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UNITED STATES DISTRICT COURT

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; VERISIGN, INC., a Delaware Corporation; NETWORK SOLUTIONS, INC., a Delaware Corporation; ENOM, INC., a Washington Corporation; ENOM FOREIGN HOLDINGS CORPORATION, a Washington Corporation; and DOES 1-10, inclusive,

Defendants.

Case No. CV 04-1368 ABC (CWx)

MEMORANDUM OF POINTS AND AUTHORITIES OF DEFENDANTS VERISIGN, INC. AND NETWORK SOLUTIONS, INC. IN SUPPORT OF MOTION TO DISMISS THE 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: 680 – Roybal Fed. Bldg.
Hon. Audrey B. Collins

[Notice of Motion and Motion filed concurrently herewith]

Defendants VeriSign, Inc. ("VeriSign") and Network Solutions, Inc. ("NSI") respectfully submit this joint memorandum in support of their Motion to Dismiss all claims asserted against them in the First Amended Complaint filed herein by Plaintiffs (the "Complaint" or "FAC").

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I. INTRODUCTION

Plaintiffs contend they are eight businesses that offer, among other things, services purportedly designed to assist persons in obtaining registrations for recently deleted Internet domain names in the event the prior registrant allowed the domain name registration to lapse and the domain name to be deleted.[1] They have filed a 51-page complaint based on a service, the Wait Listing Service ("WLS"), that VeriSign proposed over two years ago, but which is not launched or active. Nevertheless, Plaintiffs assert that WLS should be enjoined because it purportedly would harm competition and consumers. However, as Plaintiffs are aware, in another action filed last year in this Court by three registrars to block WLS, Judge Walter found that "WLS has the potential to benefit registries, registrars . . . and, *most importantly, the public.*"[2] *Dotster, Inc. v. Internet Corp. for Assigned Names & Numbers*, 296 F. Supp. 2d 1159, 1166 (C.D. Cal. 2003) (emphasis added).

Viewed in the light most favorable to Plaintiffs, their allegations do not reflect any unlawful action by VeriSign or NSI. Plaintiffs have accused VeriSign and NSI – based solely on VeriSign's *proposal* to implement WLS – of operating an "illegal lottery," violating federal antitrust laws, and deceiving "consumers" about the value of WLS. Plaintiffs' own Complaint reveals that these allegations are baseless. The facts alleged in the Complaint establish that by *proposing* to offer WLS, VeriSign and NSI have proposed no illegal lottery, have committed no antitrust violation, and have disrupted no existing business relationship between Plaintiffs and others, and that no

[1] In fact, at least two of the Plaintiffs, Esite and BidItWinIt, apparently have no active business operations and have *never* provided any domain name registration services. *See* http://www.esite.com; http://www.biditwinit.com. In addition, AusRegistry Group does not even offer registration services to consumers. *See* http://www.registrarsasia.com.

[2] In the *Dotster* action, this Court denied a preliminary injunction motion brought by several registrars against ICANN that sought to enjoin the implementation of WLS. The *Dotster* action was later dismissed with prejudice. Certain Plaintiffs in this action, namely R. Lee Chambers Co. LLC and Fiducia LLC, are members of an organization called the Domain Justice Coalition ("DJC"), of which the *Dotster* plaintiffs also are members. The DJC publicly has claimed responsibility for the *Dotster* action. *See* http://www.stopwls.com/lawsuit.html.

reasonable "consumer" could be misled by VeriSign's and NSI's promotions for the proposed WLS service.

Plaintiffs' Complaint demonstrates only the lengths to which Plaintiffs will go to stop WLS – a service that will bring certainty and order to the currently chaotic process by which prospective domain name registrants seek to be the first to register a domain name that has been deleted. Plaintiffs' anti-competitive litigation maneuvers cannot create a claim for relief. The Complaint should be dismissed in its entirety. Moreover, the Court should not grant Plaintiffs leave to amend further because Plaintiffs have already tried, without success, to correct its deficiencies by amending their original pleading after VeriSign explained the defects therein in the parties' "meet and confer."

II. SUMMARY OF THE COMPLAINT'S ALLEGATIONS

A. The Parties

The Complaint asserts claims on behalf of eight businesses, all of which purport to offer services to assist customers who seek to register a domain name that has been registered to someone else and was recently deleted. (FAC ¶ 1.4.) Plaintiffs assert claims against four defendants: VeriSign, NSI, eNom, Inc. ("eNom"), and Internet Corporation for Assigned Names and Numbers ("ICANN"). They allege that VeriSign, pursuant to an agreement with ICANN, operates the exclusive "registry" for the .com and .net top-level domains ("TLDs"). (*Id.* ¶¶ 4.13, 4.44.) Plaintiffs allege a "registry" is an organization responsible for maintaining the authoritative list of second-level domain names within a TLD. (*Id.* ¶ 4.9 & n.2.)

Plaintiffs allege that domain name registrants do not interact directly with the registry to register a domain name; instead, they register names only through registrars, such as some of the Plaintiffs, which interface with the registry operator to determine the availability of requested domain names and to register domain names. (*Id.* ¶¶ 4.10-4.11.) Plaintiffs allege that NSI and eNom are domain name registrars.[3] (*Id.* ¶ 1.3.)

[3] As Plaintiffs admit, the registrar business of NSI was sold last year. (FAC ¶ 2.11.) NSI does not currently act as a domain name registrar and does not offer, advertise, or promote WLS.

According to Plaintiffs, ICANN is a not-for-profit corporation recognized by the U.S. Department of Commerce as the entity responsible for administering the domain name system. (*See generally id.* ¶¶ 4.12-4.19.)

B. Plaintiffs' Registration of Recently Deleted Domain Names

Plaintiffs allege that there currently are 258 TLDs, including fourteen "generic" domains (such as the .com, .net, and .gov TLDs) and 243 "country code" domains (such as .us and .uk). (*Id.* ¶¶ 4.5-4.7.) They assert that, as the total number of domain names registered in the .com and .net TLDs has grown, the quantity and quality of domain names available for registration in those TLDs has been reduced, resulting in a "shortage" of desirable domain names. (*Id.* ¶¶ 4.20-4.24.) According to Plaintiffs, the shortage of domain names is ameliorated by the number of registered domain names that expire because the registrations are not renewed by the current registrants. (*Id.* ¶ 4.23.) Plaintiffs allege that approximately 800,000 domain names expire each month and are returned, at least momentarily, to a supposed "pool" of unregistered domain names available for registration.[4] (*Id.* ¶ 4.24.)

