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UNITED STATES DISTRICT COURT

FOR THE CENTRAL DISTRICT OF CALIFORNIA

REGISTERSITE.COM, an Assumed Name of ABR PRODUCTS INC., a New York Corporation, *et al.*,

Plaintiffs,

v.

INTERNET CORPORATION FOR ASSIGNED NAMES AND NUMBERS, a California corporation, *et al.*,

Defendants.

Case No. CV 04-1368 ABC (CWx)

Hon. Audrey B. Collins

[CORRECTED] PLAINTIFFS' OPPOSITION TO MOTION BY DEFENDANTS VERISIGN, INC. AND NETWORK SOLUTIONS, INC. TO DISMISS FIRST AMENDED COMPLAINT FOR FAILURE TO STATE A CLAIM PURSUANT TO FED. R. CIV. P. 12(b)(6)

DATE: July 12, 2004
TIME: 10:00 a.m.
COURTROOM: Room 680 – Roybal Bldg.

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I. INTRODUCTION

Defendants Verisign, Inc. and Network Solutions, Inc. (together "Defendants") are currently offering to consumers what they call the *Wait Listing Service* ("WLS"). Though they have not fully deployed the WLS, they are now accepting pre-orders, for which they are taking consumer credit card numbers pursuant to a binding contract. In marketing the WLS, Defendants are making false and deceptive representations to consumers and causing damages to Plaintiffs and consumers.

In their Motion to Dismiss First Amended Complaint For Failure to State a Claim (the "Motion"), Defendants contend Plaintiffs did not allege actual injury to themselves in the First Amended Complaint (the "FAC") and, as a result, lack Article III standing. However, Plaintiffs allege, among other things, that: (i) Plaintiffs' domain name registration businesses are likely to be harmed, if not destroyed, unless the WLS is enjoined (FAC ¶ 4.5.3); (ii) Defendants' unfair business practices are currently diverting customers from Plaintiffs' businesses to Defendants' businesses, and unless enjoined will prevent Plaintiffs from competing for certain domain registrations (FAC ¶ 13.6-13.13); and (iii) Defendants' misleading representations and/or omissions concerning the WLS have caused, and continue to cause, harm to Plaintiffs including loss of goodwill (FAC ¶ 13.6-13.13). Simply put, Defendants are now making unfair and deceptive representations to consumers, upon which the consumers are relying, and damaging Plaintiffs' lawful business interests. Additionally, Plaintiffs' harm will increase substantially upon the deployment of the WLS service.

Defendants also contend Plaintiffs have not alleged facts sufficient to plead any of their causes of action. Defendants arguments for failure to state a claim rely on disputed questions of fact under the pretense that they are questions of law. For example, Defendants rely on their theory that there is no evidence that consumers are misled and that all the material terms and conditions of the WLS can be

discovered by consumers. At this pleading stage, however, such factual arguments must be construed against Defendants. Plaintiffs need only allege facts sufficient to constitute a cause of action, which they have done in the FAC.

II. FACTS

A. ALLEGED FACTS RELEVANT TO DEFENDANTS' MOTION

Defendants have already launched the WLS and are accepting good and valuable consideration from consumers for the worthless WLS service. (FAC ¶¶ 1.1, 4.68.) The WLS purports to give consumers, for an annual fee, the right to be "first in line" on the "waiting list" for currently-registered <.com> and <.net> domain names. (FAC ¶ 1.1.) However, WLS consumers will receive no benefit from purchasing a WLS "subscription" *unless and until* the current domain name owner abandons it, which is unlikely. (FAC ¶ 1.1.)

By offering WLS subscriptions pre-orders, Defendants are now selling contingent future interests in property that Defendants do not own. (FAC ¶ 1.5.) Additionally, because the decision of the current domain name owner to abandon its property is beyond Defendants' control, the WLS is an illegal lottery. (FAC ¶ 1.1.) Specifically, Defendants require consideration (*i.e.*, payment of money), for the chance (*i.e.*, whether the current domain name owner abandons its property) to win the valuable domain name prize (currently owned by a party unrelated to Defendants). (FAC ¶¶ 5.11-5.13.)

Consumers who sign-up for Defendants' WLS are unaware that they are unlikely to ever win the domain names they hope to register through the WLS. (FAC ¶ 8.13.) Rather, consumers are likely to pay Defendants money for several years for the WLS, but never receive anything in return for those payments. (FAC ¶¶ 8.11-8.14.) Consumers will fall for this scheme because Defendants do not disclose the likelihood of "winning" (*i.e.*, of obtaining the desired domain name). (FAC ¶¶ 1.2, 8.6.) Defendants likewise do not disclose that domain names registration terms are for up to 100 years, and therefore most domain names will not

be available through the WLS for several years and potentially not even in this Century. (FAC ¶¶ 4.25, 9.25.)

Defendants are also advertising WLS subscriptions to consumers as a form of "insurance" that will "protect" already registered domain names. (FAC ¶ 1.3.) Current domain name registrants are likely to purchase WLS subscriptions in the face of this "offer" because it lacks disclosure about how consumers can *already* redeem inadvertently lost domain names without this insurance. (FAC ¶ 4.32.)

Defendants have already begun selling WLS subscriptions (FAC ¶ 1.4), but have not yet finalized the WLS system. (FAC ¶¶ 4.66-4.67.) In the event Defendants complete deployment of WLS, which is expected soon, several of the Plaintiffs will literally be put out of business. (FAC ¶ 4.53.) Accordingly, Plaintiffs are suffering injury now as a result of Defendants' WLS offering (FAC ¶ 8.17), and Plaintiffs will suffer even greater injury when the WLS is fully deployed[1]. (FAC ¶ 4.53.)

Plaintiffs compete against Defendants in the retail domain name sales business. (FAC ¶ 13.17.) Plaintiffs each offer a service to assist consumers in registering expired domain names. (FAC ¶ 1.4.) None of the plaintiffs charges a fee for its service unless and until it actually registers a domain name on behalf of its customer. (FAC ¶ 1.4.)

