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CCP

8 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**
9 **FOR THE COUNTY OF SAN FRANCISCO**

10 WIKIMEDIA FOUNDATION, INC.)

CASE NO. CGC-12-523971

11 Plaintiff,)

12 v.)

13 INTERNET BRANDS, INC.,)

14 Defendant.)

**DEFENDANT'S NOTICE OF DEMURRER
AND DEMURRER TO PLAINTIFF'S
COMPLAINT; MEMORANDUM OF
POINTS AND AUTHORITIES IN
SUPPORT THEREOF**

15 Date: November 19, 2012

16 Time: 9:30

17 Dept: 302

18 Trial Date: None

19 *First Amended Complaint filed: 9/13/12*

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22 **TO ALL PARTIES HEREIN AND TO THEIR RESPECTIVE COUNSEL OF RECORD:**

23 **PLEASE TAKE NOTICE** that on November 19, 2012, at 9:30 a.m., or as soon thereafter,
24 as counsel may be heard in Department 302 of the above-entitled court located at 400 McAllister
25 Street, San Francisco, CA 94102, Defendant Internet Brands, Inc. ("IB" or "Defendant"), will, and
26 hereby does, demur to Plaintiff's First Amended Complaint ("FAC") on the grounds that
27 Plaintiff's sole causes of action for Declaratory Relief is unripe and fails as a matter of law
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1 pursuant to *California Code of Civil Procedure*, Section 430.10(e).

2 Defendant's Demurrer will be based upon this Notice, the supporting Memorandum of
3 Points and Authorities, the pleadings and records on file herein and upon such oral and
4 documentary evidence as may be presented at the hearing of Defendant's Demurrer.

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6 **DEMURRER TO FIRST CAUSE OF ACTION**

7 1. Defendant generally demurs to the First Cause of Action for Declaratory Relief on
8 the ground that it fails to state facts sufficient to constitute a cause of action because there is no
9 justiciable controversy between the parties and the action is accordingly not ripe for adjudication.
10 *California Code of Civil Procedure*, Section 430.10(e).

11 DATED: October 15, 2012

iGeneral Counsel P.C.

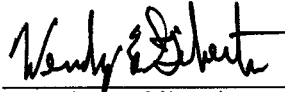
12
13 By: 
14 Wendy E. Giberti
15 Attorneys for Defendant
16 Internet Brands, Inc.
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1 MEMORANDUM OF POINTS AND AUTHORITIES

2 I. INTRODUCTION AND SUMMARY

3 Wikimedia's filing imagines a "case or controversy" that does not exist. It merely
4 concludes that there is a dispute between the parties when in fact there is not. It pleads no facts
5 from which a real dispute can be adduced. And it asks for relief from actions or positions that
6 Internet Brands has not taken. Finally, it seeks a declaration of "rights" that Internet Brands has
7 never tried to deny to the Plaintiff or any of the users in question. There simply is no "there"
8 there.

9 This Court is now aware that Internet Brands previously sued two individuals for
10 trademark infringement and related wrongs and the case was removed to federal court by
11 Plaintiff's counsel here (Defendant's counsel there). (*Internet Brands, Inc. vs. William Holliday,*
12 *Holliday IT Services & James Heilman*), Central District of California, Case No. CV12-8088-
13 SVW (Complaint is attached hereto at Exhibit "A"). Apparently, those individuals may now be
14 working with and/or for Wikimedia Foundation. Plaintiff seems to have jumped the gun and
15 assumed that when Internet Brands sued those two individuals, it was attacking Plaintiff, or the
16 members of the wiki community, or the "Wiki" "open licensing" approach to content on the world
17 wide web. Nothing could be further from the truth. Internet Brands has had a virtually identical
18 content license in place on its wikitravel ("Wikitravel") site for years, the Creative Content
19 Attribution-ShareAlike License (the "CC License") to the one Wikimedia trumpets. It has not
20 threatened to restrict the flow of wiki content or otherwise change the terms of the CC License. It
21 simply filed a lawsuit against two individuals who are alleged to have intentionally attempted to
22 confuse the recipients of certain email and others into thinking that wikitravel.org and its
23 community were "moving" or "migrating" somewhere else, which is not true.

