin has entered into
23 with certain third party affiliates have further injured competition. Manwin’s tube
24 sites compete with affiliate sites for web traffic in the relevant market. By
25 allocating a market among themselves and agreeing to output restrictions by
26 restricting their activities to the sphere outside .XXX, Manwin and its affiliates
27 have impeded the ordinary give-and-take that exists in the market, thereby harming
28 competition. For these reasons, ICM has adequately pled harm to competition

1 above and beyond harm to itself.

2 Counterdefendants' motion ignores these well-pled allegations of harm to
3 competition, and instead mischaracterizes that ICM merely alleges that Manwin
4 has engaged in (1) a refusal to deal, (2) hard negotiating, and (3) the making of
5 disparaging state-ments that hurt ICM but not competition itself. These arguments
6 are unpersuasive since they ignore the plain unambiguous language of ICM's
7 counterclaims which allege horizontal agreements between Manwin and its
8 competitors. FACC ¶ 55. The result of these agreements are the output restrictions
9 outlined above. As this Court determined in its August 14, 2012 Order on ICM's
10 motion to dismiss (Doc. 40), output restrictions in fact injure competition.
11 *Manwin*, 2012 U.S.Dist.LEXIS 125126, at *29.

12 **C. ICM Has Sufficiently Pled Antitrust Injury and Standing**

13 The Ninth Circuit recognizes that suppliers of goods and services to an
14 affected market are market participants capable of suffering antitrust injury.
15 *American Ad Mgmt., Inc. v. General Tel. Co.*, 190 F.3d 1051, 1057-1058 (9th Cir.
16 1999) (while consumers and competitors are most likely to suffer antitrust injury
17 there are situations in which other market participants such as dealers, suppliers
18 and potential entrants may suffer antitrust injury). Indeed, these parties suffer
19 antitrust injury if the injury incurred is of the type the antitrust laws were intended
20 to prevent, and that flow from that which makes defendants acts unlawful. *Id.* at
21 1055 (citing *Atl. Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328, 334 (1990)).

22 ICM's injury is a result of its inability to supply goods and services to
23 affiliates and others within the .XXX TLD and in the relevant market for online
24 search and access to adult entertainment content through websites. This injury is a
25 direct result of the output restrictions resulting from Manwin's group boycott and
26 other alleged anticompetitive activity. Injury resulting from group boycotts that
27 reduce output and result in poorer quality goods and services are precisely the
28 types of injuries the antitrust laws were intended to prevent. *Indiana Fed'n of*

1 *Dentists*, 476 U.S. at 458; *Les Shockley Racing v. National Hot Rod Assn.*, 884
2 F.2d 504, 508 (9th Cir. 1989); *Theme Promotions, Inc.*, 1998 U.S. Dist. LEXIS
3 23561 at * 21. Therefore, as a supplier or dealer of goods in the relevant market,
4 ICM has suffered antitrust injury as a result of Manwin's anticompetitive conduct.

5 Manwin incorrectly argues that ICM has failed to adequately plead antitrust
6 injury because it has failed to allege direct antitrust injury. Manwin's reliance on
7 *Dick Geothermal Corp. v. Thermogenics, Inc.*, 890 F.2d 139, 148 (9th Cir. 1989),
8 for this proposition is misplaced since the plaintiff in that case was *not* a
9 participant in, and did *not* provide goods or services to, the affected market. Here,
10 unlike the plaintiff in *Thermogenics*, ICM is a market participant and supplier of
11 .XXX TLDs to the affected adult entertainment market. Likewise, Manwin's
12 reliance on *Associated Gen. Contractors v. Cal. State Council of Carpenters*, 459
13 U.S. 519, 539-40 (1983) is inapposite because that case involved indirect injuries
14 suffered by a trade association on account of the injury suffered by its members.
15 Here, ICM is not a trade association and it has not alleged injury to its members,
16 but rather has alleged injury to itself and those in the relevant market arising from
17 the output restrictions Manwin has imposed on its affiliates.

18 Finally, Manwin's reliance on *Illinois Brick Co. v. Illinois*, 431 U.S. 720
19 (1977) is wholly inapplicable since that case involved a suit by indirect purchasers.
20 ICM is a direct market participant, not an indirect purchaser. Manwin's argument
21 that ICM has not experienced antitrust injury also ignores the fact that, as a registry
22 operator, ICM is a direct participant in the market for online search and access to
23 adult content via websites because it supplies domain names to registrars, who then
24 sell domain names to registrants (website operators), who in turn supply adult
25 content to end users. Moreover, ICM has an online search service (search.xxx) and
26 an online directory services (xxx.xxx) which direct consumers to .XXX adult
27 content sites. These registrants include purveyors of online adult entertainment
28 content just like Manwin, who are precisely the registrants targeted by the .XXX