Plaintiffs allege that domain names can be registered for periods from one to ten years. (*Id.* ¶ 4.25.) If not renewed at the end of the term, the domain name registration is deleted and is no longer included in the registry's master database. At that point, the domain name can be registered by anyone. (*Id.* ¶¶ 4.25-4.34.) According to the Complaint, when domain names expire, many registrars compete to register the names on behalf of their customers. (*Id.* ¶ 4.34.) Plaintiffs allege that, if the domain name is desirable, at least 100 registrars typically compete to register it, and it is often "re-registered" within a few milliseconds of being deleted. (*Id.* ¶¶ 4.34, 4.36.) To register a .com or .net domain name that is about to be deleted, each competing registrar sends a

[4] Plaintiffs admit that references to a "shortage" or "pool" of "unregistered" or "expired" domain names is a misnomer. (FAC ¶ 4.24 n.6.) Domain names either are registered, and thus included in the registry's database, or are not registered and do not exist. (*Id.*) *See generally Smith v. Network Solutions, Inc.*, 135 F. Supp. 2d 1159, 1160-64 (N.D. Ala. 2001).

series of "add" commands to the particular TLD Registry (the .com and .net registries are operated by VeriSign). (*Id.* ¶ 4.34.) The first competing registrar to have its command accepted for a given domain name registers that name. (*Id.*)

Registrars offer their customers (*i.e.*, potential registrants) different types of services to obtain the registration of a recently deleted domain name. (*Id.* ¶¶ 4.35-4.38.) Unlike some registrars, Plaintiffs allegedly do not charge their customers for their services unless and until the requested domain name is registered. (*Id.* ¶ 4.40.) However, Plaintiffs admit that they accept multiple "orders" to register a given domain name and will auction that domain name off to the highest bidder if they are successful in registering the domain name after it has been deleted from the registry's database. (*Id.*) Accordingly, a customer of Plaintiffs has no certainty that he or she will ultimately obtain registration of a selected domain name even if Plaintiffs are able to register the sought-after domain name. (*Id.* ¶ 4.41.) Further, while Plaintiffs reference a $60 price point for their services, compared to $24 for VeriSign's, Plaintiffs acknowledge that there is no limit on the price of a domain name when it is auctioned off to the highest bidder. (*Id.*)

C. VeriSign's Proposed WLS

Plaintiffs allege that VeriSign has proposed to permit registrars to offer potential registrants another option for registration of recently deleted domain names. (*See generally id.* ¶¶ 4.44-4.50, 4.59-4.68.) According to Plaintiffs, WLS would operate as follows: Registrars, acting on behalf of customers, could place "reservations" for currently-registered domain names in the .com and .net TLDs. (*Id.* ¶ 4.46.) Only one WLS "subscription" would be accepted for each domain name, and each subscription would last one year. (*Id.*) Subscriptions would be sold on a first-come, first-served basis, and subscribers would have the option to renew at the end of the subscription period. (*Id.* ¶¶ 4.46, 9.6.) For 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 to its customer, the WLS subscriber. (*Id.* ¶ 4.48.) WLS remains a proposal. The Complaint admits that WLS has not been implemented and is not available for registrars to sell to their customers at this time. (*Id.* ¶¶ 4.66-4.67.)

III. ARGUMENT

A complaint fails under Federal Rule of Civil Procedure 12(b)(6) if it either does not allege a cognizable legal theory or alleges insufficient facts under a cognizable legal theory. *Balistreri v. Pacifica Police Dep't*, 901 F.2d 696, 699 (9th Cir. 1990). Although the Court must assume the truth of all properly pleaded allegations of fact, "conclusory allegations of law and unwarranted inferences are insufficient to defeat a motion to dismiss." *Ove v. Gwinn*, 264 F.3d 817, 821 (9th Cir. 2001). On a Rule 12(b)(6) motion, a district court may consider documents attached to, or referred to in, the complaint, if they form the basis of the plaintiff's claim, and may assume their contents are true. *United States v. Ritchie*, 342 F.3d 903, 907-08 (9th Cir. 2003).

Applying these standards, VeriSign and NSI respectfully submit that the Complaint fails to state any claim against them and, thus, should be dismissed.

A. Plaintiffs Lack Article III Standing To Maintain Their Seven UCL Claims

Plaintiffs lack standing in federal court to pursue all *seven* of their claims against VeriSign and NSI under the Unfair Competition Law, Cal. Bus. & Prof. Code §§ 17200-17210 (the "UCL"), because they allege no injury to themselves as a result of VeriSign's and NSI's allegedly wrongful conduct. "Article III of the Constitution . . . limits the jurisdiction of the federal courts to 'cases and controversies,' a restriction that has been held to require a plaintiff to show that he actually has been injured by the defendant's challenged conduct."[5] *Lee v. Am. Nat'l Ins. Co.*, 260 F.3d 997, 1001 (9th Cir. 2001). The Ninth Circuit has made clear that plaintiffs may not proceed in federal

[5] Plaintiffs bear the burden of establishing federal jurisdiction over their UCL claims. *See Schmier v. United States Court of Appeals for the Ninth Circuit*, 279 F.3d 817, 821 (9th Cir. 2002). Moreover, "the standing doctrine's injury requirement" is a "proper basis for the grant of a motion to dismiss." *Id.* at 823.

court as "private attorneys general" under the UCL *unless* they have suffered "individualized injury as a result of the defendant's challenged conduct." *Id.* at 1001-02; *Toxic Injuries Corp. v. Safety-Kleen Corp.*, 57 F. Supp. 2d 947, 952, 957 (C.D. Cal. 1999) (no jurisdiction over UCL claim absent "concrete and particularized" injury).

In their First, Second, and Fourth through Eighth Claims, Plaintiffs seek to vindicate alleged injuries to "consumers" (*i.e.*, WLS subscribers), a group that does not include them. Not one of Plaintiffs' UCL claims alleges injury to Plaintiffs themselves:

- *Claim One (Illegal Lottery)*: There is no allegation that Plaintiffs participated in the alleged lottery (*i.e.*, that VeriSign or NSI sold them a "chance to register a currently-registered domain name" (FAC ¶ 5.18)) or were harmed by it.
- *Claim Two (CLRA Violations)*: There is no allegation that Plaintiffs purchased a WLS subscription in reliance upon a representation that they would receive an "economic benefit" that was "contingent" on the occurrence of a subsequent event. (*Id.* ¶¶ 6.4, 6.5.)
- *Claim Four (Deceptive Advertising)*: Plaintiffs do not allege that VeriSign's and NSI's alleged failure to disclose the "likelihood that a WLS subscription will succeed" has harmed them in any way. (*Id.* ¶¶ 8.6, 8.8, 8.13, 8.14.)
- *Claim Five (Deceptive Sales)*: Plaintiffs do not allege that *they* have been "defraud[ed]" by VeriSign's and NSI's alleged practice of "selling WLS subscriptions that *cannot* result in a domain name." (*Id.* ¶ 9.7.)

  Claim Six (False Representations): Plaintiffs do not allege *they* have been harmed by VeriSign's and NSI's alleged marketing of "WLS subscriptions to domain name owners as a form of protection." (*Id.* ¶¶ 10.8, 10.10.)
- *Claim Seven (Deceptive and Unfair Practices)*: Plaintiffs do not allege any harm to *them* from VeriSign's and NSI's alleged sale of "contingent future interests in property" in which they have "[no] ownership interest." (*Id.* ¶ 11.8.)
- *Claim Eight (FTCA Violations)*: There are no allegations that *Plaintiffs* have been harmed by VeriSign's and NSI's alleged "failure to disclose the likelihood that a WLS subscription will be successful." (*Id.* ¶¶ 12.6, 12.8.)

Although Plaintiffs purport to sue "on their own behalf and on behalf of the general public," they lack Article III standing because they have alleged *no* injury to themselves and, thus, no *federal* court jurisdiction. *See Lee*, 260 F.3d at 1001-02.