24 In an apparent attempt to drum up publicity for its own, new wikitravel site, Plaintiff
25 Wikimedia Foundation, Inc.'s ("Plaintiff") First Amended Complaint ("FAC") has concocted a
26 dispute between an "evil company that wants to destroy the Wiki culture and prey on its
27 community", and itself as the glorious "defender" of that culture and community. But neither of
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1 these caricatures exist in real life. Internet Brands has been operating Wikitravel for many years
2 under precisely the same type of CC License arrangement that Plaintiff is using for its new,
3 “competing” Wiki site. (www.wikitravel.org.) No change is threatened; the request for relief
4 seeks to undo something that is not being done. But Plaintiff could not be bothered to evaluate the
5 trademark-related dispute between IB and the Wikitravel administrators or to contact Internet
6 Brands to ask if there really was any dispute with Plaintiff. Instead, it “shot first”, rushing to file
7 this action the very next day, so hastily that its initial Complaint was filled with myriad errors it
8 then had to correct with a later First Amended Complaint (“FAC”). Had Plaintiff or its counsel
9 returned the phone calls from Defendant’s counsel in the interim, instead of blindly filing a second
10 complaint without even inquiring whether there was in fact any dispute, Plaintiff would have
11 heard straight from the horse’s mouth that the positions they attribute to Internet Brands simply
12 are not accurate. To wit:

13 1. Defendant has not disputed that all content created under the terms of the CC
14 License, including the content created for and appearing on Wikitravel is not simply for the sole
15 use of Defendant, and Defendant has neither the ability to, nor any interest in, restricting its use,
16 reproduction, sale or modification other than requiring that everyone comply with the terms of the
17 CC License.

18 2. Defendant has not disputed that content created by volunteer users and
19 administrators of Wikitravel may be copied or migrated to other websites as the terms of the CC
20 License indicate, and Defendant has not threatened to restrict or otherwise interfere with such
21 content migration.

22 3. Defendant has never attempted to prevent anyone who has created or posted
23 content on Wikitravel site from freely contributing to a competing travel website, including the
24 one owned by Plaintiff, and has no intention to do so.

25 4. Defendant has never disputed that Plaintiff, or anyone else for that matter, may
26 create a competing travel website that includes content that appears on Wikitravel and was created
27 under the terms of the CC License, and/or allowing creators of said content from migrating it to
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1 another website, including Plaintiff's.

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3 5. Defendant sees no problem with Plaintiff, or any other entity interested in starting a
4 competing travel website, communicating with former or current posters and content providers to
5 Wikitravel and recruiting them to provide content to the competing website, even if poster does so
6 to the exclusion of providing any future content to Defendant, provided that Plaintiff does so in a
7 lawful manner (i.e., without defaming Defendant, infringing Defendant's trademarks or using
8 forums and/or trade secret information -- not the content in question -- to which Plaintiff does not
9 rightfully have access).

10 So, if there is not really any dispute here and never was, the question is: what is really
11 going on here? What Plaintiff did not tell the Court is that several months ago, on July 14, 2012,
12 Plaintiff sought to have Defendant "donate" to Wikimedia the Wikitravel website, domain name
13 and trademark rights for which it had paid and on which it had spent much money in
14 improvements over the years, but Internet Brands politely refused to simply give away its entire
15 website. Following this, Messrs. Holliday and Heilman, the defendants in a lawsuit in the United
16 States District Court for the Central District of California, (*Internet Brands, Inc. vs. William
17 Holliday, Holliday IT Services & James Heilman*), Case No. cv12-8088-SVW (Complaint is
18 attached hereto as Exhibit "A"), are alleged to have sent emails and made misleading statements
19 that infringe IB's trademark rights and falsely designate the origin of the new, competing web site
20 they are promoting. Wikimedia is not a party, although it may be that discovery will determine
21 that these defendants were agents of Wikimedia.