1 TLD. FACC ¶¶ 46-47.

2 Manwin’s arguments would bar its own antitrust claims in this suit for lack
3 of injury and standing. Manwin alleges in its Complaint that it has suffered
4 antitrust injury as a result of “supracompetitive prices” for .XXX defensive domain
5 name registrations. First Amended Complaint (“FAC”) (Doc. 28) ¶ 74. However,
6 based on its own reasoning, Manwin is nothing more than an indirect purchaser
7 (who cannot suffer direct antitrust injury from ICM’s actions) since it does not
8 purchase directly from ICM but rather from domain name registrars (e.g.,
9 GoDaddy.com, Moniker.com, NameCheap.com), who themselves are the direct
10 purchasers of ICM’s products and services and the direct victims of ICM’s alleged
11 anticompetitive behavior.⁴ Manwin cannot be allowed to argue that ICM cannot
12 suffer direct antitrust injury as an indirect purchaser on the one hand, and then
13 argue by the same reasoning that Manwin has injury and standing as an indirect
14 purchaser of .XXX TLD registrations from ICM.

15 In sum, unlike Manwin, ICM is not an indirect purchaser of goods in the
16 affected market. It is in fact a market participant who supplies goods and services
17 to the affected market. Thus, the cases cited by Manwin that an indirect purchaser
18 does not suffer direct antitrust injury are inapplicable. Indeed, the .XXX TLD can
19 be used for little else than for supporting the adult entertainment industry, which is
20 precisely the market affected by Manwin’s group boycott. Therefore, Manwin’s
21 arguments that ICM has not sustained antitrust injury is unavailing.

22 **D. ICM Adequately Alleges Concerted Conduct**

23 **1. ICM Has Pled Bilateral Agreements**

24 To survive a motion to dismiss a Sherman Act Section One claim, a plaintiff
25 is required to allege “circumstance[s] pointing toward a meeting of the minds” to
26 support a plausible claim for conspiracy. *Bell Atl. Corp. v. Twombly*, 550 U.S.

27
28 ⁴ Founders and Premium names can be purchased from ICM directly, but can only be registered through a registrar. In any event, Manwin has not purchased any of its names from ICM.

1 544, 557 (2007). A Section One claim is sufficiently pled if the “complaint
2 contains enough factual matter (taken as true) to suggest that an agreement was
3 made.” *Id.* at 555. “Asking for plausible grounds to infer an agreement does not
4 impose a probability requirement at the pleading stage; it simply calls for enough
5 fact to raise a reasonable expectation that discovery will reveal evidence of illegal
6 agreement. And, of course, a well-pleaded complaint may proceed even if it strikes
7 a savvy judge that actual proof of those facts is improbable, and ‘that a recovery is
8 very remote and unlikely.’” *Id.* (internal citations omitted).

9 Here, ICM has pled sufficient facts, taken as true, to plausibly suggest an
10 agreement was made between Manwin and various parties to boycott .XXX and
11 restrict their competitive activities for online adult entertainment search traffic to
12 TLDs other than .XXX. FACC ¶¶ 32, 37, 39-40, 53, 55(b)-(d). ICM has alleged
13 that, per the terms of Manwin’s agreements with its affiliates, Manwin demanded a
14 boycott of .XXX, specifically that the affiliates would not register certain domain
15 names, URLs or paid advertising schemes with .XXX. *Id.*, ¶¶ 32, 35, 39-41, 43,
16 72, 98-99. Indeed, not only has ICM pled facts sufficient to show that Manwin
17 engaged in concerted action with various parties, but it has also pled facts
18 revealing the motive and intent of Manwin sufficient to show the plausibility of the
19 existence of these agreements: Manwin feared that if .XXX were successfully
20 launched, the lack of .XXX in the URL of Manwin’s tube sites could result in a
21 loss of search engine traffic to these tube sites. *Id.* ¶¶ 19-20. These fears motivated
22 Manwin to enter into the above referenced agreements to boycott .XXX. *Id.*

23 Manwin’s assertion that a Sherman Act Section One claim requires the
24 plaintiff to “specifically plead the person who made the alleged agreement, and the
25 date, time and place of its making” simply misstates the law regarding the requisite
26 pleading necessary to establish concerted action. Manwin cites *Kendall v. Visa*
27 *U.S.A., Inc.*, 518 F.3d 1042, 1048 (9th Cir. 2008) to support its assertion. But
28 *Kendall* cited no such affirmative obligation, rather, the court merely made a

1 fleeting comment in *dicta* that the complaint in that case did not answer the basic
2 questions: who did what, to whom (or with whom), where, and when, even after
3 plaintiffs had an opportunity to take depositions (a circumstance that is wholly
4 lacking here).⁵