B. The Seven UCL Claims Also Fail To State A Claim

Plaintiffs' seven purported UCL claims also fail because they are substantively defective. The UCL proscribes "unlawful, unfair or fraudulent business act[s] or

practice[s]" and "unfair, deceptive, untrue or misleading advertising." Cal. Bus. & Prof. Code § 17200. An "unlawful" business practice is one that is "forbidden by law." *Farmers Ins. Exch. v. Superior Ct.*, 2 Cal. 4th 377, 383, 6 Cal. Rptr. 2d 487 (1992). A business practice is "fraudulent" if its audience is "likely to be deceived" by it. *Korea Supply Co. v. Lockheed Martin Corp.*, 29 Cal. 4th 1134, 1151, 131 Cal. Rptr. 2d 29 (2003). If a communication, read as a whole, together with its qualifying language and stated conditions, is *un*likely to deceive a reasonable person, then the court may decide *as a matter of law* that it is not fraudulent within the meaning of the UCL. *See Freeman v. Time, Inc.*, 68 F.3d 285, 289-90 (9th Cir. 1995). "[T]he question whether it is misleading to the public will be viewed from the vantage point of members of the targeted group, not others to whom it is not primarily directed." *Lavie v. Procter & Gamble Co.*, 105 Cal. App. 4th 496, 512, 129 Cal. Rptr. 2d 486 (2003).

Finally, an "unfair" business practice is one where "the gravity of the alleged victim's harm" outweighs "the utility of the defendant's conduct." *E.g.*, *Shvarts v. Budget Group, Inc.*, 81 Cal. App. 4th 1153, 1158, 97 Cal. Rptr. 2d 722 (2000); *cf. S. Bay Chevrolet v. Gen. Motors Acceptance Corp.*, 72 Cal. App. 4th 861, 886-87, 85 Cal. Rptr. 2d 301 (1999) (a practice is unfair when it "offends an established public policy or . . . is immoral, unethical, oppressive, unscrupulous or substantially injurious to consumers").

At a minimum, a plaintiff must plead "the facts supporting the . . . elements" of a UCL claim "with reasonable particularity." *GlobeSpan, Inc. v. O'Neill*, 151 F. Supp. 2d 1229, 1236 (C.D. Cal. 2001). If the plaintiff avers *fraudulent* conduct to support a UCL claim, he or she must satisfy Federal Rule 9(b)'s heightened particularity requirement. *Vess v. Ciba-Geigy Corp. USA*, 317 F.3d 1097, 1103-05 (9th Cir. 2003).

1. <u>Plaintiffs' UCL Claim Based on an "Illegal Lottery" Fails</u>

Plaintiffs' First Claim alleges that WLS is an "unlawful" business practice because it constitutes an "illegal lottery." An illegal lottery is "any scheme for the disposal or distribution of property by chance, among persons who have paid or promised to pay any valuable consideration for the chance of obtaining such property."

Cal. Penal Code § 319. The three defining features of an illegal lottery are (1) a prize, (2) distributed by chance, (3) among persons who have paid consideration. *See W. Telcon, Inc. v. Cal. State Lottery*, 13 Cal. 4th 475, 484, 53 Cal. Rptr. 2d 812 (1996).

First, there can be no lottery unless *two or more* persons have paid for the chance to win a prize. *See Gayer v. Whelan*, 59 Cal. App. 2d 255, 259, 138 P.2d 763 (1943) ("[I]n order to constitute a lottery two or more persons must have paid or promised to pay a consideration for the chance of obtaining the prize. . . ."); Cal. Penal Code § 319 ("persons" who have paid consideration). With WLS, Plaintiffs admit that only *one* potential registrant may purchase a subscription to register a particular domain name, if deleted. (FAC ¶ 4.46.) Thus, WLS does not distribute prizes (*i.e.*, domain names) among *multiple* competing participants, as all lotteries must do. *Gayer*, 59 Cal. App. 2d at 259.

Second, Plaintiffs have failed to allege, and cannot allege, that WLS involves the necessary element of *chance*. They contend that VeriSign and NSI are operating a lottery because "WLS distribution of domain names is by chance" (*i.e.*, it is "not within the control of the WLS subscriber and will not depend on the WLS subscriber's skill"). (FAC ¶¶ 5.11, 5.12.) These allegations miss the mark. The "chance" associated with illegal lotteries refers to the distribution of a prize based solely on random mathematical probability. *See Bell Gardens Bicycle Club v. Dep't of Justice*, 36 Cal. App. 4th 717, 747, 42 Cal. Rptr. 2d 730 (1995) (lottery where distribution of poker jackpot depended on "fortuity or random event"). In contrast, uncertainty over whether a person will allow his domain name registration to lapse (*see* FAC ¶ 5.18 ("chance to register a currently-registered domain name . . . depend[s] upon the decision of the current registrant to renew the domain name")) does not constitute "chance." *See Att'y Gen. v. Preferred Mercantile Co.*, 187 Mass. 516, 519, 73 N.E. 669 (1905) ("It has repeatedly been held that such a chance as the uncertainty in regard to the number of contracts that will be allowed to lapse . . . is not a chance which makes the scheme a lottery.").

2. Plaintiffs Fail To State a UCL Claim Based on the CLRA

Plaintiffs' Second Claim alleges that VeriSign and NSI have committed an "unlawful" business practice by violating the Consumers Legal Remedies Act, Cal. Civ. Code §§ 1750-1784 (the "CLRA"). Plaintiffs allege that VeriSign's and NSI's WLS advertisements violate the CLRA's prohibition against "[r]epresenting that the consumer will receive a[n] . . . economic benefit, if the earning of the benefit is contingent on an event to occur subsequent to the consummation of the transaction." *Id.* § 1770(a)(17). (FAC ¶ 6.5.) However, state law precludes Plaintiffs from enforcing the CLRA.

a. Plaintiffs are not "consumers" under the CLRA

Only a "consumer who suffers . . . damage" from a CLRA violation may sue. Cal. Civ. Code § 1780(a). The CLRA defines "consumer" as "an individual who seeks or acquires, by purchase or lease, any goods or services *for personal, family, or household purposes.*" *Id.* § 1761(d) (emphasis added). As the Complaint admits, Plaintiffs are all business entities that purport to offer services to assist customers who seek to register recently deleted domain names. (FAC ¶ 1.4.) Plaintiffs also fail to allege that *they* have sought or acquired any WLS subscriptions – which purportedly are the "goods or services" that are the subject of the alleged CLRA violation – or that they did so for "personal, family or household purposes." Plaintiffs clearly are not "consumers" under the CLRA.

b. Plaintiffs have not suffered any damage

Plaintiffs have not alleged, as they must, that they have "suffer[ed] any damage." *See* Cal. Civ. Code § 1780. The Complaint alleges that WLS is only a proposal; it has not been implemented and is not available for registrars to sell to their customers. (FAC ¶¶ 4.66-4.67.) Thus, even if VeriSign and NSI were advertising WLS in violation of the CLRA, no damage could have been caused by the representations because WLS is not yet available.

c. Plaintiffs have alleged no representation by VeriSign

The CLRA prohibits, in some circumstances, "[r]epresenting that the consumer

will receive a[n] . . . economic benefit." Cal. Civ. Code § 1770(a)(17). Plaintiffs, however, have pleaded no facts that *VeriSign* made any such "representation"; only NSI and eNom are alleged to have made "representations." (FAC ¶¶ 6.6, 6.7.)