22 It is alleged in that suit that the defendants improperly used Internet Brands' "Wikitravel"
23 trademark and made deliberately misleading statements to confuse readers into thinking that
24 Internet Brands' Wikitravel website was broken and was migrating to a new site, neither of which
25 is true. No facts are alleged there or here that give rise to the fanciful dispute pleaded in the First
26 Amended Complaint. Thus, the only dispute that could have possibly arisen from the allegations
27 of the prior Complaint by Internet Brands would be if Wikimedia believed it was being threatened
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1 with the claims in that suit even though it was not being sued. However, those claims arising from
2 that dispute, and the claims that Wikimedia has concocted here, are entirely different. Any claims
3 arising out of facts pleaded in the other case would have to be compulsory counterclaims in the
4 other suit. So, the reason Wikimedia invented these claims out of whole cloth, forcing Internet
5 Brands now to prove a negative, is because it wanted to file a separate action (in a separate court
6 increasing the chance of confusion), and announce it to the press, allowing it to trumpet itself in
7 the media as a “defender” of a “culture” and “community” that has never been threatened. There
8 simply is not, and never was, any dispute about the subject matter alleged in this case – the terms
9 of the CC License under which both parties’ wiki sites operate.

10 Internet Brands welcomes fair competition among differing travel websites. However,
11 disingenuous attempts to convince users that Internet Brands’ Wikitravel website was no longer
12 viable or was being usurped by a third party is underhanded and illegal. Internet Brands’ only
13 dispute is with the defendants in the other case, not with Wikimedia Foundation. In neither that
14 lawsuit nor this one has Internet Brands claimed that it may have the only wiki website regarding
15 travel. Nor has it insisted that the content created pursuant to the CC License may not be copied
16 and migrated to that website under the terms of the license. The court in that matter will
17 determine, as a matter of fact and law, whether the evidence of wrongdoing by those defendants is
18 conclusive.

19 On the other hand, in the instant suit, there are no facts pleaded that give rise to a
20 justiciable controversy. This action is not ripe because the parties do not have the dispute being
21 claimed and Internet Brands is not trying to prevent what the prayer for relief seeks permission to
22 do. This action is seeking a purely advisory opinion, which Plaintiff does not need to seek and
23 this Court may not issue.

24 **II. THE INSTANT DEMURRER IS PROPER**

25 *California Code of Civil Procedure*, Section 430.10, provides, in pertinent part, as follows:

26 “The party against whom a complaint...has been filed may object,
27 by demurrer or answer as provided in Section 430.30, to the
pleading on any one or more of the following grounds:

* * *

28 (e) The pleading does not state facts sufficient to constitute a cause

of action.”

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Defendant’s Demurrer is proper and well taken as to the First cause of action because there is no dispute or justiciable controversy between the parties, and thus no claim for declaratory relief may lie.

III. PLAINTIFF’S SOLE CLAIM FOR DECLARATORY RELIEF IS UNRIPE

To qualify for declaratory relief, Plaintiff must demonstrate the action presented two essential elements: (1) a proper subject of declaratory relief; and (2) an actual controversy involving justiciable questions. *Wilson & Wilson v. City Council of Redwood City* (2011) 191 Cal.App.4th 1159, 1582; California Code of Civil Procedure (C.C.P.) §1060. “The actual controversy language in [C.C.P. §1060] encompasses a *probable* future controversy relating to the legal rights and duties of the parties.” *Id.* A party seeking declaratory judgment must therefore “demonstrate that the controversy is justiciable... [a]nd to be justiciable, the controversy must be ripe.” *Id.*

“Ripeness” refers to the requirements of a current controversy and “an action not brought for the purpose of securing a determination of a point of law...will not be entertained.” *Golden Gate Bridge etc. Dist. v. Felt* (1931) 214 Cal. 308, 316. A controversy “ripens” once it has reached “but has not passed, the point that the facts have sufficiently congealed to permit an intelligent and useful decision to be made.” *California Water & Telephone Co. v. County of Los Angeles* (1967) 253 Cal.App.2d. 16, 61. “Ripeness” is aimed at preventing “courts from issuing purely advisory opinions....It is rooted in the fundamental concept that the proper role of the judiciary does not extend to the resolution of abstract differences of opinion. It is in part designed to regulate the workload of courts by preventing judicial consideration of lawsuits that seek only to obtain general guidance, rather than to resolve specific legal disputes. However, the ripeness doctrine is primarily bottomed on the recognition that judicial decision-making is best conducted in the context of an actual set of facts so that the issues will be framed with sufficient definiteness

1 to enable the court to make a decree finally disposing of the controversy. *Pacific Legal*
2 *Foundation v. California Coastal Com.* (1982) 33 Cal.3d. 158, 170.