5 Federal Rule of Civil Procedure 8(a)(2) requires only “a short and plain
6 statement of the claim showing that the pleader is entitled to relief,” in order to
7 “give the defendant fair notice of what the . . . claim is and the grounds upon which
8 it rests.” *Twombly*, 550 U.S. at 155 (citing *Conley v. Gibson*, 355 U.S. 41, 47
9 (1957)). To state a Section One claim, it is *not* necessary for the complainant to
10 plead with specificity when the agreement took place, who was involved, when it
11 happened, where it happened and all the parties to the agreement--so long as it
12 pleads with sufficient specificity that a “meeting of minds” occurred between the
13 parties. *Id.* Under the correct standard, ICM has sufficiently pled a “meeting of the
14 minds” to sustain its Section One claim.

15 **E. ICM Adequately Alleges Predatory and Anti-Competitive Conduct in**
16 **Support of its Antitrust Claims**

17 **1. Predatory Agreements and Other Conduct**

18 Although the Sherman Act does not restrict one’s freedom to decide with
19 whom one will or will not do business, “group boycotts, or concerted refusals by
20 traders to deal with other traders,” have long been held to be *per se* illegal. *Klor’s*
21 *v. Broadway-Hale Stores*, 359 U.S. 207, 212 (1959). “Even where they operate to
22 lower prices or temporarily stimulate competition,” group boycotts or concerted
23 refusals to deal are prohibited. *Id.* “Such agreements, no less than those to fix
24 minimum prices, cripple the freedom of traders and thereby restrain their ability to
25

26 ⁵ Likewise, Manwin’s reliance on *In re Late Fee and Over-limit Fee Litig.*, 528 F.Supp.2d 953,
27 962 (N.D.Cal. 2007), is unavailing. Again, the court merely observed that these details had not
28 been pleaded, not that the plaintiff had an affirmative duty to plead each of these things.
Moreover, unlike these cases where the existence of a contract was completely speculative, ICM
has alleged an actual contract, namely, Manwin’s webmaster agreements that demonstrate
concerted action. FACC ¶ 35.

1 sell in accordance with their own judgment.” *U.S. v. Patten*, 226 U.S. 525, 542
2 (1913).

3 This is precisely the predatory and anti-competitive conduct alleged by ICM
4 in its counterclaims. ICM has alleged that the independence of webmasters and
5 certain third party affiliates to purchase .XXX domain name registrations has been
6 impeded by virtue of the anticompetitive agreements which Manwin has forced on
7 those parties. FACC ¶¶ 32, 37, 39-40, 53, 55(b)-(d).⁶ Accordingly, ICM has
8 sufficiently pled a group boycott or concerted refusal to deal to sustain its Section
9 One and Section Two claims.

10 **2. ICM Has Sufficiently Pled Predatory Conduct for its Section 2 Claim**

11 A coordinated campaign to exclude a market participant from the market,
12 resulting in reduction of output, is predatory conduct even though the individual
13 acts alone may not be *per se* predatory or anticompetitive. *See Indiana Fed’n of*
14 *Dentists*, 476 U.S. 447 (1986) (trade union established to prevent the submission of
15 documents to insurers that suppressed competition among dentists violated Section
16 One of the Sherman Act); *see generally PNY Techs., Inc. v. SanDisk Corp.*, Case
17 No. C-11-04689 YGR, 2012 U.S. Dist. LEXIS 55965, *36 (N.D. Cal. Apr. 20,
18 2012).

19 Here, the totality of Manwin’s conduct constitutes a coordinated campaign
20 to exclude ICM from the relevant market, resulting in reduced output of .XXX
21 domain name registrations and quality-controlled goods and services within the
22 .XXX TLD. Taken together, Manwin’s (1) business negotiations, (2) plans to form
23 a trade association, (3) disparaging statements and (4) this lawsuit establish a
24 campaign of predatory conduct as outlined below.

25 **a. Business Negotiations**

26 Manwin wrongly claims that its pre-suit negotiations with ICM regarding

27 _____
28 ⁶ Even if Manwin’s boycott were designed and implemented to reduce the alleged “supra-competitive prices” charged for .XXX domain names, the boycott would still be illegal because the independence of traders takes precedent over low prices. *Patten*, 226 U.S. at 542.