Plaintiffs allege that a WLS subscription provides no value to consumers (FAC ¶ 4.54, 12.17, FAC § L) and effectively destroys Plaintiffs' legitimate

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[1]Taking Defendants' argument that consumers providing consideration (*i.e.*, entering into binding agreements) for the WLS does not constitute launch of the WLS to its logical conclusion would require that Defendants provide value before the WLS can be challenged. Under this theory, Defendants could maintain that the WLS is not ripe for judicial review until and unless a domain name is transferred to a consumer pursuant to the WLS. The problem with this argument, of course, is that Plaintiffs allege most consumers are unlikely to ever obtain domain name registrations as a result of the WLS. Accordingly, Defendants could avoid judicial review of the WLS service by never conferring value to consumers. Rather, Defendants could continue to require binding contracts of consumers, without ever providing anything of value to them. Under Defendants' theory, any consumer scam could avoid scrutiny by never offering any value to the consumers.

businesses (FAC ¶¶ 4.53, 16.20). A current registrant, having the option to renew a domain (and a grace period if the renewal is inadvertently abandoned), gains no advantage from the purchase of a WLS subscription. (FAC ¶ 4.31.) Similarly, most WLS subscribers gain no value from the WLS. (FAC ¶ 4.54.) The WLS consumer would unwittingly purchase "for a one-year period" the right to obtain a domain name if it expires in that year. (FAC ¶ 4.46.) However, the domain name may not become available for decades because it is registered to someone else for such a term. (FAC ¶ 4.25.) Accordingly, the prospective registrant is waiting in a line that may never end. (FAC ¶ 12.17.)

B. FACTUAL INACCURACIES ALLEGED IN DEFENDANTS' MOTION

Defendants motion includes a purported "Summary of the Complaint's Allegations" which includes several material inaccuracies and improper citations to the FAC. (Motion at 3-5.) Defendants state that "Plaintiffs allege that domain names can be registered for periods from one to ten years." (Motion at 3:16-17.) In truth, Plaintiffs allege that "[d]omain names are registered for fixed periods . . . up to 100 years". (FAC ¶ 4.25.) The difference between "one to ten" years and "up to 100 years" is significant because no reasonable consumer would purchase a "waiting list" position for a domain name not scheduled to expire for another century. (FAC ¶ 9.7.) For this reason, Plaintiffs allege in the FAC that Defendants should disclose this material registration term to consumers, and that failure to do so constitutes an unfair business practice. (FAC ¶ 9.9.)

Defendants misrepresent that "Plaintiffs have failed to allege, and cannot allege, that WLS involves the necessary element of chance." (Motion at 8:13-8:14.) In truth, Plaintiffs allege that "Defendants' WLS distribution of domain names is by chance." (FAC ¶ 5.11.)

Defendants prevaricate that "Plaintiffs reference a $60 price point for their services, compared with $24 for Verisign's." (Motion at 4:14.) In truth, Plaintiffs reference a one-time $60 (retail) charge for their services, compared with a $24 *per*

year wholesale charge for Verisign's services, which consumers are required to pay year-after-year indefinitely. (FAC ¶¶ 4.40; 4.46-4.47.) Plaintiffs also allege that consumers will always receive a domain name by paying the fee to Plaintiffs, but that Defendants' WLS is a scheme "in which most consumers will receive nothing for their money." (FAC ¶ 1.1.)

Defendants contend "[t]he Complaint admits that WLS has not been implemented and is not available for registrars to sell to their customers at this time." (Motion at 5:2-5:3.) In truth, Plaintiffs allege that "Defendants eNom and NSI are currently advertising the WLS and are accepting 'pre-orders' for WLS subscriptions on their Web sites." (FAC ¶ 4.68.)

Defendants misstate that "[f]or domain names with a WLS subscription, upon cancellation of the domain name registration and deletion of the domain name, the recently deleted domain name would automatically be registered through the registrar that sold the WLS subscription...". (Motion at 4:26-5:1.) In support of this allegation, Defendants cite paragraph FAC ¶ 4.48. (Motion at 5:1.) In truth, FAC ¶ 4.48 alleges the opposite: that Verisign will *not* delete domain names with a WLS subscription. (FAC ¶ 4.48.) That allegation is fundamental to Plaintiffs' Declaratory Relief and Breach of Contract claims (against Verisign and ICANN, respectively).

III. ARGUMENT

A court may not dismiss a complaint for failure to state a claim "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Conley v. Gibson, 355 U.S. 41, 45-46 (1957); *see also* Moore v. City of Costa Mesa, 886 F.2d 260, 262 (9th Cir. 1989); Haddock v. Bd. of Dental Exam'rs, 777 F.2d 462, 464 (9th Cir. 1985) (court should not dismiss a complaint if it states a claim under any legal theory, even if plaintiff erroneously relies on a different theory). Dismissal is proper under FED. R. CIV. P. 12(b)(6) only where there is either a "lack of a cognizable legal theory" or "the

absence of sufficient facts alleged under a cognizable legal theory." Balistreri v. Pacifica Police Dep't, 901 F.2d 696, 699 (9th Cir. 1988).

FED. R. CIV. P. 8(a) guides determination of whether a complaint states a claim. It provides that a complaint need only contain "a short and plain statement" of the pleader's claim showing that the pleader is entitled to relief. FED. R. CIV. P. 8(a). The facts upon which the claim is based need not be set out in detail. Conley, 355 U.S. at 47. "[A]ll the Rules require is 'a short and plain statement of the claim' that will give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests." Id.; *see* Swierkiewicz v. Sorema N.A., 534 U.S. 506 (2002); Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit, 507 U.S. 163, 168 (1993).

In ruling on a FED. R. CIV. P. 12(b)(6) motion, the court must accept all factual allegations pleaded in the complaint as true, and must construe them and draw all reasonable inferences from them in favor of the nonmoving party. Cahill v. Liberty Mut. Ins. Co., 80 F.3d 336, 337-38 (9th Cir. 1996); Mier v. Owens, 57 F.3d 747, 750 (9th Cir. 1995). Moreover, and particularly relevant in the matter at bar, a court generally cannot consider material outside of the complaint (*e.g.*, facts presented in briefs, affidavits, or discovery materials). Branch v. Tunnell, 14 F.3d 449, 453 (9th Cir. 1994); Braco v. MCI Worldcom Communs., Inc., 138 F. Supp. 2d 1260, 1267 (C.D. Cal 2001). A court may, however, consider exhibits submitted with the complaint. Branch v. Tunnell, 14 F.3d 449, 454 (9th Cir. 1994). A court may also consider documents that are not physically attached to the complaint but "whose contents are alleged in [the] complaint and whose authenticity no party questions." Id.

In this matter, Plaintiffs have easily met the standards of FED. R. CIV. P. 8(a) by pleading at least a short and plain statement of each claim alleged in the FAC.

A. PLAINTIFFS HAVE STANDING UNDER ARTICLE III

Article III of the Constitution limits the power of federal courts to deciding

"cases" and "controversies". To meet the "cases and controversies" standard, a plaintiff seeking relief in federal court must show (1) he has suffered an "injury in fact" or is immediately in danger of sustaining such an injury, (2) that the injury is "fairly traceable" to the actions of the defendant, and (3) the injury will likely be redressed by a favorable decision. *See* Bennett v. Spear, 520 U.S. 154, 162 (1997); *see also* Vongrabe v. Sprint PCS, 2004 U.S. Dist. LEXIS 5438 (C.D. Cal. 2004); L.A. v. Lyons, 461 U.S. 95, 102 (1983). Defendants' Motion challenges only the first element of standing (*i.e.*, whether Plaintiffs alleged a particularized injury).

In Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992), the Supreme Court ruled that a plaintiff meets the injury-in-fact requirement by alleging an "invasion of a legally protected interest which is (a) concrete and particularized ... and (b) actual or imminent, not conjectural or hypothetical . . ." (internal quotation marks and citations omitted). "A plaintiff may survive a motion to dismiss for lack of injury in fact by merely alleging that a string of occurrences commencing with the challenged act has caused him injury; at that stage we presume that 'general allegations embrace those specific facts that are necessary to support the claim.'" Wyoming v. Oklahoma, 502 U.S. 437, 464 (1992) (citations omitted). Article III does *not* require a Plaintiff to prove the case on the merits in order to establish standing. "The purpose of the standing doctrine is to ensure that the plaintiff has a concrete dispute with the defendant, not that the plaintiff will ultimately prevail against the defendant." Hall v. Norton, 266 F.3d 969, 976-977 (9th Cir. 2001). Thus, a plaintiff "need not establish causation with the degree of certainty that would be required for him to succeed on the merits, say, of a tort claim." Churchill County v. Babbitt, 150 F.3d 1072, 1078 (9th Cir. 1998). Rather, he need only establish "the 'reasonable probability' of the challenged action's threat to [his] concrete interest." Id. A plaintiff satisfies the requirements of Article III if he can "show that he personally has suffered some actual or threatened injury as a result of the putatively illegal conduct" of the other party. Gladstone, Realtors v. Village of

Bellwood, 441 U.S. 91, 99 (1979); *see also* Warth v. Seldin, 422 U.S. 490, 501 (1975).

Defendants contend Plaintiffs failed to allege injury to themselves under California's Unfair Competition Law, CAL. BUS. & PROF. CODE §§ 17200 - 17210 (the "UCL"), and consequently lack standing to pursue their UCL claims[2]. (Motion at 5:18-5:21.) However, Plaintiffs allege Defendants "are currently advertising the WLS and are accepting 'pre-orders' for WLS subscriptions on their Web sites." (FAC ¶ 4.68.) Defendants' "pre-orders cannot be cancelled, and by placing an order the customer authorizes [Defendants] to charge its credit card if the WLS subscription sought is available." (FAC ¶ 8.7.) Plaintiffs allege due to this activity Defendants are now "caus[ing] harm to plaintiffs including loss of goodwill" (FAC ¶ 8.12), "Plaintiffs have suffered damages in an amount to be determined at trial" (FAC ¶ 14.7), and "consumers and Plaintiffs have been and will continue to be harmed as a result" of Defendants' conduct. (FAC ¶ 8.17.)

Additionally, Plaintiffs allege impending harm, and specifically that "[s]everal of the Plaintiffs derive their entire revenue from services relating to expired domain names, and will be put out of business if the WLS is implemented." (FAC ¶ 4.53.) "Other[] [Plaintiffs], if not put out of business, will lose their primary source of revenue and the entire goodwill associated with their businesses and business

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[2]Curiously, Defendants argue Plaintiffs lack Article III standing to bring a CAL. BUS. & PROF. CODE §17200 claim based on Defendants' creation and operation of an illegal lottery because Plaintiffs cannot be harmed by such a lottery if they have not participated in it. (Motion, 6:5-9.) The same Defendants (through the same legal counsel), however, argued in an earlier case against all defendants to this action that plaintiffs' participation in an illegal lottery *barred* them from making a §17200 claim for that lottery due to unclean hands from participating in it. (*See* Corrected Memorandum of Points and Authorities in Support of Defendants Network Solutions, Inc.'s and Verisign, Inc.'s Demurrer to the First Amended Complaint in Smiley v. Internet Corporation for Assigned Names and Numbers et al., Los Angeles Superior Court Case No. BC 254659 (2001), a true and correct copy of which is attached as Exhibit A to Plaintiffs' Request for Judicial Notice in Connection with Motion by Defendants Verisign, Inc. and Network Solutions, Inc. to Dismiss First Amended Complaint for Failure to State a Claim, filed herewith.) Defendants have taken inconsistent positions on this issue and, taken together, Defendants' arguments lead to the illogical conclusion that a party harmed by an illegal lottery may *never* sue the operators of that lottery under CAL. BUS. & PROF. CODE §17200.

models." (Id.) This threatened injury is alleged as harm that will imminently result if the WLS is formally launched, which Plaintiffs seek to *avoid* by this lawsuit. As the United States Supreme Court has noted, "[one] does not have to await the consummation of threatened injury to obtain preventive relief. If the injury is certainly impending that is enough." (citations) Babbitt v. United Farm Workers Nat'l Union, 442 U.S. 289, 298 (1979).

This case is distinguished from those Defendants cite in which plaintiffs "suffered no individualized injury as a result of the defendant's challenged conduct", but rely solely upon third party harm. *See* Lee v. Am. Nat'l Ins. Co., 260 F.3d 997, 1001 (9th Cir., 2001). Here, Plaintiffs alleged in the FAC (i) both actual and threatened harm to themselves (ii) directly traceable to Defendants, (iii) which will be redressed by an injunction from this Court. The harm alleged is concrete and particularized, and a combination of both actual and imminent. Plaintiffs do not allege conjectural or hypothetical harm, but allege the injuries they are currently suffering and are sure to suffer after Defendants complete WLS deployment. Plaintiffs have suffered harm as a result of Defendants' unfair methods of competition. Therefore, Plaintiffs' allegations plead a "short and plain statement" sufficient to establish standing.

B. PLAINTIFFS ALLEGE FACTS SUFFICIENT TO STATE SEVEN UCL CLAIMS

California's unfair competition law defines "unfair competition" to mean and include "any unlawful, unfair or fraudulent business act or practice and unfair, deceptive, untrue or misleading advertising and any act prohibited by [the false advertising law]." BUS. & PROF. CODE § 17200. The UCL's purpose is to protect both consumers and competitors by promoting fair competition in commercial markets for goods and services. Barquis v. Merchants Collection Assn., 7 Cal. 3d 94, 110 (1972).