3 "A two-pronged test is used to determine the ripeness of a controversy: (1) whether the
4 dispute is sufficiently concrete so that declaratory relief is appropriate; and (2) whether the parties
5 will suffer hardship if judicial consideration is withheld." *City of Santa Monica v. Stewart* (2005)
6 126 Cal.App.4th 43, 88. "Under the first prong, the courts will decline to adjudicate a dispute if
7 the abstract posture of the proceeding makes it difficult to evaluate the issues, if the court is asked
8 to speculate on the resolution of hypothetical situations, or if the case presents a contrived inquiry.
9 Under the second prong, the courts will not intervene merely to settle a difference of opinion;
10 there must be an imminent and significant hardship inherent in further delay." *Id.* Plaintiff fails
11 both of the aforementioned prongs and the case is therefore unripe.

12 With respect to the first prong, Plaintiff is asking this Court to consider a purely
13 hypothetical situation. Courts have made clear that "unripe cases" are those in which parties seek
14 a judicial declaration on a question of law, though no actual dispute or controversy ever existed
15 between them requiring the declaration for its determination." *Wilson & Wilson*, 101 Cal.App.4th
16 at 1573. As mentioned above, Defendant does not in fact dispute any of the alleged contentions
17 that Plaintiff erroneously believed existed between the parties. Simply put, there is no
18 disagreement or difference of opinion here so the case is unripe. *See Gillies v. La Mesa Lemon*
19 *Grove and Spring Val. Irr. Dist.* (1942) 54 Cal.App.2d. 756, 762 ("an action for declaratory relief
20 lies when there is an actual bona fide dispute between the parties as to a legal obligation... the
21 plaintiffs must show that the dispute presents a question to which there is more than one answer").

22 With respect to the second prong, Plaintiff has offered no allegations that there is imminent
23 and significant hardship. Plaintiff alleges in Paragraph 35 of the FAC that it plans to launch a
24 competing travel website (presumptively in the near future) but offers no facts that Defendant in
25 any way plans to interfere or oppose same.

26 Where allegations of a complaint for declaratory relief reveal the controversy to be
27 conjectural, anticipated to occur in future or attempt to obtain advisory opinion from the court, the
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1 fundamental basis of declaratory relief is lacking. *Brownfield v. Daniel Freeman Marina Hospital*
2 (1989) 208 Cal.App.3d. 405, 410. Furthermore, the character of action must be determined from
3 examination of the facts pleaded, rather than from title or prayer for relief. *Fritz v. Superior Court*
4 *of City and County of San Francisco* (1936) 18 Cal.App.2d. 232, 235. Here, Plaintiff has not
5 pleaded any facts in the FAC that support any argument that Defendant has or will (1) restrict the
6 use of any content on Wikitravel in violation of the CC License (as alleged in Paragraph 38 of the
7 FAC); (2) prevent the migration of content created under the CC License for Wikitravel to another
8 website (as alleged in Paragraph in 39 of the FAC); (3) prevent anyone who has posted or created
9 content on Wikitravel from contributing content to a new travel website owned by Plaintiff (as
10 alleged in Paragraph 40 the FAC); (4) oppose the creation of any website containing content
11 created pursuant to the CC License that had previously been hosted on Wikitravel (as alleged in
12 Paragraph 41 of the FAC); (5) interfere with Plaintiff's contacting or recruiting authors and
13 administrators (former or current) of Wikitravel to migrate content to and create content for
14 Plaintiff's rival website (as alleged in Paragraph 42 of the FAC); and/or (6) impede Plaintiff from
15 assisting Wikitravel editors who wish to copy and migrate content from Wikitravel to a competing
16 site owned by Plaintiff (as alleged in Paragraph 43 of the FAC).

