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Defendants Manwin Licensing International
8 S.A.R.L., a Luxemburg Limited Liability
Company (S.A.R.L.), and Digital Playground,
9 Inc., a California Corporation

10 UNITED STATES DISTRICT COURT
11 CENTRAL DISTRICT OF CALIFORNIA
12 WESTERN DIVISION - ROYBAL FEDERAL BUILDING

13 MANWIN LICENSING
14 INTERNATIONAL S.A.R.L., a
Luxemburg limited liability company
15 (S.A.R.L.); and DIGITAL
16 PLAYGROUND, INC., a California
corporation,

17 Plaintiffs,
18 v.

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

22 Defendants.

23
24 AND RELATED COUNTERCLAIM
25
26

CASE NO. CV11-9514 PSG (JCGx)

The Honorable Philip S. Gutierrez

**COUNTERCLAIM DEFENDANTS'
NOTICE OF SPECIAL MOTION
AND SPECIAL MOTION TO
STRIKE PURSUANT TO
CALIFORNIA CODE OF CIVIL
PROCEDURE SECTION 425.16
(ANTI-SLAPP)**

Courtroom: 880 Roybal Federal
Building

Date: February 11, 2013

Time: 1:30 p.m

1 TO THE COURT, ALL PARTIES AND THEIR ATTORNEYS OF
2 RECORD:

3
4 PLEASE TAKE NOTICE that on February 11, 2013 at 1:30 p.m., or as soon
5 thereafter as the matter may be heard in Courtroom 880, located at Roybal Federal
6 Building, 255 E. Temple Street, Los Angeles, CA 90006, Plaintiffs and
7 Counterclaim Defendants Manwin Licensing International S.À.R.L. and Digital
8 Playground, Inc. (collectively “Manwin”) will and hereby do move, pursuant to
9 California Code of Civil Procedure section 425.16, for an order striking, with
10 prejudice, ICM Registry, LLC’s (“ICM”) Sixth and Seventh Claims contained in
11 its First Amended Counterclaims, for unfair competition under California Business
12 & Professions Code Section 17200, and tortious interference with prospective
13 economic advantage, respectively. Manwin also will and hereby does, move for an
14 order, pursuant to California Code of Civil Procedure section 425.16, awarding
15 Manwin its reasonable attorneys’ fees incurred in bringing this motion.

16 This motion is made on the grounds that ICM’s state law unfair competition
17 and tortious interference with prospective economic advantage counterclaims arise
18 from protected activity, and ICM cannot establish a probability that it will prevail
19 on either counterclaim.

20 This motion is based upon this Notice of Motion; the attached Memorandum
21 of Points and Authorities; the concurrently filed declaration of Kate Miller; all
22 pleadings and other records on file in this action; and such further evidence and
23 arguments as may be presented at or before any hearing on the motion.

24 //
25 //
26 //

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1 In compliance with Local Rule 7-3, counsel for Manwin and ICM have met
2 and conferred extensively on these matters, including by telephone on November
3 28, 2012. Despite these efforts, the parties have been unable to resolve their
4 disputes.

5
6 DATED: December 7, 2012

THOMAS P. LAMBERT
JEAN PIERRE NOGUES
KEVIN E. GAUT
MITCHELL SILBERBERG & KNUPP LLP

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8
9 By: /s/ Jean Pierre Nogues
10 Jean Pierre Nogues
11 Attorneys for Plaintiffs and Counterclaim
12 Defendants
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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

Page

- I. INTRODUCTION..... 1
- II. BACKGROUND..... 1
- III. ANTI-SLAPP STANDARDS 3
- IV. ICM’S STATE LAW CAUSES OF ACTION ARISE FROM PROTECTED
ACTIVITY 4
 - A. Protected Anti-SLAPP Activity 4
 - B. Manwin’s Challenged Activity is Protected..... 5
 - 1. Manwin’s Speech is Protected Activity 5
 - 2. Manwin’s Boycott Is Protected Activity 6
 - 3. Manwin’s Pre-Litigation Demands Are Protected Activity 7
- V. ICM CANNOT SHOW A LIKELIHOOD OF PREVAILING ON THE MERITS 8
- VI. MANWIN IS ENTITLED TO ITS FEES IN BRINGING THIS MOTION 9

TABLE OF AUTHORITIES

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

Page(s)