Moreover, Plaintiffs' allegation that NSI and eNom are VeriSign's "agents" does not save their claim. (*Id.* ¶ 2.14.) The UCL does not permit vicarious liability. *See People v. Toomey*, 157 Cal. App. 3d 1, 14, 203 Cal. Rptr. 642 (1984) ("The concept of vicarious liability has no application to actions brought under the [UCL]."). Therefore, "[a] defendant's liability [under the UCL] must be based on [its] personal '*participation* in the unlawful practices' and '*unbridled control*' over the practices that are found to violate [the UCL]." *Emery v. Visa Int'l Serv. Ass'n*, 95 Cal. App. 4th 952, 960, 116 Cal. Rptr. 2d 25 (2002) (emphasis added). Plaintiffs do not allege any facts indicating that VeriSign exercised "unbridled control" over, or even "participated" in, the alleged representations of eNom and NSI. *See id.* at 964 (no UCL liability where the defendant "played no part in preparing or sending any 'statement' that might be construed as untrue or misleading under the unfair business practices statutes").

d. <u>The lone alleged representation by NSI is not deceptive</u>

Plaintiffs have alleged a single representation by NSI that supposedly violates the CLRA. However, as Plaintiffs' allegations reveal, that advertisement explicitly states, on its face, that a WLS subscription will result in a domain name registration only "*[i]f the domain name becomes available during [the WLS] subscription period.*"[6] (*Id.*

[6] Plaintiffs did not quote the alleged ad in full or attach it to the Complaint. On a motion to dismiss, a court may examine the entirety of an allegedly misleading communication that was only partially quoted in the complaint. *Haskell v. Time, Inc.*, 857 F. Supp. 1392, 1396-98 (E.D. Cal. 1994). A copy of the complete advertisement is attached as Exhibit 1 hereto and can be found at "www.nextregistrationrights.com/backorder." The advertisement contains additional disclosures that negate Plaintiffs' allegation of deception. For example, the advertisement states: "*If the domain name is not renewed and completes the registry deletion cycle during your subscription term*, then the domain name is yours," and Next Registration Rights "[a]utomatically grants you the next registration *if the domain name becomes available.*" (Ex. 1 at 1 (emphases added).) Finally, this advertisement is located at a website that is not operated by NSI since, as Plaintiffs admit, VeriSign sold NSI's domain name registrar business last year. (FAC ¶ 2.11.) As previously stated, NSI does not currently act as a domain name registrar and does not offer, advertise, or promote WLS.

¶ 6.6.) Far from deceiving "consumers" about the contingent nature of the benefit to be received from a WLS subscription, NSI has disclosed up front that a WLS subscription may not result in a domain name registration.

The CLRA was enacted to protect consumers from *deception*. *See Broughton v. CIGNA Healthplans*, 21 Cal. 4th 1066, 1077, 90 Cal. Rptr. 2d 334 (1999) (CLRA designed to "alleviate social and economic problems stemming from deceptive business practices"); Cal. Civ. Code § 1760. In view of this purpose, it is not the law that a representation can violate the CLRA even if it expressly discloses the contingent nature of the benefit to be derived from the good or service. If it were, no seller could advertise a good or service that offered an economic benefit dependent on the occurrence of a future event. For example, sellers of stolen vehicle recovery systems (such as LoJack) could not legally advertise that their goods and services increase the likelihood of recovering a stolen car, because the economic benefit (recovery of the car) is contingent upon an uncertain future event (the car being stolen and recovered). Such an absurd interpretation of the CLRA would ignore its very purpose, which is to protect consumers from *deception*. Here, there is no deception. The Court should dismiss the Second Claim for Relief.

3. The UCL Does Not Require VeriSign and NSI Individually To Counsel Each WLS Subscriber as to the Likelihood of Success

In their Fourth Claim for Relief, Plaintiffs allege that VeriSign and NSI have committed a "fraudulent" business practice by publishing promotional materials for WLS that do not disclose "the likelihood that a subscriber will obtain the domain name to which it subscribes." (FAC ¶ 8.6; *see also id.* ¶ 8.8.) Although Plaintiffs conclusorily assert that this omission is "likely to deceive consumers" (*id.* ¶ 8.12), the facts actually alleged in the Complaint negate the allegation of deception.

Specifically, Plaintiffs admit that domain name registrants already are aware of "the fact that most currently registered domain names will be renewed." (*Id.* ¶ 4.54.) Indeed, Plaintiffs developed their "pay if successful" business models in response to

consumer recognition of this very fact. (*Id.* ¶¶ 1.4, 4.53-4.54.) Therefore, the Complaint concedes that potential domain name registrants already understand that few registrants of desirable domain names allow their domain name registrations to be canceled and their domain names to be deleted. *Nowhere have Plaintiffs alleged that this fact is unknown to the reasonable WLS subscriber.*

Only nondisclosures that render a transaction *misleading* run afoul of the UCL. In *Searle v. Wyndham International, Inc.*, 102 Cal. App. 4th 1327, 126 Cal. Rptr. 2d 231 (2002), for example, a hotel patron alleged that the Wyndham Plaza Hotel committed a fraudulent business practice by failing to disclose that a seventeen percent "service charge" added to room service bills included a tip paid to the server. The court affirmed dismissal of the claim, holding that the hotel had no obligation to disclose this information because its nondisclosure did not deceive patrons about the cost of their room service meals. *Id.* at 1330, 1335.

Here, the UCL does not require VeriSign or NSI to furnish WLS subscribers with the statistical probability that a WLS subscription will succeed, because, as in *Searle*, nondisclosure of that information would not deceive a reasonable subscriber about the nature of what it is purchasing. Based on the Complaint's allegations, reasonable registrants already understand that the success or failure of any WLS subscription, as well as the resultant value of Plaintiffs' services, will be inherently uncertain. The UCL does not require VeriSign and NSI individually to counsel each customer on the probability that a subscription will succeed. If it did impose such affirmative disclosure obligations, no insurance company could sell earthquake insurance policies in California without advising each insured of the (relatively low) statistical probability that an earthquake will occur – and benefits become payable – during the policy term. These insureds realize, in a very real – if unquantified – way, that the premiums they agree to pay are unlikely to return any value other than peace of mind. For the same reason, WLS subscriptions do not become "fraudulent" simply because VeriSign and NSI do not quantify and individualize the already *known* and disclosed risk that a

domain name will not be deleted.

In addition, the Court should dismiss this claim because Plaintiffs have not alleged with reasonable particularity the *contents* of VeriSign's and NSI's supposedly deceptive statements. *See Vess*, 317 F.3d at 1103-05 (heightened pleading requirement of Fed. R. Civ. P. 9(b) applied to allegations of *fraudulent* in support of a UCL claim). These statements allegedly are posted on VeriSign's and NSI's websites. (FAC ¶¶ 8.8, 8.10.) Yet, as to VeriSign, Plaintiffs merely characterize the promotional materials – in vague and self-serving ways – without setting forth any of the specific statements contained therein.[7] (*Id.* ¶ 8.8.) Rule 9(b) requires more.

As to NSI, the only statement alleged in support of the claim could not support liability because it is nonactionable "puffery."[8] According to Plaintiffs, NSI stated that WLS is "superior to traditional back-order services, which are not administered by the .com/.net registry and frequently accept more than one name per backorder." (*Id.* ¶¶ 8.10-8.11.) "Puffery" consists of statements not "capable of being proved false," *Coastal Abstract Serv., Inc. v. First Am. Title Ins. Co.*, 173 F.3d 725, 731 (9th Cir. 1999), such as "generalized boasting" that a competitor's products are "inferior" and "'lack certain characteristics' that [our] products provide," *Pinnacle Sys., Inc. v. XOS Techs., Inc.*, 2003 WL 21397845, at *5-*6 (N.D. Cal. June 17, 2003). Courts may determine as a matter of law that a statement is puffery. *Coastal Abstract*, 173 F.3d at 731. NSI's statement that WLS is "superior" is "generalized boasting" that Plaintiffs cannot disprove. Accordingly, the Court should dismiss the Fourth Claim for Relief.