1 the .XXX TLD goods and services were not anticompetitive, and inaccurately
2 characterizes them as mere “price negotiations.” However, ICM’s counterclaims
3 allege that these negotiations did not merely involve price, but involved the nature
4 and quality of goods to be disseminated by ICM. FACC ¶ 55(e)-(f). As alleged in
5 the counterclaims, Manwin sought assurances that neither ICM nor IFFOR would
6 limit or prevent tube sites from existing in .XXX (with the obvious effect, *inter*
7 *alia*, that Manwin’s tube sites could then continue to host copyright-infringing
8 material). FACC ¶¶ 30, 31, 55(e). As such, Manwin sought to impede the
9 production of a quality product that met the requirements of IFFOR. Such an
10 agreement would limit consumer choice and is thereby anticompetitive. Moreover,
11 at no time were such business negotiations interpreted by ICM as settlement
12 negotiations sufficient to invoke the settlement privilege of Federal Rule of
13 Evidence 408.⁷ Manwin takes the declaration of Stuart Lawley, ICM’s Chairman
14 and CEO, out of context and seizes upon discrete references to “threats” of
15 litigation to wrongly cloak all business development discussions between ICM and
16 Manwin with the settlement privilege.⁸

17 **b. Manwin’s Prohibited Trade Association Plans**

18 Manwin’s assertion that plans to form an adult industry trade association are
19 not anticompetitive ignores ICM’s actual allegations in its counterclaims. ICM
20 alleges that Manwin intends to form such an association to maintain its monopoly
21 and market power and to exclude smaller webmasters with whom it, Manwin,
22 competes in the relevant market. FACC ¶ 46. Trade associations “do not fall under
23 the interdiction of the [Sherman] Act,” *unless they make agreements “with respect*
24 *to prices or production or restraining competition.” Sugar Instit., Inc. v. United*

25 _____
26 ⁷ Nor were they impliedly or expressly stated by Mawnin as settlement discussions. In fact,
27 when ICM expressly requested confidentiality agreements for those discussions, Manwin said
28 they were not needed because nothing being discussed was confidential. *See* ICM’s Opposition
to Special Motion to Strike Pursuant to Cal. Code Civ. Proc. § 425.16, (Doc. 78), pp.10-12.

⁸ *See* Lawley Decl. in Support of ICM’s Opposition to Special Motion to Strike, (Doc.78-1),
¶¶ 2-4.

1 *States*, 297 U.S. 553, 558-59 (1936) (emphasis added). That is precisely the
2 allegation here. Thus, ICM has sufficiently pled a proscribed trade association to
3 restrain trade in the relevant market in violation of the Sherman Act.

4 **c. Manwin’s Disparaging Statements**

5 ICM pled the disparaging statements in support of its fifth counterclaim for
6 unfair competition under Section 43(a) of the Lanham Act, not in support of its
7 Sherman Act claims.

8 **d. This Lawsuit**

9 Manwin claims that the Sherman Act counterclaims at issue are barred
10 because the filing of this lawsuit is protected by the *Noerr-Pennington* doctrine,
11 and thus cannot constitute predatory conduct.⁹ However, even if this were true (and
12 it is not, see below), other anticompetitive acts alleged need not be dismissed
13 merely because one element of the scheme is protected under *Noerr-Pennington*.
14 *Clipper Exxpress v. Rocky Mountain Motor Tariff*, 690 F.2d 1240 (1982).

15 Here, ICM has alleged additional predatory and anticompetitive conduct,
16 aside from Manwin’s filing of the instant suit, that consist of separate violations of
17 the Sherman Act, including group boycotts, tying arrangements, and horizontal
18 agreements between competitors. FACC ¶¶ 32, 33, 35, 37, 39, 40, 43, 55. Manwin
19 thus cannot insulate itself from antitrust liability for the other anticompetitive acts
20 alleged in the counterclaims merely because this lawsuit may be protected under
21 *Noerr-Pennington*. In any event, ICM has properly pled in its counterclaims and
22 motion to dismiss (Doc. 29) that this lawsuit is (1) objectively baseless, and (2) a
23 concealed attempt to interfere with ICM’s business relationships sufficient to fall
24 under the “sham” exception to *Noerr-Pennington*. FACC ¶¶ 20-21, 24-25.

25
26 ⁹ The *Noerr-Pennington* doctrine immunizes from antitrust liability those who face antitrust
27 charges based on their petitions to any of the three branches of government, but does not protect
28 petitioning activity that is a mere “sham” to cover an attempt to interfere directly with the
business relationships of a competitor. See generally *E.R.R. Presidents Conference v. Noerr
Motor Freight, Inc.*, 365 U.S. 127, 144 (1961); *United Mine Workers of Am. v. Pennington*, 381
U.S. 657 (1965).