CASES

Blanchard v. DIRECTV, Inc.,
123 Cal. App. 4th 903, 20 Cal. Rptr. 3d 38 (2004) 7

Cedars-Sinai Med. Ctr. v. Global Excel Mgmt.,
No. CV 09-3627 PSG, 2009 U.S. Dist. LEXIS 120411 (C.D. Cal. Dec. 4, 2009)
(Gutierrez, J.)..... 3

Cross v. Cooper,
197 Cal. App. 4th 357, 127 Cal. Rptr. 3d 903 (2011) 5

Equilon Enterprises v. Consumer Cause, Inc.,
29 Cal. 4th 53, 124 Cal. Rptr. 2d 507 (2002) 7

Fashion 21 v. Coalition for Humane Immigrant Rights of Los Angeles,
117 Cal. App. 4th 1138, 12 Cal. Rptr. 3d 493 (2004) 7

Feldman v. 1100 Park Lane Associates,
160 Cal. App. 4th 1467, 74 Cal. Rptr. 3d 12 (2008) 8

Fleming v. Coverstone,
No. 08cv355 WQH, 2009 U.S. Dist. LEXIS 22021 (S.D. Cal. Mar. 18, 2009)..... 8

Fox Searchlight Pictures, Inc. v. Paladino,
89 Cal. App. 4th 294, 106 Cal. Rptr. 2d 906 (2001) 5

Navellier v. Sletten,
29 Cal. 4th 82, 124 Cal. Rptr. 2d 530 (2002) 3

Neville v. Chudacoff,
160 Cal. App. 4th 1255, 73 Cal. Rptr. 3d 383 (2008) 7

New.Net, Inc. v. Lavasoft,
356 F. Supp. 2d 1090 (C.D. Cal. 2004)..... 9

Overhill Farms, Inc. v. Lopez,
190 Cal. App. 4th 1248, 119 Cal. Rptr. 3d 127 (2010) 7

Paiva v. Nichols,
168 Cal. App. 4th 1007, 85 Cal. Rptr. 3d 838 (2008) 3, 8

Pistoresi v. Madera Irrigation Dist.,
No. CV-F-08-843-LJO-DLB, 2008 U.S. Dist. LEXIS 99164
(E.D. Cal. Nov. 25, 2008) 5

TABLE OF AUTHORITIES
(continued)

		<u>Page(s)</u>
1		
2		
3	<i>Roberts v. McAfee, Inc.</i> ,	
4	660 F.3d 1156 (9th Cir. 2011).....	8
5	<i>Rohde v. Wolf</i> ,	
6	154 Cal. App. 4th 28, 64 Cal. Rptr. 3d 348 (2007).....	7
7	<i>Salma v. Capon</i> ,	
8	161 Cal. App. 4th 1275, 74 Cal. Rptr. 3d 873 (2008).....	4
9	<i>Steed v. Dep’t of Consumer Affairs</i> ,	
10	204 Cal. App. 4th 112, 138 Cal. Rptr. 3d 519 (2012).....	4, 8
11	<i>Summit Bank v. Rogers</i> ,	
12	206 Cal. App. 4th 669, 142 Cal. Rptr. 3d 40 (2012).....	5
13	<i>Terry v. Davis Community Church</i> ,	
14	131 Cal. App. 4th 1534, 33 Cal. Rptr. 3d 145 (2005).....	5
15	<i>U.S. ex rel. Newsham v. Lockheed Missiles & Space Co., Inc.</i> ,	
16	190 F.3d 963 (9th Cir. 1999).....	3
17	<i>Wilcox v. Superior Court</i> ,	
18	27 Cal. App. 4th 809, 33 Cal. Rptr. 2d 446 (1994).....	6

STATUTES

17	Cal. Code Civ. Proc.	
18	§ 425.16.....	1, 5
19	§ 425.16(a).....	3
20	§ 425.16(b)(1).....	4
21	§ 425.16(c).....	9
22	§ 425.16(e).....	4
23	§ 425.16(e)(1).....	7
24	§ 425.16(e)(2).....	5, 7
25	§ 425.16(e)(3).....	5
26	§ 425.16(e)(4).....	5, 6
27	California Business and Professions Code § 17200 <i>et seq.</i>	1

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Federal courts rigorously enforce California’s proscriptions against lawsuits seeking to curb public participation (also known as Strategic Lawsuits Against Public Participation or “SLAPP”). *See* Cal. Code Civ. Proc. § 425.16 (California’s anti-SLAPP statute). The state law counterclaims of defendant ICM Registry, LLC (“ICM”) are archetypal examples of such improper use of the judicial system.