The UCL's scope is broad. Kasky v. Nike, Inc., 27 Cal. 4th 939, 950 (2002). By defining unfair competition to include any "*unlawful* . . . business act or

practice", the UCL permits violations of other laws to be treated as unfair competition that is independently actionable. Id., *citing* Cel-Tech Communications, Inc. v. Los Angeles Cellular Telephone Co., 20 Cal. 4th 163, 180 (1999). By defining unfair competition to include also any "*unfair* or *fraudulent* business act or practice", the UCL sweeps within its scope acts and practices not specifically proscribed by any other law. Id. A private plaintiff may bring a UCL action even when "the conduct alleged to constitute unfair competition violates a statute for the direct enforcement of which there is no private right of action." Stop Youth Addiction, Inc. v. Lucky Stores, Inc., 17 Cal. 4th 553, 565 (1998). To state a claim under the UCL based on false advertising or promotional practices, "it is necessary only to show that 'members of the public are likely to be deceived.'" Committee on Children's Television, Inc. v. General Foods Corp., 35 Cal. 3d 197, 211 (1983); *accord*, Bank of the West v. Superior Court, 2 Cal. 4th 1254, 1267 (1992).

1. Plaintiffs State a Claim for Violation of B&P 17200 predicated on Illegal Lottery

Plaintiffs allege Defendants committed unfair competition by violating CAL. PENAL CODE § 319, *et seq.* proscribing lotteries. Specifically, Defendants require consideration (*i.e.* payment of money) for the chance (*i.e.*, whether a current domain name owner abandons its property) to win the valuable domain name prize. Under California law, a lottery has three essential elements: (1) a prize; (2) chance; and (3) consideration. California Gasoline Retailers v. Regal Petroleum Corporation, 50 Cal.2d 844, 851 (1950). The California Supreme Court held the Penal Code definition of a "lottery" is materially indistinguishable from the definition of a "lottery game" under the California State Lottery Act of 1984 (CAL. GOV. CODE §§ 8880-8880.68). Western Telcon, Inc. v. California State Lottery, 13 Cal.4th 475, 484 (1996).

Defendants seek to dismiss Plaintiffs' First Cause of Action under two theories: 1) the WLS does not distribute prizes among multiple competing

participants, and 2) Plaintiffs fail to allege that WLS involves the necessary element of chance. (Motion at 8:10-8:14.)

a. There Are Multiple Participants in the WLS Lottery

Defendants claim their lottery is not unlawful because only one person may enter to win each particular domain name prize. (Motion at 8:8-8:11.) To the contrary, the chance of one participant winning a single prize within the context of a larger scheme effecting multiple participants can constitute an illegal lottery. *See e.g.,* Western Telcon, Inc., 13 Cal.4th at 484.

The Lottery Act defines a "lottery game" as "any procedure authorized by the Commission whereby *prizes* are distributed among persons who have paid, or unconditionally agreed to pay, for tickets or shares which provide the opportunity to win such prizes." CAL. GOV. CODE § 8880.12 (emphasis added). There is no requirement that the prize come from a particular source such as the consideration paid by the participants. *See* 71 Op.Atty.Gen.Cal. 139 (1988). Schemes ranging from "Scratchers" (a variety of off-line "instant ticket games" in which players win prizes ranging from a free ticket to several thousand dollars) to a raffle in which winners won haircuts have been held to constitute lottery games. *See* Western Telcon, Inc., 13 Cal.4th at 484; *see also* 72 Op.Atty.Gen.Cal. 143 (1989).

In the present matter, Defendants plan to sell multiple WLS subscriptions and award multiple domain name prizes. The WLS is akin to a scratch-and-win where the participant must scratch the card to see if it has won a prize. Like the Defendants' WLS scheme, there is only one participant for each scratch card. Some participants in the scratch game will be successful and win a cash prize. The fact that each scratch game has only one participant does not constitute a defense to an illegal lottery charge. Similarly, some WLS subscribers will be successful and win a domain name prize. In both the scratch game and WLS, the vast majority of players will pay for the chance but win nothing. The scratch-and-win game is the same as Defendants' WLS for purposes of California's lottery law. Both have many

participants, but just one participant per prize.

b. The WLS Lottery Relies on Chance from the Perspective of the Consumer

Defendants' claim that the WLS is not a lottery because domain names are not awarded by "mathematical" chance is similarly unfounded.[3] Defendants assert "uncertainty over whether a person will allow his domain name registration to lapse...does not constitute chance". (Motion at 8:21-8:24.) In support of that proposition, Defendants cite only a century-old opinion from a Massachusetts state court. However, California law is to the contrary: "whether a prize is distributed by chance is determined from the perspective of the players." 76 Op.Atty.Gen.Cal. 266 (1993). The fact that the success or failure of a WLS subscription may turn on a third party domain name owner's decision to allow a registration to lapse is irrelevant because it is *not within the control of the WLS subscriber.* The "chance" element is present because "as to the purchaser it is uncertain, it is chance that luck and good fortune will give a large return for a small outlay." People v. Hecht, 119 Cal. App. Supp. 778, 787 (1931).

In People v. Hecht, a defendant clothing store owner sold memberships in a "suit club" at a price of two dollars per week. The suit club membership contract was ostensibly a standard agreement for the purchase of a tailor-made suit for the sum of $60. The contract obligated the seller to deliver a tailored garment upon payment of the difference between the amount paid in membership fees and $60 at any time during the life of the contract. In contrast to a standard purchase agreement, however, the contract provided that each week, one member of the club would be selected by defendant to receive a free suit.

The Hecht Defendant was convicted of setting up and proposing a lottery.

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[3]As noted above, Plaintiffs expressly allege that the WLS involves the distribution of prizes by chance (FAC ¶ 5.11), which is sufficient to defeat Defendants' Motion under Rule 12(b)(6).

The court rejected defendant's argument that the choice of persons to receive the suit was not by lot or chance noting that:

> With the purchaser, what prize he might obtain was a mere matter of lot and chance. The scheme involved substantially the same sort of gambling upon chances as in any other kind of lottery. It appealed to the same disposition for engaging in hazards and chances with the hope that luck and good fortune may give a great return for a small outlay, and as we think within the general meaning of the word "lottery", and clearly within the mischief against which the statute is aimed.

Id. The Court recognized that "[t]he vice of the whole scheme . . .is found in the 'chance' which the customer takes when he pays his money under the terms of the contract . . . if he fails once or twice, or more times, to win the prize, and discontinues paying, he loses all that he has paid." Id.

The WLS is similar to the Hecht scheme. Just as whether the Hecht defendant distributed suits was based upon a decision by someone other than the suit club member, whether Defendants distribute the domain name is based upon a decision by someone other than the WLS subscriber. Both schemes involve a decision rather than a random drawing. But, both are lotteries because they involve "chance" – that is, the subscriber is not responsible for whether she wins the prize. The WLS subscriber's likelihood of actually registering the domain name is "entirely upon others over whom and whose actions the beneficiary has no control." 23 Op.Atty.Gen.Cal. 260 (1900); *see also* Public Clearing House v. Coyne, 194 U.S. 497 (1904); Wolf v. F.T.C., 135 F.2d 564 (7th Cir. 1943). Also, like the Hecht scheme, if the WLS customer "fails once or twice, or more times, to win the prize, and discontinues paying, he loses all that he has paid" and consequently will pay the WLS fee year-after-year. *See* Hecht, 119 Cal. App. Supp. at 787. Therefore, Defendants' WLS scheme is an illegal lottery pursuant to CAL. PENAL CODE § 319 and a commensurate violation of the UCL.