1 **F. ICM’s Attempt and Conspiracy Claims Are Sufficiently Pled**

2 “It is not necessary that plaintiffs plead market share in a complaint to have
3 adequately pled that defendants have a dangerous probability of success in monop-
4 olizing the relevant market.” *Axiom Advisers and Consultants, Inc., v. School*
5 *Innovations and Advocacy, Inc.*, 2006 U.S.Dist.LEXIS 11404, at * 19-20 (E.D.Cal
6 Mar. 20, 2006). Although market share may be the most significant factor in
7 determining monopoly power, it is not exclusive. *Id.* Indeed, the Ninth Circuit has
8 cautioned courts to be wary of the numbers game of market percentage when
9 considering attempt-to-monopolize claims.” *Rebel Oil v. Atlantic Richfield Co.*, 51
10 F.3d 1421, 1438 (9th Cir. 1995) (citing *Dimmitt Agri Indus., Inc. v. CPC Int’l, Inc.*
11 679 F.2d 516, 533 (9th Cir. 1982) (internal citations omitted).

12 Factors relevant to determining dangerous probability include but are not
13 limited to whether defendant is a multi-market firm, the number and strength of
14 other competitors, market trends, and entry barriers, as well as a defendant’s
15 market share. *Id.* (citing *Multistate Legal Studies, Inc. v. Harcourt Brace*
16 *Jovanovich Legal and Professional Publications, Inc.*, 63 F.3d 1540 (9th Cir.
17 1995)). More generally, but equally applicable, the plaintiff in an attempted
18 monopolization case “must plead its claim but need not plead its evidence.”
19 *Momento, Inc. v. Seccion Amarilla USA*, Case No. C 09-1223 SBA, 2009
20 U.S.Dist.LEXIS 85295, * 12-13 (N.D.Cal. Sep. 16, 2009) (citing *Tele Atlas N.V. v.*
21 *NAVTEO Corp.*, 397 F.Supp.2d 1184 (N.D.Cal. 2005) (sustaining complaint of
22 exclusive dealing against plaintiff’s rival even though complaint did not name the
23 firms with whom exclusive dealing was allegedly imposed)).

24 In its counterclaims, ICM has pled facts tending to show a dangerous
25 probability that Manwin will establish a monopoly in the relevant market. Manwin
26 is the only adult entertainment operator of its size conducting significant operations
27 in both free and subscription-based websites. FACC ¶ 18. Manwin’s portfolio of
28

1 free and paid sites¹⁰ uniquely positions Manwin to engage in tying arrangements
2 forbidden by the Sherman Act. Manwin’s position as a large multi-market firm
3 creates a dangerous probability that it will obtain a monopoly in the relevant
4 market. *Id.* at ¶¶ 66-72. Manwin’s arguments that a Section Two monopolization
5 claim requires (1) monopoly power in the relevant market evidenced by the
6 defendant’s control of at least 65% of the market or 50% of the market; and (2)
7 barriers to entry and expansion, improperly reduces “monopoly power” to a
8 numbers-game, and are contrary to applicable law.

9 **G. ICM’s Lanham Act Claim is Sufficiently Pled**

10 Courts hold generally that FRCP Rule 9(b) does not apply to claims for libel
11 and slander. *See, e.g., Kennedy Funding, Inc. v. Chapman*, 2010 U.S. Dist. LEXIS
12 116038, 2010 WL 4509805 at *5 (N.D. Cal., November 1, 2010) (defamation,
13 which encompasses both libel and slander, is not subject to the heightened pleading
14 requirement of Rule 9(b)); *N’Genuity Enterprises Co. v. Pierre Foods, Inc.*, 2009
15 U.S. Dist. LEXIS 81779, 2009 WL 2905722, at *14 (D. Ariz., Sept. 9, 2009) (“The
16 Federal Rules of Civil Procedure do not include [defamation, libel and slander]
17 among the list of allegations that must be pled with particularity, and [a] require-
18 ment of greater specificity for [pleading] particular claims is a result that must be
19 obtained by the process of amending the Federal Rules, and not by judicial
20 interpretation”).

21 **1. Manwin’s Arguments Regarding ICM’s Lanham Act Claim Proceeds**
22 **by an Entirely Incorrect Analysis**

23 Manwin incorrectly asserts that ICM’s Lanham Act counterclaim, which is
24 predicated on Manwin’s libelous statements alleging that ICM committed unlawful
25 anti-competitive conduct, must be pled with more particularity under Rule 9(b).

26
27 ¹⁰ These free websites comprising Manwin’s tube sites such as YouPorn.com, xTube.com,
28 Pornhub.com, Extreme Tube, Sextube, Gaytube and Spankwire. FACC ¶ 15. Manwin’s paid
subscription-based websites consist of Brazzers (which owns approximately 30 pornographic
websites) and other content sites it owns and operates. *Id.* at ¶ 17.