Plaintiffs Manwin Licensing International S.À.R.L. and Digital Playground, Inc. (collectively, “Manwin”) among other things run adult-content websites. They have vocally and vigorously opposed ICM’s establishment of the .XXX top level domain as blatantly anticompetitive and injurious to consumers. In November 2011, Manwin filed suit against ICM for violations of the Sherman Act in connection with the establishment of the .XXX top level domain.

ICM now asserts state law counterclaims arising from Manwin’s protected activity in opposing .XXX. For that reason, under California’s anti-SLAPP statute, those counterclaims must be dismissed unless ICM meets its burden to prove through admissible evidence a probability of prevailing on those claims. *See* Cal. Code Civ. Proc. § 425.16. ICM cannot meet that burden.

II. BACKGROUND

ICM alleges two California state law counterclaims against Manwin: (1) for violations of California’s Unfair Competition Law, California Business and Professions Code section 17200 *et seq.* (the “UCL”); and (2) for tortious interference with prospective business advantage. *See* First Amended Counterclaims (“CC”) ¶¶ 90-115.

ICM premises both causes of action on three categories of speech or conduct. First, ICM complains that Manwin has engaged in speech vigorously attacking .XXX. Specifically, for example, ICM alleges that “Manwin has

1 publicly and privately denounced the .XXX TLD in the adult entertainment
2 industry” CC ¶ 38. ICM further alleges that “Manwin has ... publish[ed] false
3 statements to third parties via press release that ICANN and ICM have engaged in
4 an illegal scheme to eliminate competitive bidding and market restraints in
5 violation of federal and state unfair competition laws.” CC ¶ 45.

6 Second, ICM alleges that Manwin has boycotted .XXX by refusing to
7 promote or host content for websites using the .XXX top level domain, or by
8 refusing to deal with adult industry spokesmodels or trade organizations which also
9 contract with .XXX. *See* CC ¶¶ 32, 33, 37, 39-45. ICM’s boycott allegations
10 apparently rely in large part on a December 2, 2011 Manwin press release which
11 reads in full:

12 In addition to the lawsuit filed on November 16, 2011,
13 Manwin has determined to cease any and all Internet
14 liaisons with the .XXX Top Level Domain.

15 As of today, Manwin has banned all activities between its
16 brands and internet sites registered with a .XXX TLD.

17
18 “We oppose the .XXX domain and all it stands for,” said
19 Fabian Thylmann, Managing Partner of Manwin. “The
20 lawsuit was just the beginning. Through this ban, we
21 hope to make a strong statement against the .XXX
22 domain.”

23
24 Manwin will no longer permit content from or
25 advertising for .XXX websites on its Tube sites.
26

1 In addition, Manwin will not permit its content to be used
2 or advertised on .XXX websites. This will prevent ICM
3 or .XXX from exploiting the 60 million daily visitors to
4 Manwin’s network sites.

5
6 By permanently blocking the .XXX domain, Manwin
7 hopes to send a clear message that it does not support
8 ICM or .XXX.

9 Declaration of Kate Miller (“Miller Decl.”) ¶ 6, Ex. 1.

10 Third, ICM complains about demands allegedly made by Manwin during
11 pre-litigation settlement communications. CC ¶¶ 30, 31, 34, 36, 55(e), 55(f);
12 Miller Decl. ¶¶ 2-5. ICM falsely and pejoratively labels these demands “attempt[s]
13 to improperly extort concessions from ICM.” CC ¶ 30.

14 **III. ANTI-SLAPP STANDARDS**

15 California’s anti-SLAPP statute summarily disposes of meritless causes of
16 action intended “to chill or punish a party’s exercise of constitutional rights to free
17 speech and to petition the government for redress of grievances.” *Paiva v. Nichols*,
18 168 Cal. App. 4th 1007, 1015, 85 Cal. Rptr. 3d 838, 846 (2008); Cal. Code Civ.
19 Proc. § 425.16(a). The anti-SLAPP statute applies in federal court to state law
20 causes of action. *U.S. ex rel. Newsham v. Lockheed Missiles & Space Co., Inc.*,
21 190 F.3d 963, 972 (9th Cir. 1999); *see also Cedars-Sinai Med. Ctr. v. Global Excel*
22 *Mgmt.*, No. CV 09-3627 PSG, 2009 U.S. Dist. LEXIS 120411, at *27 (C.D. Cal.
23 Dec. 4, 2009) (Gutierrez, J.) (“Federal courts can grant special motions to strike
24 pursuant to California’s anti-SLAPP statute”).