2. Plaintiffs State a Claim for Violation of B&P 17200 Predicated on the Consumers Legal Remedies Act

Plaintiffs allege Defendants violated the UCL by violating the Consumers

Legal Remedies Act, CAL. CIV. CODE §§ 1750-1784 (the "CLRA"). Defendants contend Plaintiffs fail to state a claim under the UCL because Plaintiffs allegedly do not qualify for protection under the CLRA. In particular, Defendants contend Plaintiffs have not alleged they sought or acquired any WLS subscriptions, or that they did so for "personal, family or household purposes". (Motion at 9:15-9:18.) Defendants' objection, however, misconstrues the nature of a claim under CAL. BUS. & PROF. CODE § 17200.

a. Plaintiffs Need Not Be Consumers but Are

Plaintiffs are *not* asserting a claim under the Consumers Legal Remedies Act; they are asserting a claim under the Unfair Competition Law. "To state a claim under the [UCL] one need not plead and prove the elements of a tort [in this case, the CLRA]. Instead, one need only show that 'members of the public are likely to be deceived.'" Freeman v. Time, Inc., 68 F.3d 285, 289 (9th Cir. 1995), *citing* Bank of the West, 2 Cal. 4th at 1267, Chern v. Bank of America, 15 Cal. 3d 866, 876 (1976). Plaintiffs properly pled that consumers are likely to be deceived by Defendants' representations. (*e.g.*, FAC ¶ 8.12 ("The representations and omissions as alleged herein are likely to deceive consumers and cause harm to plaintiffs including loss of goodwill.").) In any event, Plaintiffs also allege they are themselves consumers: "Each Plaintiff owns at least one domain name in <.com> or <.net>, and is a consumer of domain names to that extent." (FAC ¶ 2.15.)

b. Plaintiffs Suffered Damages and Alleged Accordingly

Defendants contend Plaintiffs must allege damage to themselves specific to CAL. CIV. CODE § 1780. However, Plaintiffs do not sue under the CLRA and are not subject to CAL. CIV. CODE § 1780. Rather, they sue under the UCL, and have properly alleged a *competitive* injury arising from Defendants' violation of the

CLRA.[4]

c. Plaintiffs Allege a Representation by Verisign

The Motion falsely claims "Plaintiffs . . . have pleaded no facts that Verisign made any . . . representation" that violates the CLRA. In truth, Plaintiffs allege that "Defendant Verisign, both itself and acting by and through the Participating Registrars, is representing to consumers that they will receive an economic benefit . . . the earning of which is contingent on an event to occur subsequent to the consummation of the transaction . . ." (FAC ¶ 6.5.) Moreover, Defendants do not cite any authority for the proposition that the only violation of the CRLA could be by *express* representations. In any event, the FAC alleges Defendants are making express and implied representations that consumers will receive an economic benefit, the earning of which is contingent upon events to occur subsequent to the consummation of the transaction. Accordingly, Plaintiffs' allegations provide fair notice to Defendants of the alleged claims and the grounds upon which they rest.

Finally, Defendants aver Verisign cannot be liable for eNom's and NSI's representations, because "the UCL does not permit vicarious liability". People v. Toomey, 157 Cal. App. 3d 1, 14 (1984). In Toomey, the primary case upon which Defendants rely, the defendant owned a company that sold coupon books purportedly worth thousands of dollars in discounts at Las Vegas casinos and businesses. Toomey was charged with unfair business practices (CAL. BUS. & PROF. CODE § 17200) and false advertising. (CAL. BUS. & PROF. CODE § 17500). The trial court found that the disclosure of certain terms, conditions and restrictions placed on the coupons was unavailing. The Court of Appeal held that

> "if the evidence establishes defendant's participation in the unlawful practices, either directly or by aiding and abetting the

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[4]This critical distinction does not, however, render Plaintiffs' claims representative in nature. Just as a plaintiff asserting a Lanham Act (*i.e.,* trademark infringement) claim is presumed to suffer irreparable injury if consumers (not plaintiff herself) are likely to be deceived, Plaintiffs will suffer competitive injury as a consequence of Defendants' deceptive practices proscribed by the CLRA.

> principal, liability under sections 17200 and 17500 can be imposed . . . All parties to a conspiracy to defraud are directly liable for all misrepresentations made pursuant to such conspiracy and anyone who knowingly aids and abets fraud or furnishes the means for its accomplishment is liable equally with those who actually make the misrepresentations."

Toomey, 157 Cal. App. 3d at 15 (internal citations omitted). Because Toomey was "the moving force behind the entire coupon sales program and a joint participant with the other distributors in their business operations," he was responsible for the misleading and unfair practices of the distributors which sold the coupons. Id. at 15-16.

The FAC clearly alleges that Verisign is "the moving force behind the entire" WLS program, and that it "knowingly aids and abets fraud or furnishes the means for its accomplishment" of the scheme to defraud. *See* Id. Verisign acted in concert with eNom and NSI and, accordingly, is responsible for eNom and NSI's misleading and unfair actions in selling WLS subscriptions. Verisign is therefore liable under CAL. BUS. & PROF. CODE § 17200.

d. Defendants' Representations Are Deceptive

Plaintiffs allege in the FAC that Defendants' representations and omissions "renders their sale of WLS subscriptions misleading and deceptive to consumers." (FAC ¶ 1.2.) Defendants contend their representations are not deceptive in the same way that representations about the purpose in LoJack vehicle recovery systems are not deceptive. Defendants' LoJack analogy is inapposite. Defendants proffer that the value of LoJack is not really the LoJack vehicle monitoring service, but rather the recovery of a vehicle itself (which may never occur). LoJack provides a service independent of whether a vehicle is stolen. Moreover, LoJack, like other legitimate insurance products, are sold to consumers who already own property they wish to protect or monitor.