17 The reason no such facts are pleaded is because they cannot be. Defendant has neither
18 done, nor expressed any desire to do, anything that can be construed as opposing any of the acts or
19 rights on which Plaintiff has sought a judicial determination. Defendant has never sent a cease or
20 desist letter or otherwise communicated or evidenced any indication that it would oppose Plaintiff
21 in creating a rival travel website or limit content providers to Defendant's Wikitravel page from
22 migrating content to, or creating content for, Defendant's competing travel website, nor has
23 Plaintiff alleged same. In fact, the only allegation in Plaintiff's FAC which describes any action
24 taken by Defendant, allegedly improper or otherwise, is Defendant's filing of the lawsuit in the
25 Central District of California discussed above (Paragraphs 32-34 of the FAC) against the other
26 defendants. That lawsuit, as previously mentioned, strictly involves Internet Brands' objections to
27 parties infringing their Wikitravel trademark, passing themselves off as the owners of that
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1 trademark and website and guardians of that community, and/or unfairly creating the false
2 impression that Internet Brands' Wikitravel website was ceasing to exist or its community was
3 migrating anywhere else. Noticeably, that lawsuit does not have any claim relating to the mere
4 creation of a rival travel website by Wikimedia or the copying or migration of content created
5 under the CC License and posted on Wikitravel to any competing website.

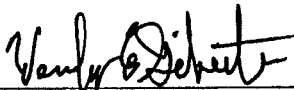
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7 In short, Plaintiff is picking a fight where one does not exist, as a publicity stunt. The
8 conduct on which Plaintiff seeks judicial determination is conduct that Defendant has not
9 threatened to enjoin, and does not oppose or seek to prevent. On a macro level, this lawsuit is
10 nothing more than an ill-advised, reactionary and retaliatory response to Defendant's (1) refusal to
11 "donate" the Wikitravel website and accompanying intellectual property and goodwill to
12 Wikimedia; and (2) filing suit against other parties, seeking to curb the unfair and misleading
13 business practices outlined in that action that have nothing to do with free and fair competition but
14 actually amount to deliberate deception and sabotage by a competitor. As a matter of law, this
15 case lacks any justiciable controversy by virtue of being unripe and therefore must be dismissed.

16 **IV. CONCLUSION**

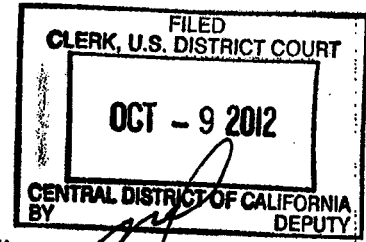
17 For the reasons set forth above, Defendant respectfully requests that this Court sustain its
18 demurrer to the First Cause of Action for Declaratory Relief.

19 DATED: October 15, 2012

iGENERAL COUNSEL P.C.

20
21 By: 
22 Wendy E. Giberti
23 Attorneys for Defendant
24 Internet Brands, Inc.

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10
11 **UNITED STATES DISTRICT COURT**
12 **CENTRAL DISTRICT OF CALIFORNIA**
13 **WESTERN DIVISION**

14 INTERNET BRANDS, INC., a)
15 Delaware corporation,)
16)
17 Plaintiff,)

18 Case No.: CV 11-5358 CAS (CWx)
19)
20 **PROPOSED ORDER**
21 **EXTENDING WRITTEN**
22 **DISCOVERY CUTOFF**

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103 Pursuant to the parties' stipulation, and finding good cause therefor, the
104 Court hereby extends the time to complete written discovery as follows:

- 105 1. Written discovery shall be completed not later than **December 1,**
106 **2012.**
107 2. All written discovery to be taken after October 24, 2012 shall be
108 served by email as an attachment in PDF format. The responding party shall have
109 15 days after service to serve a response.

1 3. This order shall not alter or modify the expert witness discovery
2 schedule set forth in the Court's Order of March 26, 2012 (Doc. No. 22).

3
4 **IT IS SO ORDERED.**

5
6 DATED: 10/9/12

Christina M. Snyder
7 HON. CHRISTINA M. SNYDER
8 UNITED STATES DISTRICT JUDGE
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