4. The UCL Does Not Require VeriSign or NSI To Advise WLS Subscribers To Check the Expiration Dates for Domain Names

Plaintiffs allege in their Fifth Claim that VeriSign and NSI "are defrauding

[7] Nor, notably, do Plaintiffs allege that registrars provided VeriSign's "sample" ads to customers without alteration. (*See* FAC ¶ 8.8.) As the Complaint admits, "consumers" interact directly with registrars, not VeriSign. (FAC ¶ 4.10.)

[8] As noted above, because NSI no longer operates as a domain name registrar, or offers Next Registration Rights, the described advertising is not currently made by NSI.

consumers" by their proposal to offer WLS subscriptions for domain names not set to expire within the subscription period, without advising "consumers" to check the "expiration dates" for such names. (FAC ¶¶ 9.4-9.7.) However, the supposedly hidden information – "expiration dates" – is accessible to the entire world, a fact confirmed by the Complaint's exhibits. Further, Plaintiffs have not alleged any facts indicating that reasonable consumers are likely to be deceived by the alleged nondisclosure of this information.

First, interested WLS subscribers have unfettered access to the "expiration dates" for registered domain names. Upon registering a name, the sponsoring registrar must submit the "expiration date" as one of the required "data elements" of the registration. (FAC Ex. A § 2.4.5.) VeriSign maintains this information, for *all* domain names registered in its TLDs, in a publicly accessible registry "WHOIS" database. VeriSign's WHOIS database, at http://registrar.verisign-grs.com/whois/, is available for free to the public.[9] Every ICANN-accredited registrar also must provide a similar publicly accessible "WHOIS" database that includes up-to-date data, including expiration date, for currently registered domain names that it sponsors. (*Id.* Ex. B § 3.3.) Using the database, anyone can input an existing domain name and instantly determine, among other information, the "expiration date" of the domain name. *See generally Smith*, 135 F. Supp. 2d at 1162-63 (domain name expiration dates are publicly accessible); *Columbia Ins. Co. v. Seescandy.com*, 185 F.R.D. 573, 575 (N.D. Cal. 1999) (listing information regarding a domain name registration and stating "[t]he ownership information for any given domain name can be looked up in a public database using a 'WHOIS' query").[10] Thus, as the Complaint's exhibits reveal, VeriSign and NSI are

[9] The Court may take judicial notice of the fact that VeriSign's WHOIS database is publicly available at VeriSign's Internet website. *See* Fed. R. Evid. 201; *Hendrickson v. Ebay Inc.*, 165 F. Supp. 2d 1082, 1084 n.2 (C.D. Cal. 2001) (taking judicial notice of website and the "information contained therein").

[10] For example, according to the current "WHOIS" database, the RegisterSite.com domain name registration will expire on August 10, 2008.

not concealing domain name "expiration dates" from consumers. They are, in fact, actively providing that data.

Second, and more fundamentally, Plaintiffs have not alleged that a reasonable WLS subscriber *could not* or *would not* check this information before it purchased a WLS subscription. (Of course, common sense says otherwise, especially when told that a WLS subscription will mature into a registration only if and when a domain name is deleted.) Absent such an allegation, there can be nothing deceptive about VeriSign's and NSI's selling WLS subscriptions without reminding "consumers" to check public sources of information.[11]

Finally, in addition to alleging that this practice is "fraudulent," Plaintiffs tersely add that it is "unfair." (FAC ¶ 9.9.) They fail to allege, however, what could be unfair about the practice in the absence of any likelihood of deception. Their allegations of unfairness, therefore, fail for the same reasons as their deception allegations.

5. Plaintiffs Fail To State a UCL Claim Based on VeriSign's and NSI's Alleged Marketing of WLS as "Protection"

In their original complaint, Plaintiffs alleged that VeriSign was committing "extortion" under the federal Hobbs Act, 18 U.S.C. § 1951(a), by advising registrars to market WLS subscriptions to domain name registrants as "protection" against the unintentional expiration of their registrations. (Compl. ¶¶ 9.2-9.12.) They asserted that VeriSign was "inculcating fear among registrants of a problem that does not exist" because the chance that a domain name registration would unintentionally expire is very low. (*Id.* ¶ 9.10.) Plaintiffs amended their complaint after VeriSign pointed out that it is

[11] This claim also rests on a false premise, namely, that no rational "consumer" would buy a WLS subscription for a domain name not set to "expire" within the subscription period because it "*cannot* result in a domain name." (FAC ¶ 9.7.) As Plaintiffs admit, a current registrant may delete its own registration before the expiration date, thereby making the domain name available for registration during the subscription period. (*Id.* ¶ 15.6.) In addition, because WLS subscribers will have the option to renew at the end of the term (*id.* ¶ 9.6), purchasing a subscription before the domain name is set to expire enables the subscriber to reserve its place at the front of the line for future years, when the underlying domain name *is* scheduled to expire.

legally entitled to delete domain names after all grace periods have expired, and a party does not commit extortion by warning that it *will* do an act which it is legally entitled to do. *See, e.g.*, *Rothman v. Vedder Park Mgmt.*, 912 F.2d 315, 318 (9th Cir. 1990).

In the FAC, Plaintiffs retain precisely the same factual theory of liability, but now assert that marketing WLS as "protection" violates the UCL. (FAC ¶¶ 10.2-10.14.) The legal principle that foreclosed Plaintiffs' Hobbs Act theory, however, applies equally to Plaintiffs' new legal theory. A supposed "threat" is not unlawful "where that which is threatened is only what the party has a legal right to do." *McKay v. Retail Auto. Salesmen's Local Union No. 1067*, 16 Cal. 2d 311, 321, 106 P.2d 373 (1940). Plaintiffs admit that VeriSign is entitled to delete a domain name after all renewal grace periods have elapsed. (FAC ¶ 10.7.) Any supposed "threat" by VeriSign that it may act on this legal right cannot be unlawful.

In addition, Plaintiffs fail to allege facts indicating that a reasonable domain name registrant is likely to be deceived by VeriSign's and NSI's supposed marketing of "protection." As Plaintiffs concede, registrants can register domain names for a term of many years and, before any domain name is deleted, receive "clear notice that their domain name requires attention." (FAC ¶¶ 10.6, 10.11; *see also id.* ¶¶ 4.26-4.32.) Plaintiffs have failed to allege that a reasonable registrant is unaware of these circumstances and is likely to be deceived about the "protective" value of a WLS subscription.

Finally, Plaintiffs fail to allege with reasonable particularity the facts showing that VeriSign and NSI are marketing WLS as "protection." They do not set forth the contents of any specific statement, but merely characterize, in the light most favorable to them, what ostensibly are advertisements available on the Internet. Plaintiffs' bare allegations plainly are insufficient. *See Vess*, 317 F.3d at 1103-05. Further, despite their admission that VeriSign itself is not publishing any such ads (FAC ¶ 10.8), Plaintiffs do not allege any facts indicating that VeriSign has any control over NSI's or eNom's alleged advertising. *Supra* p. 10. Therefore, Plaintiffs have not alleged a claim

against VeriSign or NSI and, at the very least, have not alleged that VeriSign can be liable, either directly or vicariously, on this claim.