25 The California Legislature has mandated that the anti-SLAPP statute “shall
26 be construed broadly.” Cal. Code Civ. Proc. § 425.16(a). The statute applies no
27 matter what the legal theory of the claim, provided it attacks protected conduct.

1 See *Navellier v. Sletten*, 29 Cal. 4th 82, 93, 124 Cal. Rptr. 2d 530, 539 (2002) (“the
2 nature or form of the action is not what is critical but rather that it is against a
3 person who has exercised certain rights”).

4 There are two steps to a motion under the anti-SLAPP statute. First, the
5 moving party must make a *prima facie* showing that the claims at issue “arise
6 from” protected activity. Second, once the moving party meets that burden, the
7 responding party must establish through admissible evidence the probability that it
8 will prevail on its claims. *Steed v. Dep’t of Consumer Affairs*, 204 Cal. App. 4th
9 112, 119-120, 138 Cal. Rptr. 3d 519, 525 (2012); see also Code Civ. Proc.
10 § 425.16(b)(1).

11 As explained below, Manwin has met its initial burden, and ICM cannot
12 meet its response burden on the counterclaims at issue.

13 **IV. ICM’S STATE LAW CAUSES OF ACTION ARISE FROM**
14 **PROTECTED ACTIVITY**

15 **A. Protected Anti-SLAPP Activity**

16 Activity protected under the Anti-SLAPP statute includes:

- 17 • “any written or oral statement or writing made in connection with an
18 issue under consideration or review by a legislative, executive, or judicial body, or
19 any other official proceeding authorized by law”;
- 20 • “any written or oral statement or writing made in a place open to the
21 public or a public forum in connection with an issue of public interest”; or
- 22 • “any other conduct in furtherance of the exercise of the constitutional
23 right of petition or the constitutional right of free speech in connection with a
24 public issue or an issue of public interest.” See Cal. Code Civ. Proc. § 425.16(e).

25 The Anti-SLAPP statute applies even if the cause of action only *in part*
26 challenges such protected activities. See, e.g., *Salma v. Capon*, 161 Cal. App. 4th
27 1275, 1287, 74 Cal. Rptr. 3d 873, 883 (2008) (“A mixed cause of action is subject

1 to section 425.16 if at least one of the underlying acts is protected conduct, unless
2 the allegations of protected conduct are merely incidental to the unprotected
3 activity.”); *Fox Searchlight Pictures, Inc. v. Paladino*, 89 Cal. App. 4th 294, 308,
4 106 Cal. Rptr. 2d 906, 918 (2001) (“a plaintiff cannot frustrate the purpose of the
5 SLAPP statute [by] combining allegations of protected and non-protected activity
6 under the label of one ‘cause of action’”).

7 **B. Manwin’s Challenged Activity is Protected**

8 Under these standards, both of ICM’s counterclaims are subject to the anti-
9 SLAPP statute because they are based in large part on three forms of protected
10 alleged Manwin speech or conduct.

11 **1. Manwin’s Speech is Protected Activity**

12 Public speech on a matter of public interest is protected activity under the
13 anti-SLAPP statute. Code Civ. Proc. § 425.16(e)(3); *Summit Bank v. Rogers*, 206
14 Cal. App. 4th 669, 693, 142 Cal. Rptr. 3d 40, 57 (2012) (holding posting on
15 internet “rants and raves” board to be protected activity). Even private speech
16 about a matter of public interest is protected. Code Civ. Proc. § 425.16(e)(4);
17 *Terry v. Davis Community Church*, 131 Cal. App. 4th 1534, 1546, 33 Cal. Rptr. 3d
18 145, 153 (2005) (“subdivision (e)(4) applies to private communications concerning
19 issues of public interest.”).¹

20 Manwin’s speech about and criticizing .XXX is plainly about a matter of
21 public interest. *See Cross v. Cooper*, 197 Cal. App. 4th 357, 372, 127 Cal. Rptr. 3d
22 903, 912 (2011) (“[C]ourts have broadly construed ‘public interest’. . . . [T]he
23 issue need not be ‘significant’ to be protected by the anti-SLAPP statute—it is
24

25 ¹ Statements Mawwin made in a press release announcing Manwin’s filing of this
26 case, as alleged in paragraphs 45 and 84 of the first amended counterclaims, are
27 also protected under the Anti-SLAPP statute for the independent reason that they
28 relate to the litigation. *See, e.g.,* Code Civ. Proc. § 425.16(e)(2), *Pistoresi v.*
Madera Irrigation Dist., No. CV-F-08-843-LJO-DLB, 2008 U.S. Dist. LEXIS
99164, at *31 (E.D. Cal. Nov. 25, 2008) (cause of action for defamation regarding
assertions in press release pertaining to lawsuit “arises from” protected activity).