1 Manwin’s cited authority is distinguishable, primarily because the claims at issue
2 in those cases deal with false advertising grounded in fraud, whereas ICM’s
3 counter-claim in the instant case does not.

4 The distinction between pleading requirements for false advertising claims,
5 on the one hand, and unfair competition claims predicated on anticompetitive
6 conduct and trade libel, on the other hand, is underscored by the elements of a false
7 advertising claim: (1) a false statement of fact by the defendant in a commercial
8 advertisement about its own or another’s product; (2) the statement actually
9 deceived or has the tendency to deceive a substantial segment of its audience;
10 (3) the deception is material, in that it is likely to influence the purchasing
11 decision; (4) the defendant caused its false statement to enter interstate commerce;
12 and (5) the plaintiff has been or is likely to be injured as a result of the false
13 statement, either by direct diversion of sales from itself to defendant or by a
14 lessening of the goodwill associated with its products. *Southland Sod Farms v.*
15 *Stover Seed Co.*, 108 F.3d 1134, 1139 (9th Cir. 1997). An unfair competition
16 claim under Section 43(a) of the Lanham Act does not impose these requirements
17 or elements.

18 Unfair competition under the Lanham Act encompasses not only false
19 advertising, but trade libel and product disparagement as well. *See J.T. McCarthy*
20 *on Trademarks and Unfair Competition*(2012) § 27:93 (under the 1989
21 amendments to § 43(a), trade libel and product disparagement claims are now
22 actionable under the act). And under the pleading standards of *Twombly/Iqbal*, a
23 trade libel claimant need only specify the “time, place, and specific content of the
24 false representations, the identities of the parties to the representation, what is false
25 or misleading about the statement, and why it is false.” *Schreiber Distrib. Co. v.*
26 *Serv-Well Furniture Co.*, 806 F.2d 1393, 1401 (9th Cir. 1986); *Vess v. Ciba-Geigy*
27 *Corp. USA*, 317 F.3d 1097, 1106 (9th Cir. 2003) (citations omitted); *Kennedy*
28 *Funding, Inc. v. Chapman*, 2010 U.S.Dist.LEXIS 116038, at *15 (N.D.Cal.

1 November 1, 2010) (defamation is not subject to the heightened pleading standard
2 of Rule 9(b); under *Iqbal*, “plaintiff need only allege facts sufficient to state a
3 ‘plausible claim for relief’”).

4 Additionally, “it is clear that the [Lanham Act] reaches more than the typical
5 advertising campaign.” *Oxycal Lab. v. Jeffers*, 909 F.Supp. 719, 723 (S.D.Cal.
6 1995) (citing *Semco, Inc. v. Amcast, Inc.*, 52 F.3d 108, 112 (6th Cir. 1995) (article
7 written for trade magazine can be commercial promotion); *Bolger v. Youngs Drug*
8 *Products Corp.*, 463 U.S. 60 (1983) (mailing of informational pamphlets by non-
9 profit organization can be commercial speech); *Birthright v. Birthright, Inc.*, 827
10 F.Supp. 1114, 1138 (D.N.J. 1993) (nonprofit fundraising letters can be commercial
11 advertising); *National Artists Mgmt. Co. v. Weaving*, 769 F. Supp. 1224, 1234-36
12 (S.D.N.Y. 1991) (former employee’s “bad-mouthing” of employer can be
13 commercial advertising)).

14 Here, because ICM’s unfair competition counterclaim is not predicated on
15 false statements made in advertising, the pleading requirements of a false
16 advertising claim do not apply, and accordingly Manwin’s arguments proceed
17 entirely on the wrong analysis. Under the proper analysis, ICM’s Lanham Act
18 claim does adequately plead the “time, place, and specific content of the false
19 representations, the identities of the parties to the representation, what is false or
20 misleading about the statement, and why it is false.” *Schreiber Distrib. Co.*, 806
21 F.2d at 1401. ICM expressly identifies Manwin’s press release as containing:

22 [f]alse allegations [that] were reported as established facts rather than
23 mere unproven allegations . . . Manwin stated that this ‘lawsuit reveals
24 ICM intended to exploit the defensive registration process to reap
25 profits and conspired with ICANN to monopolize the .XXX domain
26 TLD’ . . . The report also [referred to] ‘new details about the illegal
27 scheme by ICANN and ICM to eliminate competitive bidding and
28 market restraints in, and to monopolize, the markets for .XXX registry
services.’ These statements were made in a press release dated
February 17, 2011 on Manwin’s website at www.manwin.com. The
press release is and was targeted to members of the adult enter-
tainment industry, including ICM’s actual and prospective customers
seeking registration of domain names in the .XXX TLD. FACC ¶ 84.