6. Plaintiffs Fail To State a UCL Claim Based on VeriSign's and NSI's Purported Sales of "Property" They Do Not Own

In their Seventh Claim for Relief, Plaintiffs allege that domain names are "intangible personal property" and that, by offering WLS subscriptions, VeriSign and NSI are selling "contingent future interests in property [*i.e.*, domain names] in which neither . . . has any ownership interest whatsoever." (FAC ¶¶ 11.5, 11.8.) These sales, according to Plaintiffs, violate the "implied[] representation that [a property seller] has good and marketable title in the property he sells," and constitute "unfair" and "fraudulent" business practices under the UCL. (*Id.* ¶¶ 11.4, 11.11.) This claim is legally-deficient based on Plaintiffs' own allegations.

Plaintiffs illustrate their theory by comparing the sale of WLS subscriptions to a bank's, valet parking attendant's, or coat check's raffling off of deposited funds, parked cars, or furs entrusted to their care. (*Id.* ¶¶ 1.6. 1.7, 11.9.) However, unlike deposited funds, parked cars, or checked coats, a deleted domain name – the alleged "property" that is the subject of a WLS subscription – does not exist and, thus, belongs to *no one*. (*See id.* ¶ 4.24 n.6.) Once a domain name registration is deleted, neither VeriSign nor NSI has any legal obligation to maintain that "property" for another.

Plaintiffs' Complaint concedes these fatal flaws in their theory. They admit that a WLS subscription will only be activated if and when the current registrant "abandons" the domain name registration (*i.e.*, fails to renew the registration), in which event the domain name registration is canceled, and the domain name is deleted. Accordingly, the former registrant has no "rights" to the deleted domain name. The domain name is then "registered" to the WLS subscriber. (*Id.* ¶¶ 1.1, 4.48.) Thus, Plaintiffs have not alleged, and cannot allege, that *anyone* has a valid legal right to a deleted domain name, or that VeriSign or NSI is under any legal obligation to "hold" a deleted domain name for the benefit of anyone, least of all Plaintiffs.

7. Plaintiffs' UCL Claim Based on Alleged FTCA Violations Fails

In the Eighth Claim, Plaintiffs allege that VeriSign and NSI have committed an "unlawful" business practice by violating the Federal Trade Commission Act, 15 U.S.C. §§ 41-58 (the "FTCA"). (FAC ¶¶ 12.1-12.10.) This claim is an improper attempt to circumvent Congress' unequivocal decision that no private right of action shall lie under the FTCA and is, at bottom, a repackaging of their deficient Fourth Claim for Relief.

a. Plaintiffs may not indirectly enforce the FTCA

The language and legislative history of the FTCA make clear that Congress vested *exclusive* enforcement authority for the Act in the FTC. *See Moore v. N.Y. Cotton Exch.*, 270 U.S. 593, 603, 46 S. Ct. 367, 70 L. Ed. 750 (1926); *Holloway v. Bristol-Myers Corp.*, 485 F.2d 986, 1002 (D.C. Cir. 1973); *Carlson v. Coca-Cola Co.*, 483 F.2d 279, 280 (9th Cir. 1973); 15 U.S.C. § 45(a)(2). Consequently, there is no private right of action to enforce the statute. *See Carlson*, 483 F.2d at 281.

Plaintiffs cannot evade this prohibition by disguising in UCL clothing what is in fact a claim under the FTCA. The UCL may not be used as the vehicle for enforcing federal statutes, such as the FTCA, as to which Congress has unambiguously rejected any private right of enforcement. *See Summit Tech., Inc. v. High-Line Med. Instruments, Co.*, 933 F. Supp. 918, 932-33, 943 n.21 (C.D. Cal. 1996) (a plaintiff "may not bring a [UCL] claim that is, in fact, an attempt to state a claim under the federal FDCA," where there is no private right of action to enforce the FDCA).

b. Plaintiffs have not alleged an FTCA violation

Plaintiffs have not alleged any "deceptive" acts on the part of VeriSign or NSI. The FTCA prohibits "[u]nfair methods of competition . . . and unfair or deceptive acts or practices in or affecting commerce." 15 U.S.C. § 45(a)(1). An act or practice is "deceptive" under the FTCA if, among other things, it is likely to mislead consumers acting reasonably under the circumstances. *See FTC v. Gill*, 265 F.3d 944, 950 (9th Cir. 2001). The UCL's judicially crafted definition of "fraudulent" mimics the FTCA standard. *See Haskell*, 857 F. Supp. at 1399 (applying FTC's interpretation of

"deceptive" in the UCL context).

Plaintiffs' Eighth Claim for Relief, like their Fourth, is based on VeriSign's and NSI's allegedly deceptive "failure to disclose the likelihood that a WLS subscription will be successful." (FAC ¶¶ 8.6, 8.8, 8.13, 12.6, 12.8.) For the reasons set forth above with respect to Plaintiffs' Fourth Claim under the UCL, *supra* pp. 12-13, Plaintiffs have not alleged a claim for deception under the FTCA.

C. Plaintiffs Fail To Plead The Essential Elements Of A Tying Claim

Plaintiffs' Ninth Claim alleges that VeriSign and NSI have established an unlawful *per se* tying arrangement in violation of § 1 of the Sherman Act because "each consumer who purchases a WLS subscription will be required to agree to purchase any resulting domain name registration from the same registrar." (FAC ¶¶ 13.2, 13.6.) Plaintiffs have not, and cannot, allege an antitrust claim against either VeriSign or NSI.

1. Plaintiffs Do Not Have Standing To Allege Their Tying Claim

As an initial matter, Plaintiffs lack standing to bring their antitrust claim because there have not been *any* sales of WLS. Indeed, Plaintiffs readily admit that VeriSign has not yet launched WLS. (FAC ¶¶ 4.66-4.67.) Even though "threatened" injury is sometimes enough to confer standing under section 16 of the Clayton Act, 15 U.S.C. § 26, *see Los Angeles Mem'l Coliseum Comm'n v. Nat'l Football League*, 468 F. Supp. 154, 158-59 (C.D. Cal. 1979), it is insufficient where, as here, the "threatened" injury is merely speculative and does not constitute a *significant* threat. *Id.*; *see also In re Multidist. Vehicle Air Pollution M.D.L. No. 31*, 481 F.2d 122, 125-30 (9th Cir. 1973) (courts have exercised "pronounced restraint in granting standing" where, as here, a party seeks treble damages). Among other things, as set forth in more detail below, Plaintiffs have failed to articulate or to quantify the purported impact on commerce from VeriSign's proposed launch of WLS (and cannot do so at this premature stage). Plaintiffs do not and cannot satisfy these standing requirements.

2. Plaintiffs' Tying Claim Fails on the Merits

Under the Sherman Act, a seller creates an unlawful tie by requiring that a

consumer who purchases the tying product or service also purchase the tied product or service. *Paladin Assocs., Inc. v. Mont. Power Co.*, 328 F.3d 1145, 1159 (9th Cir. 2003) ("A tying arrangement is a device used by a competitor with market power in one market [the tying product market] to extend its market power to an entirely distinct market [the tied product market]."). A plaintiff must allege three elements to assert a *per se* illegal tying arrangement:

> (1) [T]hat there exist two distinct products or services in different markets whose sales are tied together; (2) that the seller possesses appreciable economic power in the tying product market sufficient to coerce acceptance of the tied product; and (3) that the tying arrangement affects a 'not insubstantial volume of commerce' in the tied product market.