1 enough that it is one in which the public takes an interest.”) (internal citations and
2 quotation marks omitted). Indeed, ICM expressly conceded that the “public
3 interest” requirement is satisfied. ICM *itself* brought an anti-SLAPP motion
4 challenging state court claims asserted against ICM by Manwin in its original
5 complaint. *See, e.g.*, ICM’s Special Motion to Strike, ECF No. 21-1. In that
6 motion and the declarations filed in support of it, ICM expressly admits that issues
7 concerning the .XXX TLD meet the anti-SLAPP “public interest” standard. *Id.* at
8 19:19-21:4 (section titled “The .XXX sTLD is an Issue of Public Interest.”); *see*
9 *also id.* 9:15-17 (“The public interest in the creation of the .XXX domain has been
10 overwhelming, and the public’s fascination with the launch of ICM’s .XXX sTLD
11 far exceeds that of any other sTLD.”); *id.* at 20:15-18 (“[B]oth the broader adult
12 entertainment community and the general public have taken an interest in the
13 unique .XXX domain and have made ICM’s conduct in creating this venue for
14 responsible erotic speech an issue of global significance.”); Declaration of Stuart
15 Lawley, ECF No. 22 (noting “intense public interest” in .XXX approval process);
16 *id.* at ¶ 38 (estimating the number of articles written about ICM and the launch of
17 .XXX “to number into the thousands”).

18 2. Manwin’s Boycott Is Protected Activity

19 Boycotts are protected under the anti-SLAPP statute as “other conduct in
20 furtherance of the exercise of the constitutional right of petition or the
21 constitutional right of free speech in connection with a public issue or an issue of
22 public interest.” Code Civ. Proc. § 425.16(e)(4); *see also, e.g., Wilcox v. Superior*
23 *Court*, 27 Cal. App. 4th 809, 821, 33 Cal. Rptr. 2d 446, 453 (1994) (“[T]he
24 definition of an ‘act in furtherance of’ a person’s First Amendment rights is not
25 limited to oral and written statements. Thus if the plaintiff’s suit arises out of the
26 defendant’s constitutionally protected conduct, *such as a peaceful economic*
27 *boycott* the plaintiff should be required to satisfy the statute’s requirements.”)

1 (internal citations omitted) (emphasis added), *disapproved on other grounds*,
2 *Equilon Enters. v. Consumer Cause, Inc.*, 29 Cal. 4th 53, 68 n.5, 124 Cal. Rptr. 2d
3 507, 519 n.5 (2002); *Overhill Farms, Inc. v. Lopez*, 190 Cal. App. 4th 1248, 1255-
4 1259, 119 Cal. Rptr. 3d 127, 135-37 (2010) (claims relating to distribution of flyer
5 calling for boycott arose from protected activity); *Fashion 21 v. Coalition for*
6 *Humane Immigrant Rights of Los Angeles*, 117 Cal. App. 4th 1138, 1143-1145, 12
7 Cal. Rptr. 3d 493, 496-97 (2004) (claims relating to “call for nationwide boycott”
8 arose from protected activity).

9 Here, ICM alleges that Manwin’s purported boycott arises out of a matter of
10 public interest, its vocal opposition to the .XXX TLD. CC ¶¶ 38, 45, 84. That
11 activity is thus protected within the holding of these authorities.