In the present matter, consumers who purchase WLS subscriptions do not already own the domain name they hope to obtain. A WLS subscription provides

no service and protects no property interest. The current registrant already has a "Redemption Grace Period" in the event the domain name is inadvertently lost and the WLS subscriber will only obtain the domain name if the current registrant elects to abandon the domain name – an opportunity that the subscriber has regardless of the WLS. (FAC ¶ 4.31.) Defendants' threat of deletion and request for a payment to "protect" a name is, therefore, unfair, misleading, deceptive, and a violation of the UCL. Unbeknownst to the consumer, any benefit derived from the WLS subscription is contingent upon an event which may occur subsequent to the consummation of the transaction. Unlike LoJack, where consumers are buying a vehicle recovery system to monitor cars already owned in the event of theft, WLS consumers are buying a subscription that Defendants deceived them into believing will result in a domain name. Defendants fail to disclose that the WLS subscription will probably never result in a domain name or anything else of value. Accordingly, the comparison to LoJack is misplaced. Defendants are liable under the UCL for their violation of the CLRA because they confer no value to consumers.

3. Plaintiffs State a Claim for Deception re Likelihood of Success

Defendants ask this Court to rule as a matter of law that Defendants' representations and omissions are not deceptive about the likelihood that a WLS subscriber will actually register its desired domain name. The Court should reject this theory for two reasons. First, Defendants based their entire argument on the equivocation that "the Complaint concedes that potential domain name registrants already understand that few registrants of desirable domain names allow their domain name registrations to be cancelled and their domain names to be deleted." (Motion at 12:1 - 12:5.) To the contrary, Plaintiffs allege several times that the "representations and omissions [alleged in the FAC] are likely to deceive consumers [and] defendants' failure to disclose the likelihood that a WLS subscription will be successful creates a false assumption in the mind of consumers that WLS

subscriptions will result in actual domain name registrations" (FAC ¶¶ 8.12-8.13.) Defendants characterization of the FAC is plainly false and is, therefore, either disingenuous or negligent.

Second, Defendants' requested relief would be improper in the context of a motion under FED. R. CIV. P. 12(b)(6), which tests only the sufficiency of Plaintiffs' allegations. Triable issues of fact remain as to whether Defendants' representations and omissions are misleading and deceptive notwithstanding Defendants' contention that the risk a domain name will not be deleted is disclosed. *See* Podolsky v. First Healthcare Corp., 50 Cal. App. 4th 632 (1996).

In People v. Dollar Rent-A-Car Systems, Inc., 211 Cal. App. 3d 119 (1989), the court affirmed a judgment finding that Dollar Rent-A-Car violated the UCL. There, Dollar sold collision damage waivers (CDWs) to its customers and billed repair charges for rental car damages. Dollar argued that its contract adequately disclosed the terms and conditions of the CDW. The court found substantial evidence of a UCL violation based, in part, upon the context of false and misleading statements and business practices which confused consumers regardless of disclaimers included in the contracts. Dollar, 211 Cal. App. 3d at 129. Even though the revised contract advised customers they would be charged the "retail value" of all repairs, the court held that language did not resolve the ambiguity because Dollar failed to disclose it paid a discount for repairs. Id. The Dollar court made clear that reliance on disclosures is insufficient in the face of allegations that representations and omissions are likely to mislead consumers.

Defendants' theory of adequate disclosure relies on, amongst other things, a thorough understanding of the terms of the WLS, an understanding of the current registrant's grace period, and a working familiarity with the "WHOIS" database and its limitations. Accordingly, it is merely a theory and is insufficient to prevail on a motion to dismiss.

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4. Plaintiffs State a Claim for Deception re Expiration Dates

The FAC alleges domain names registration terms are for up to 100 years, and therefore most domain names will not be available through the WLS for several years and potentially not even for a century. (FAC ¶¶ 4.25, 9.25.) Defendants fail to advise consumers to check the expiration date on domain names. (FAC ¶ 9.5.) Consequently, "[b]y selling WLS subscriptions that *cannot* result in a domain name (because the expiration date of the domain name falls later than the trial subscription period), [Defendants] are defrauding consumers." (FAC ¶ 9.7.)

In their Motion, Defendants allege expiration dates are publically accessible, and that consumers should just know to check them. On that basis, Defendants request the Court to rule as a matter of law that the failure to disclose expiration dates is not deceptive. However, the evidence will show that expiration dates are not always public, and most consumers have no knowledge of any public database of expiration dates. At this stage, presenting such evidence would be premature. Rather, Plaintiffs' mere allegation in a "short and plain statement" that consumers are likely to be deceived is sufficient to defeat Defendants' Motion. Therefore, Plaintiffs adequately stated a cause of action under the UCL concerning Defendants' failure to disclose expiration date information to consumers.

5. Plaintiffs State a UCL Claim Based on Defendants' Marketing of WLS as "Protection"

Defendants assert the offering of WLS subscriptions does not constitute "protection" because "a threat is not unlawful 'where that which is threatened is only what the party has a legal right to do.'" (Motion at 16:7-16:9.) The corollary to the rule cited by Defendants, and the basis for Plaintiffs' claim in this regard, is that when recited consideration consists of nothing more than a preexisting obligation or duty, it cannot be consideration of a promise. CAL. CIV. CODE § 1605 (consideration consists of "[a]ny benefit conferred, or agreed to be conferred, upon the promisor, by any other person, to which the promisor is not lawfully entitled . . ."); Williams

Constr. Co. v. Standard-Pacific Corp., 254 Cal. App. 2d 442, 453 (1967); Podolsky v. First Healthcare Corp., 50 Cal. App. 4th at 655.

Plaintiffs allege "Defendants are impliedly representing that there is a benefit to be obtained" from purchasing a WLS subscription on one's own domain names" and that such representation is false. (FAC ¶ 10.12.) The reason it is false is inherent in the nature of the WLS: a subscription gives the subscriber the right to register a domain name if the current registrant declines to do so. The current registrant, having the option to renew a domain, gains no rights by the purchase of a WLS subscription. The current registrant already has a "Redemption Grace Period" in the event the domain name is inadvertently lost. (FAC ¶ 4.31.) Defendants' threat of deletion and request for a payment to "protect" a name is, therefore, unfair, misleading, deceptive, and a violation of the UCL.

6. Plaintiffs State a UCL Claim Based on Defendants' Sales of Property They Do Not Own

Domain names are property, and "like other forms of property, domain names are valued, bought and sold, often for millions of dollars". Kremen v. Network Solutions, Inc., 337 F.3d 1024, 1030 (9th Cir. 2003). The Ninth Circuit found that Defendant and movant Network Solutions, Inc. could be liable for "handing [a] domain name over to" someone before it has been duly deleted. Id.

Defendants assert that Plaintiffs' UCL claim based on Defendants' sales of property they do not own fails because "a deleted domain name...does not exist and thus belongs to no one." (Motion at 17:16-17:17.) Defendants misrepresent that Plaintiffs "admit that a WLS subscription will only be activated if and when the current registrant 'abandons' the domain name registration . . . in which event the domain name registration is cancelled, and the domain name is deleted." (Motion at 17:20-17:24.) In truth, Plaintiffs repeatedly allege domain names subject to WLS subscriptions will *not* be deleted. Rather, Defendants will wrongfully refuse to delete domain names and instead wrongfully hand them over to a WLS subscriber.