1 Moreover, Counterdefendants’ definition of “commercial speech” as state-
2 ments constituting “advertising or promotion” is too narrow. Rather, “commercial
3 speech” looks to the primary motivation of the statement; the gravamen of
4 commercial speech is whether it is primarily motivated by commercial concerns.
5 *Edge Broadcasting Co.*, 509 U.S. at 426; *Oxycal Lab.*, 909 F.Supp. at 720-21, 725.
6 Under this definition, Plaintiffs’ press release constitutes commercial speech under
7 the Lanham Act. Plaintiffs and ICM have overlapping customer bases—i.e., the
8 adult entertainment industry and content providers. Indeed, the press release is
9 clearly motivated by Counterdefendants’ commercial concerns over the
10 competitive impediments posed by the .XXX TLD to their online adult content
11 platforms.

12 **2. ICM Has Standing to Assert a Lanham Act Claim**

13 A plaintiff need only believe that he is likely to be injured in order to bring a
14 Lanham Act claim. *TrafficSchool.com, Inc. v. Edriver Inc.*, 653 F.3d 820, 825 (9th
15 Cir. 2011) (citing 15 U.S.C. § 1125(a)). Indeed, Lanham Act suits “can be brought
16 by any person ‘who believes that he or she is or is likely to be damaged by’ the use
17 of . . . a false description or representation.” *POM Wonderful LLC v. Coca-Cola*
18 *Co.*, 679 F.3d 1170, 1175 (9th Cir. 2012). The “dispositive question” as to a
19 party’s standing to maintain an action under section 43(a) is whether the party “has
20 a reasonable interest to be protected.” *Smith v. Montoro*, 648 F.2d 602, 608 (9th
21 Cir. 1981); *accord Famous Horse Inc. v. 5th Ave. Photo Inc.*, 624 F.3d 106, 112-
22 113 (2d Cir. 2010).¹¹

23 Here, ICM has standing to bring a Lanham Act claim against
24

25 ¹¹ “While stressing the importance of whether the plaintiff and defendant are in competition, our
26 cases, with the exception of *Telecom*, have not treated this factor as a *sine qua non* of standing.
27 Rather, we have said that competition is a factor that strongly favors standing, not that compe-
28 tition is an absolute requirement for standing. Our test for standing has been called the ‘reason-
 able interest’ approach. Under this rubric, in order to establish standing under the Lanham Act, a
 plaintiff must demonstrate (1) a reasonable interest to be protected . . . and (2) a reasonable basis
 for believing that the interest is likely to be damaged . . . We have not required that litigants be in
 competition . . .” *Id.* at 112-113.

1 Counterdefendants, regardless of whether ICM is in direct competition with them.
2 Moreover, ICM and Counterdefendants do compete, if not directly, because the
3 .XXX TLD is geared towards the adult entertainment industry and those who seek
4 to host their adult entertainment content online. Manwin is the licensor of
5 Youporn.com, an online adult entertainment content website, and Digital
6 Playground produces adult entertainment content. FACC ¶ 15; Plaintiffs' FAC
7 ¶¶ 4-5. Therefore, there is commercial overlap between ICM's business and that of
8 Counterdefendants. Indeed, Manwin's press release statements that ICM has
9 committed unlawful, anti-competitive conduct through its operation of the .XXX
10 Registry, creates a basis for ICM to reasonably believe that its business and
11 interests will be damaged. In addition, search.xxx and xxx.xxx are direct
12 competitors to some of Manwin's search properties. See FACC ¶ 31.

13 **H. ICM Sufficiently Pleads its UCL Claim**

14 Counterdefendants challenge ICM's unfair competition claim under Cal.
15 Bus. and Prof. Code section 17200 on the grounds that, because ICM's underlying
16 antitrust and Lanham Act claims (allegedly) fail, so too must ICM's state law
17 unfair competition claim. However, as outlined above, ICM's antitrust and
18 Lanham Act claims are sufficiently pled and thus, under this line of reasoning, so
19 too must be ICM's state unfair competition claim. Moreover, as is apparent from
20 the face of its unfair competition counterclaim, ICM does not seek any relief other
21 than the allowable injunctive relief to restrain Counterdefendants from further acts
22 of unfair competition. FACC ¶¶ 102-103. Thus, Counterdefendants' argument as to
23 the impropriety of relief sought by ICM is inapt.

24 **I. ICM Sufficiently Pleads its Tortious Interference Claim**

25 A claim for interference with prospective economic advantage requires
26 pleading: (1) an existing economic relationship between plaintiff and a third party;
27 (2) defendant's knowledge of that relationship; (3) intentional acts or conduct on
28 the part of the defendant designed to interfere with or disrupt the relationship; (4)

1 actual disruption of the relationship; and (5) economic harm to the plaintiff. *Korea*
2 *Supply Co. v. Lockheed Martin Corp.*, 29 Cal.4th 1134, 1153-54 (2003).