12 **3. Manwin’s Pre-Litigation Demands Are Protected Activity**

13 “Although litigation may not have commenced, if a statement concern[s] the
14 subject of the dispute and is made in anticipation of litigation contemplated in good
15 faith and under serious consideration, then the statement may be petitioning
16 activity protected by section 425.16.” *Neville v. Chudacoff*, 160 Cal. App. 4th
17 1255, 1268, 73 Cal. Rptr. 3d 383, 394 (2008) (internal citations and quotation
18 marks omitted); *see also* Code Civ. Proc. §§ 425.16(e)(1), (e)(2); *Rohde v. Wolf*,
19 154 Cal. App. 4th 28, 37, 64 Cal. Rptr. 3d 348, 355 (2007) (voicemail messages
20 were protected activity where “the spectre of litigation loomed over all
21 communications between the parties at that time”); *Blanchard v. DIRECTV, Inc.*,
22 123 Cal. App. 4th 903, 918, 20 Cal. Rptr. 3d 38, 395 (2004) (case arises from
23 protected activity premised on “demand letter, sent in advance of, or to avoid,
24 litigation”).

25 Here, ICM complains about demands allegedly made by Manwin in
26 anticipation of litigation. ICM’s President Stuart Lawley so admitted in his
27 declaration filed in support of ICM’s earlier Special Motion to Strike. In the

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1 declaration, Mr. Lawley admits that the “demands” were made during meetings
2 between ICM and Manwin mere weeks before this lawsuit was filed, and included
3 express threats to file litigation if the demands were not met. Lawley Decl. ¶¶ 30,
4 31; *see also* Miller Decl. ¶¶ 2-5. The purported demands are thus protected
5 activity under the anti-SLAPP statute. *See, e.g.*, CC ¶¶ 30, 31, 34, 36, 55.

6 ICM’s inaccurate and pejorative characterization of the discussions as
7 “attempts to extort concessions” does not change this result. *See, e.g.*, CC ¶ 30;
8 *see also Feldman v. 1100 Park Lane Associates*, 160 Cal. App. 4th 1467, 1481, 74
9 Cal. Rptr. 3d 1, 12 (2008) (Landlords “threats” were protected activities, as they
10 constituted “communications in connection with an ongoing dispute and in
11 anticipation of litigation.”); *Fleming v. Coverstone*, No. 08cv355 WQH, 2009 U.S.
12 Dist. LEXIS 22021, at *10-12 (S.D. Cal. Mar. 18, 2009) (email sent threatening to
13 expose plaintiff’s ethics violations and illegal tax scam was in anticipation of
14 litigation and so protected activity).

15 **V. ICM CANNOT SHOW A LIKELIHOOD OF PREVAILING ON THE**
16 **MERITS**

17 Under the second step of the anti-SLAPP analysis, “the burden shifts to the
18 plaintiff to demonstrate a probability of prevailing on the challenged claims.”
19 *Roberts v. McAfee, Inc.*, 660 F.3d 1156, 1163 (9th Cir. 2011); *Steed*, 204 Cal. App.
20 4th at 119. To meet its burden, the moving party may not rely on its allegations
21 alone; instead, its showing must be made through “competent admissible
22 evidence.” *Paiva*, 168 Cal. App. 4th at 1017; *see also Steed*, 204 Cal. App. 4th at
23 120 (“to carry his burden to demonstrate probability of prevailing on their
24 complaint, [Plaintiff] must demonstrate *by admissible evidence* the probability that
25 [he] would succeed on the merits”) (internal quotation marks omitted) (emphasis
26 added). Moreover, the moving party’s showing “is considered under a standard
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1 similar to that employed in determining nonsuit, directed verdict or summary
2 judgment motions.” *Paiva*, 168 Cal. App. 4th at 1017.

3 ICM cannot meet these burdens. Indeed, for the reasons specified in
4 Manwin’s simultaneously filed motions to dismiss, which is incorporated herein,
5 ICM’s state law claims fail as a matter of law.

6 **VI. MANWIN IS ENTITLED TO ITS FEES IN BRINGING THIS**
7 **MOTION**

8 A moving party which prevails on any portion of its anti-SLAPP motion is
9 entitled to recover its attorney’s fees. Code Civ. Proc. § 425.16(c); *see also*
10 *New.Net, Inc. v. Lavasoft*, 356 F. Supp. 2d 1090, 1115 (C.D. Cal. 2004) (“An
11 award is proper even if the anti-SLAPP motion is granted as to only some of a
12 plaintiff’s claims”). Manwin should thus recover its fees upon granting of this
13 Motion.

14 DATED: December 7, 2012

THOMAS P. LAMBERT
JEAN PIERRE NOGUES
KEVIN E. GAUT
MITCHELL SILBERBERG & KNUPP LLP

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18 By: /s/ Jean Pierre Nogues
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19 Attorneys for Plaintiffs and
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