(FAC ¶ 4.48.) Moreover, even if Defendants were correct that the names they are selling (which are currently registered to third parties) are actually deleted and belong to no one, then Defendants have no right to preclude Plaintiffs from competing to register them. In either event, Plaintiffs have properly alleged an unfair competition claim based on Defendants' purported sales of domain names they do not own.

7. Plaintiffs State a UCL Claim Based on FTC Act Violations

a. Plaintiffs May Allege the FTC Act as a Predicate to a UCL Claim

Under California law, any unlawful business practice, including violations of laws for which there is no direct private right of action, may be redressed by a private action under BUS. & PROF. CODE § 17200. Committee on Children's Television, Inc. v. General Foods Corp., 35 Cal. 3d 197, 210-11 (1983). It is not necessary that the predicate law provide for private civil enforcement. Saunders v. Superior Court, 27 Cal. App. 4th 832, 838-39 (1994). Defendants assert that Plaintiffs' Eighth Cause of Action constitutes an impermissible attempt to indirectly enforce the Federal Trade Commission Act, 15 U.S.C. §§ 41-58 (the "FTC Act"). None of the cases cited, however, conclude as Defendants argue. Moore v. N.Y. Cotton Exch., 270 U.S. 593 (1926), Holloway v. Bristol-Myers Corp., 485 F. 2d 986 (D.C. Cir. 1973), and Carlson v. Coca-Cola Co., 483 F. 2d 279 (9th Cir. 1973) all address attempts by private plaintiffs to enforce the FTC Act directly (*i.e.*, to state a cause of action for violation of the FTC Act, and not a cause of action under the UCL). Those attempts were rejected because the FTC Act does not provide for private enforcement.

Summit Tech, Inc. v. High-line Med. Instruments Co., 933 F. Supp 918 (C.D. Cal. 1996) addresses an attempt by a private plaintiff to enforce the federal Food, Drug and Cosmetic Act (the "FDCA"), and not the FTC Act, via the UCL. The court held that such indirect enforcement is expressly *preempted* by 21 U.S.C. §

337. The FTC Act, on the other hand, does not preempt state law and enforcement through the UCL. Rather, Defendants' violation of the FTC Act is no different than any other violation of law which private citizens cannot directly assert but can use as the basis for a UCL claim[5]. Accordingly, Plaintiffs may assert a claim under the UCL predicated upon Defendants' violation of the FTC Act.

b. Plaintiffs Properly Alleged an FTC Act Violation

Defendants claim that Plaintiffs have not alleged an FTC violation is similarly unfounded. As Defendants note, an act or practice is "deceptive" under the FTC Act if it is likely to mislead consumers acting reasonably under the circumstances. Defendants ask this Court to rule as a matter of law that consumers are not likely to be deceived by a service that "may not result in a domain name registration," (Motion at 11:3) because consumers supposedly already "understand that few registrants of desirable domain names allow their domain name registrations to be cancelled and their domain names to be deleted." (Motion at 12:1-12:3.). Defendants' assertion that all the risks associated with WLS subscriptions are disclosed and known is a question of fact, not amenable to resolution on a motion under Rule 12(b)(6). Moreover, even if such risks are disclosed, triable issues of fact remain as to whether Defendants' representations and omissions are deceptive. *See* Podolsky v. First Healthcare Corp., 50 Cal. App. 4th at 650 (absence of information about relevant protections under federal and state law renders otherwise accurate agreement potentially deceptive and therefore in violation of the UCL); People v. Dollar Rent-A-Car Systems, Inc., 211 Cal. App. 3d 129. Accordingly,

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[5]*E.g.*, Consumers Union of United States, Inc. v. Fisher Development, Inc., 208 Cal. App. 3d 1433, 1444 (1989) (anti-discrimination laws); B.W.I. Custom Kitchen v. Owens-Illinois, Inc., 191 Cal. App. 3d 1341, 1348 (1987) (antitrust laws); People v. E.W.A.P., Inc., 106 Cal. App. 3d 315, 318 (1980) (criminal laws); People v. K. Sakai Co., 56 Cal. App. 3d 531, (1976) (environmental protection laws); People ex rel. Van de Kamp v. Cappuccio, Inc., 204 Cal. App. 3d 750, 759 (1988) (fish and game laws); Hernandez v. Stabach, 145 Cal. App. 3d 309, 314-315 (1983) (housing laws); People v. Los Angeles Palm, Inc., 121 Cal. App. 3d 25, 32-33 (1981) (labor laws); People v. James, 122 Cal. App. 3d 25, 35-36 (1981) (vehicle laws); Webster v. Omnitrition Int'l, 79 F.3d 776 (1996) (criminal fraud laws).

Plaintiffs have alleged facts sufficient to state a cause of action for violation of the UCL claim predicated on violation of the FTC Act.

C. PLAINTIFFS STATE A CLAIM FOR TYING

1. Plaintiffs Have Standing to Allege the Tying Claim

Defendants allege that Plaintiffs lack standing to bring their antitrust claim because, Defendants claim, the threatened injury "does not constitute a significant threat." This claim goes to the merits of Plaintiffs' claims, and not to the sufficiency of their factual allegations. As Defendants acknowledge, Section 16 of the Clayton Act authorizes injunctive relief in reasonable anticipation of threatened as well as actual injury. 15 U.S.C. § 26; Zenith Radio Corp. v. Hazeltine Research, Inc., 395 U.S. 100, 130 (1969). Defendants claim Plaintiffs have failed to "quantify the purported impact from Verisign's proposed launch of WLS". (Motion at 19:24-25.) However, Plaintiffs are not required at this stage to present evidence of the quantity of the impact. Instead, Plaintiffs need only allege, and did allege, "[a] not insubstantial volume of commerce in the tied product market will be affected by [Defendants'] tying agreement". (FAC ¶ 13.16.)

2. Plaintiffs Properly Allege the Elements of a Tying Claim

A tying arrangement is an agreement by a party to sell one product on the condition that a buyer also purchase a second product, or at least that the buyer will not purchase the second product from any other supplier. Northern Pacific Railway Co. v. United States, 356 U.S. 1, 5-6 (1958). Tying arrangements are unreasonable if a party has sufficient market power with respect to the tying product to restrain appreciably competition for the tied product and a not insubstantial amount of interstate commerce is affected. Id. Plaintiffs allege that Verisign exercises dominant market power with respect to WLS subscriptions (FAC ¶ 13.9); that every consumer who purchases a WLS subscription will be required to purchase a domain name registration from the same registrar (Id.); that the tying arrangement will unreasonably restrain commerce in domain name registrations (FAC ¶ 13.11); and

that a not insubstantial volume of commerce in the tied product market will be affected (FAC ¶ 13.16). Plaintiffs have therefore pled the "short and plain statement" for each element of a tying claim, and Defendants' Motion is without merit as to Plaintiffs' Ninth Cause of Action.