3 ICM has sufficiently pled each and every one of these elements for this
4 claim. It has pled several facts, including: (1) ICM offered advanced registration of
5 .XXX domain names in exchange for a registration fee;¹² (2) members of the adult
6 enter-tainment industry, such as Really Useful, Ltd. and Reality Kings, expressed
7 their intent to enter into and did enter into agreements with ICM for such
8 registrations during the reservation period; (3) under its contracts with Really
9 Useful, ICM was to receive a series of payments, which were deferred because of
10 Plaintiffs' boycott of .XXX registrants (by not taking video uploads, links, sites or
11 ads from .XXX sites); (4) Really Useful intended to enter into additional premium
12 name contracts with ICM for other domains but decided not to do so because of
13 Plaintiffs' boycott, which caused decreased revenue to ICM; (5) Plaintiffs knew
14 about ICM's right to registration offering through various publications; (6)
15 Plaintiffs knew about adult entertainment industry members' intention to obtain the
16 right to registrations through direct contact with these potential registrants and
17 through various online publications/announcements; and (7) Plaintiffs' actions did
18 disrupt ICM's relationships with these prospective registrants who decided to
19 forego registration, resulting in economic harm to ICM or in the case of Really
20 Useful, delayed payment under its Founder's agreement with ICM. FACC ¶¶ 106-
21 115. Nevertheless, in their Opposition, Counterdefendants wholly ignore these
22 well-pled allegations that identify specific relationships and parties with potential
23 and actual economic benefit to ICM. The claim is more than sufficiently pled.

24 **J. Neither the Noerr-Pennington Act nor California's Litigation Privilege**
25 **Bars ICM's Counterclaims**

26 As discussed *supra*, the *Noerr-Pennington* Act does not bar ICM's counter-
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28 ¹² Technically, the payments to ICM were "Founder's fees" for the right to register those names with registrars, and the registration fees then paid by the Founder to the registrar.

1 claims, because ICM has sufficiently alleged facts establishing the applicability of
2 the sham exception to the doctrine. Similarly, California’s litigation privilege
3 under Cal. Civ. Code Section 47(b) also does not bar ICM’s counterclaims that are
4 predicated upon Manwin’s publication of its libelous press release or statements
5 made during business (not settlement) negotiations prior to the filing of this suit.
6 *See* ICM’s Opposition to Motion to Strike (Anti-SLAPP), (Doc. 78), pp.10-12.


7 Further, Manwin’s press release is not protected in any event. Although
8 reports of judicial proceedings are generally an exercise of free speech, the
9 privilege applies only to a “fair and true report” in “a judicial proceeding, or
10 anything said in the course thereof.” *Sipple v. Foundation for Nat. Progress*, 71
11 Cal.App.4th 226, 240, 242 (1999); Cal. Civ. Code § 47; *Flatley v. Mauro*, 39
12 Cal.4th 299, 323 (2006). The test is whether the report “captures the substance, the
13 ‘gist’ or ‘sting’ of the subject proceedings.” *Braun v. Chronicle Publishing Co.*, 52
14 Cal.App.4th 1036, 1050 (1997). This test measures the publication by its “natural
15 and probable effect on the mind of the average reader.” *Id.* (internal citations
16 omitted). Here, as discussed above, Manwin’s press release does not merely
17 “report” or opine on the proceedings in this lawsuit, it actually and falsely casts
18 Manwin’s false allegations as conclusive fact. These statements, on their face, are
19 not just reports or opinion statements. Because they are not couched as allegations,
20 but rather are asserted as fact, they are not protected or privileged, and can and do
21 provide a proper basis for ICM’s counterclaims.

22 **IV. CONCLUSION**

23 Based on the foregoing, ICM respectfully requests the Court deny Counter-
24 defendants’ motion to dismiss in its entirety.

25 Dated: January 14, 2013

Respectfully submitted,
GORDON & REES LLP

26 by 
27 Richard P. Sybert
28 Attorneys for Counterclaimant
ICM REGISTRY, LLC dba .XXX

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CERTIFICATE OF SERVICE

I hereby certify that on January 14, 2013, a copy of the foregoing document and was filed electronically. Notice of this filing will be sent by operation of the Court's electronic filing system to all parties indicated on the electronic filing receipt. All other parties will be served by regular U.S. Mail (N/A). Parties may access this filing through the Court's electronic filing system.

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I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct and executed on January 14, 2013, in the City of San Diego, State of California.

/s/ Richard P. Sybert

Richard P. Sybert