Id. at 1159. Moreover, the Ninth Circuit requires that the defendant receive some type of economic benefit from sales of the tied product or service. *County of Tuolumne v. Sonora Cmty. Hosp.*, 236 F.3d 1148, 1158 (9th Cir. 2001) (because plaintiffs' claimed benefit was "so attenuated" their *per se* tying claim failed). An indirect benefit from the tied product, even if substantial, will not be enough. *See id.*; *Robert's Waikiki U-Drive, Inc. v. Budget Rent-A-Car Sys., Inc.*, 732 F.2d 1403, 1407-08 (9th Cir. 1984) ($1 cost savings per package sold is inadequate). Plaintiffs' Complaint fails to allege any conduct by VeriSign or NSI that satisfies these elements.[12]

a. No claim has been alleged against VeriSign

First, a plaintiff must allege sufficiently that two separate and distinct products or services in separate relevant markets are being tied together. *See County of Tuolumne*, 236 F.3d at 1157. "Separateness is determined in part by whether the products are normally sold or used as a unit and whether their joint sale effects savings beyond those

[12] Any tying claim based on the "rule of reason" is also deficient. Plaintiffs claim that WLS "will unreasonably restrain commerce" because it will limit consumers' choices of domain name registrars and compel consumers to purchase domain name registrations from a registrar who may "not necessarily" offer the lowest price. (FAC ¶¶ 13.11-13.12.) Yet Plaintiffs offer no supporting factual details of how or why anticompetitive harm will result, particularly in light of their allegations that WLS would be available to, and may be offered by, all domain name registrars. (*See id.* ¶ 13.13 (alleging that registrars "choose" to sell WLS).) Such "conclusory, self-serving allegations" fail to state a rule of reason claim. *Falstaff Brewing Co. v. Stroh Brewery Co.*, 628 F. Supp. 822, 828 (N.D. Cal. 1986).

of combined marketing." *Klamath-Lake Pharm. Ass'n v. Klamath Med. Serv. Bureau*, 701 F.2d 1276, 1289 (9th Cir. 1983); *see also Hirsh v. Martindale-Hubbell, Inc.*, 674 F.2d 1343, 1350 (9th Cir. 1982) ("Absent the existence of separate markets, the alleged tying and tied products are, in reality, but a single product."). Further, separateness depends on whether the products are "distinguishable in the eyes of buyers" depending on the character of demand. *Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2, 19-20, 104 S. Ct. 1551, 80 L. Ed. 2d 2 (1984).

Plaintiffs cannot allege separate products here. Although they allege that a WLS subscription will be nothing more than the purchase of a subscription to register a domain name in the future if that domain name becomes available, Plaintiffs assert that "WLS subscriptions and domain name registrations are separate, distinct services." (FAC ¶ 13.8.) However, they do not plead any facts to show whether *consumers* of "back order" services for currently-registered domain names, such as those Plaintiffs offer, consider the "back order" request to be a different service from the resulting domain name registration. On the contrary, Plaintiffs allege that these two events are intertwined. They allege that they join their own "back order" service with registration of the subject domain name. (FAC ¶ 4.40.)

Furthermore, the very nature of the services at issue suggests that they are not susceptible to a tying claim. The Ninth Circuit has noted that it makes no sense to "treat[] a contract granting an option with respect to an item as a product distinct from that consisting of the terms on which the option is to be exercised." *Klamath-Lake*, 701 F.2d at 1290. Based on Plaintiffs' allegation in their Complaint, WLS can be considered the equivalent of an option to register a domain name once it becomes available. (*See, e.g.*, FAC ¶ 1.5 ("WLS is a contingent future interest in a domain name . . . .").) Under *Klamath-Lake*, therefore, WLS, as pleaded by Plaintiffs, cannot be treated as a service distinct from domain name registration services.

Second, a plaintiff must allege that the seller's tying activity will result in a not insubstantial effect on commerce in the market for the *tied* product or service. *Paladin*

Assocs., 328 F.3d at 1159. Here, Plaintiffs allege that domain name registration services are the "tied" service. Not surprisingly, since WLS has not been launched, Plaintiffs cannot allege any facts to support the conclusion that there will be a "not insubstantial effect" on the market for domain name registration services. In fact, based on Plaintiffs' allegations, a *de minimis* effect would be expected, if any effect at all. They allege that a very small percentage ("less than 5%") of the currently-registered domain names that would be desirable to WLS customers will ever be available for registration. (FAC ¶¶ 4.55-4.58.) Admittedly, this small percentage is an even smaller percentage of the overall number of domain name registrations. Moreover, as Plaintiffs allege, all domain name registrants are free to transfer a domain name registration from one registrar to another. (*Id.* ¶ 13.3.) Thus, any domain names registered as a result of WLS can be transferred by the registrant to another registrar. Based on these allegations, Plaintiffs cannot contend that the domain name registration "market" will suffer any substantial impact as a result of WLS.

Finally, Plaintiffs cannot satisfy the Ninth Circuit's requirement that the defendant must receive an economic benefit from the tied product or service. Because Plaintiffs fail to allege that VeriSign has a sufficient economic interest in the tied product, domain name registrations, they have failed to allege this element of a tying claim. (*See id.* ¶ 13.2.) Plaintiffs' FAC makes clear that WLS subscriptions will be sold by registrars, not VeriSign, and, likewise, the domain name registration that may be effectuated when a domain name subject to a WLS subscription expires is also "sold" by a registrar, not by VeriSign. (*Id.* ¶¶ 4.10-4.11, 4.48.) Irrespective of which registrar may sell a WLS subscription and then register the domain name for its customer, VeriSign will receive the same registry fee. (*Id.* ¶¶ 4.11, 4.48.) In other words, VeriSign will receive no higher registration fees in the future if a registrar uses WLS or a competitive service, such as those offered by Plaintiffs.[13] (*See id.* ¶¶ 4.39-

[13] Moreover, Plaintiffs' cursory allegation that "VeriSign owns 15% of NSI and has an economic interest in restricting registrars' ability to compete with NSI for domain name registrations" does not salvage their tying claim. (FAC ¶ 13.17.) Notably, Plaintiffs do

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4.43.) Absent any allegation of direct economic benefit to VeriSign, Plaintiffs' tying claim is legally insufficient.

b. No claim has been alleged against NSI

Plaintiffs' tying claim against NSI must fail because Plaintiffs do not – and cannot – allege that NSI's conduct satisfies the elements necessary for a tying claim. Significantly, Plaintiffs do not allege that NSI has or will have *any* economic power in the alleged "tying" service market to affect the alleged "tied" service or that NSI has taken any steps to "tie" the two services. While Plaintiffs allege that "NSI is the largest registrar" and "NSI sponsors nearly one-fourth of all registered domain names in <.com> and <.net>" (FAC ¶ 13.14), these allegations only address NSI's former market share in the *tied* market and ignore the relevant inquiry of NSI's purported share in the *tying* market in which WLS may compete in the future.[14] Moreover, Plaintiffs admit that WLS would not be limited to NSI. (*Id.* ¶ 13.13.) Thus, as pleaded, NSI has or had no unique position in connection with WLS.