D. PLAINTIFFS STATE A CLAIM FOR TORTIOUS INTERFERENCE

Defendants assert that Plaintiffs' claim for Tortious Interference fails because Plaintiffs allege interference with "beneficial economic relationships with [Plaintiffs'] respective customers," whereas in the original complaint, Plaintiffs alleged that they were seeking business from "prospective customers." On the basis of this change, Defendants contend that Plaintiffs "admitted in their original complaint that these customer relationships had not yet developed at the time of Verisign's allegedly tortious conduct." (Motion at 24:10-24:11.) Of course, the change to which Defendants refer is hardly an admission; the tort of intentional interference does not require that the relationships interfered with be with current customers. *See* Westside Center Associates v. Safeway Stores 23, Inc., 42 Cal. App. 4th 507, 520-521 (1996) (tort of interference with prospective economic advantage protects the expectation of an advantageous business relation even in the absence of an existing, legally binding agreement). Because Plaintiffs may base a claim of interference with prospective economic advantage on relations with current and/or prospective customers, the allegations are not inconsistent and Defendants' objection is unfounded.

Similarly, Defendants' contention that Plaintiffs fail to allege facts supporting their claim for tortious interference relies entirely on authority from California state courts, and is therefore inapposite: federal courts do apply California's fact-pleading standard. Diodes, Inc. v. Franzen, 260 Cal. App. 2d 244, 250 (Ct. App., 1968) (noting "[t]he federal cases since the adoption of the federal rules are not helpful on the pleading questions in an action brought in a state court in California, because federal cases use 'notice pleading,' whereas California uses 'fact pleading.'").

Plaintiffs allege each of the elements of a cause of action for tortious interference with prospective economic advantage. Accordingly, the FAC is sufficient under the federal notice pleading standard, and Defendants' motion should be denied.

E. PLAINTIFFS ARE ENTITLED TO DECLARATORY RELIEF ON THE ELEVENTH CLAIM

Defendants assert that Plaintiffs are not entitled to Declaratory Relief because "the Complaint itself unequivocally demonstrates that WLS would have no effect on a sponsoring registrar's ability to delete domain names they have registered." (Motion at 25:9-25:11.) The FAC does no such thing. To the contrary, it expressly and repeatedly asserts that after the the WLS is fully deployed, Verisign will *ignore* "delete" commands sent by registrars. (FAC ¶¶ 4.48, 15.2, 15.10-15.12.) For the purpose of this motion, the Court must accept all factual allegations in the FAC as true, and Defendants' (unsupported) contention that WLS would "not affect a registrar's ability to delete registrations of domain names they have registered" (Motion at 25:13-25:14) must be ignored. Indeed, one court has already made the factual finding that "[c]ontrary to the current system, domain names that are subject to a WLS subscription would never be deleted from the registry when the original registration expired." Dotster, Inc. v. Internet Corp., 296 F. Supp. 2d 1159, 1161 (C.D. Cal. 2003). Plaintiffs properly pled a declaratory relief cause of action against Verisign.

IV. CONCLUSION

For the foregoing reasons, Defendants' motion should be denied.

Dated this 17th day of June, 2004.

Respectfully Submitted,

NEWMAN & NEWMAN, ATTORNEYS AT LAW, LLP

By: _____

Derek A. Newman (190467)
S. Christopher Winter (190474)

Attorneys for Plaintiffs

PROOF OF SERVICE

I hereby certify that on this **17th day of June**, 2004, I served the foregoing document described as:

– [CORRECTED] PLAINTIFFS' OPPOSITION TO MOTION BY DEFENDANTS VERISIGN, INC. AND NETWORK SOLUTIONS, INC. TO DISMISS FIRST AMENDED COMPLAINT FOR FAILURE TO STATE A CLAIM PURSUANT TO FED.R.CIV.P. 12(b)(6) and –PROOF OF SERVICE

to be served on all interested parties in this action by transmitting a true copy thereof by Email, and by Federal Express addressed as follows:

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I declare that I am employed in the office of a member of the bar of this court at whose direction the service was made.

Executed on **June 17th , 2004** at Seattle, Washington.

Diana Au

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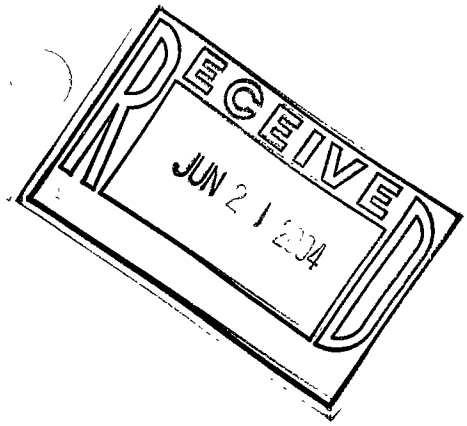

SENT VIA EMAIL AND FEDERAL EXPRESS

June 17, 2004

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Re: Registersite.com, et al v. Icann, et al

Dear Counsel:

Today, we served on you and attempted to file *Plaintiffs' Opposition to Motion by Defendants Verisign, Inc. and Network Solutions, Inc. to Dismiss First Amended Complaint for Failure to State a Claim Pursuant to FED. R. CIV. P. 12(b)(6)*. However, the court did not accept the document as "filed" because it was 26 pages in length, but instead held the document as a "discrepancy".

In order to correct the issue, we struck from the brief footnote 6 and most of the conclusion. Then, we delivered a *[Corrected] Plaintiffs' Opposition to Motion by Defendants Verisign, Inc. and Network Solutions, Inc. to Dismiss First Amended Complaint for Failure to State a Claim Pursuant to FED. R. CIV. P. 12(b)(6)* to our service for filing. We understand the service may not have made today's deadline, in which event it will be filed tomorrow morning.

Attached, and served today, please find the *[Corrected] Plaintiffs' Opposition to Motion by Defendants Verisign, Inc. and Network Solutions, Inc. to Dismiss First Amended Complaint for Failure to State a Claim Pursuant to FED. R. CIV. P. 12(b)(6)*.

We apologize for any confusion or inconvenience. Please call me with any questions or concerns.

Very Truly Yours,

NEWMAN & NEWMAN,
ATTORNEYS AT LAW, LLP

Derek A. Newman

encl.