D. Plaintiffs Fail To State A Tortious Interference Claim

Plaintiffs' Tenth Claim must fail because, as they concede, WLS has not been launched. Even if WLS had been launched, Plaintiffs' claim is legally deficient. California law is clear that the claim of tortious interference with prospective economic

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not contend that VeriSign has or will limit WLS to a small number of registrars; instead, Plaintiffs allege that registrars "choose" whether to sell WLS. (FAC ¶ 13.13.) Because end users will be able to purchase WLS and domain name registrations from registrars other than NSI, VeriSign does not have a sufficient economic interest in the tied product market to support a *per se* tying claim. *See Comm-Tract Corp. v. N. Telecom, Inc.*, 1996 WL 11953, at *8 (D. Mass. Jan. 5, 1996) (holding that defendant who was majority owner of three distributors did not have sufficient economic interest in tied service that was also sold by numerous distributors with no relation to defendant).

[14] Plaintiffs cannot resuscitate their claim by contending that NSI's market share in the tied market can be extrapolated to the tying market because a court will not infer market power from a market share of less than 25%. *See Jefferson Parish*, 466 U.S. at 26-27 (30% share insufficient); *Brokerage Concepts, Inc. v. U.S. Healthcare, Inc.*, 140 F.3d 494, 516-17 (3d Cir. 1998) (25% share insufficient). Moreover, as noted above, NSI no longer operates as a domain name registrar. *See supra* at 2 n.3.

advantage does not protect the "speculative expectation that a potentially beneficial relationship will eventually arise." *Westside Ctr. Assocs. v. Safeway Stores 23, Inc.*, 42 Cal. App. 4th 507, 524, 49 Cal. Rptr. 2d 793 (1996). Plaintiffs' original complaint alleged that, when VeriSign allegedly made "false and defamatory" statements about Plaintiffs' services, Plaintiffs "were seeking business from *prospective customers*." (Compl. ¶ 10.9 (emphasis added); *see also id.* ¶ 10.11.) In the FAC, however, these "prospective customers" have been transformed into "beneficial economic relationships with [Plaintiffs'] *respective customers*" (FAC ¶ 14.4 (emphasis added)), even though VeriSign's allegedly tortious conduct has remained unchanged. Plaintiffs admitted in their original complaint that these customer relationships had not yet developed at the time of VeriSign's allegedly tortious conduct, and no facts alleged in the amended complaint call this admission into doubt. Plaintiffs' disingenuous attempt, with the stroke of a pen, to breathe life into their legally deficient claim should fail. *See Reddy v. Litton Indus., Inc.*, 912 F.2d 291, 296-97 (9th Cir. 1990).

To allege a claim for tortious interference, Plaintiffs must allege the identity of the relationships with which Defendants purportedly interfered. *See Brown v. Allstate Ins. Co.*, 17 F. Supp. 2d 1134, 1140 (S.D. Cal. 1998) (dismissing the plaintiff's tortious interference claim where the plaintiff "fail[ed] to identify any *specific* existing relationships with which [the defendant] tortiously interfered") (emphasis added). They must also allege facts that demonstrate "*existing* noncontractual relations which hold the promise of future economic advantage." *Westside Ctr.*, 42 Cal. App. 4th at 524.

Here, Plaintiffs have failed to identify these necessary facts. They have not identified any of the purported customers or the nature of their business relationships with Plaintiffs. Nor have they alleged that these supposed customers had clearly agreed to continue using Plaintiffs' services, such that they were existing, rather than potential, customers. Finally, since WLS has not launched, they cannot allege any interference. Plaintiffs' allegations amount to "at most a hope for an economic relationship and a desire for future benefit," *Blank v. Kirwan*, 39 Cal. 3d 311, 330-31, 216 Cal. Rptr. 718

(1985), which is legally insufficient.[15]

E. The Eleventh Claim Does Not Entitle Plaintiffs To Declaratory Relief

Plaintiffs seek a declaration that implementation of WLS would breach the Registry-Registrar Agreement (the "RRA") that VeriSign has entered into with each ICANN-accredited registrar that uses VeriSign's domain name registration systems. (FAC ¶¶ 15.1-15.16; Prayer ¶ 9; Ex. A.) Specifically, Plaintiffs assert that WLS would stop VeriSign from fulfilling its supposed contractual obligation to "delete domain names from the registry at the direction of the sponsoring registrar." (FAC Prayer ¶ 9; *id.* ¶ 15.2.) However, the Complaint itself unequivocally demonstrates that WLS would have no effect on a sponsoring registrar's ability to delete domain names they have registered. Indeed, as Plaintiffs acknowledge, WLS would merely determine who would be the next in line to register a domain name *after* the deletion (*id.* ¶¶ 1.1, 4.30-4.32, 4.48); it would *not* affect a registrar's ability to delete registrations of domain names they have registered. Consequently, Plaintiffs have failed to allege a threatened breach that could support a declaratory relief claim.

IV. CONCLUSION

For all of the foregoing reasons, the Court should grant this motion and dismiss each and every claim asserted against VeriSign and NSI without leave to amend.

Dated: May 28, 2004

ARNOLD & PORTER LLP

By: _____
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[15] Plaintiffs also must allege that VeriSign engaged in an independently *unlawful* act that interfered with their prospective economic advantage. *See Korea Supply*, 29 Cal. 4th at 1158-59. Here, Plaintiffs summarily assert that VeriSign's conduct "was independently wrongful as described hereinabove." (FAC ¶ 14.7.) Assuming Plaintiffs are referring to their UCL and Sherman Act claims, their tortious interference claim must fail because Plaintiffs have failed to state a claim under either of these statutes. *Supra* pp. 5-23.

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- Coming soon! Pre-order today and you will be notified as soon as the service is released.
- Only one order per domain name will be accepted so place your order today before it's too late.
- Automatically grants you the next registration if the domain name becomes available
- Learn More

SELECT A DOMAIN NAME

1 Enter your desired domain name: 2 Choose an extension: 3 Your code is: 3fh4v

www. [ ] ☑ .com ☑ .net Enter code here: [ ]

i.e. my-own-company

Search for multiple domain names

SEARCH

MORE ABOUT NEXT REGISTRATION RIGHTS

H w Pre-Order Works
Pre-Orders for Next Registration Rights will be available until the service "goes live". Customers who placed pre-orders will be notified at that time. When you place your pre-order you commit to purchasing the service should you receive the subscription. There is no guarantee that pre-orders will result in obtaining a Next Registration Rights subscription. When the service "goes live", if your credit card is valid at that time, your order will be submitted to the VeriSign registry on a first come first served basis. If the Next Registration Rights subscription you ordered is available, it will be automatically purchased for you. Your credit card on file will be charged $39 for each successful subscription. You will be notified via e-mail whether or not your order was successful.

A superior new way to backorder
The only backorder service administered by the .com/.net registry, offering only one subscription per domain name. If the domain name is not renewed and completes the registry deletion cycle during your subscription term, then the domain name is yours. The domain name will be automatically placed into your account with a 1-year registration.

How will orders work after the Pre-Order Period?
After the service "goes live," each time you search for Next Registration Rights availability for a particular domain name, you will be able to view whether or not the subscription is currently available. If it is available for purchase you will have the opportunity to immediately secure the subscription. At that time your credit card will be charged $39 for a 1-year subscription. Your order will be confirmed via e-mail.

*One year domain name registration included with the purchase of Next Registration Rights if the domain name becomes available and is registered to you during the subscription term.

Next Registration Rights Home, Manage Your Subscription, Contact Us, Network Solutions Home
Review our Privacy Policy, Service Agreement, Legal Notice