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SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF LOS ANGELES

REGISTERSITE.COM, an Assumed Name of ABR PRODUCTS INC., a New York Corporation; NAME.COM, LLC, a Wyoming Limited Liability Company; R. LEE CHAMBERS COMPANY LLC, a Tennessee Limited Liability Company *d/b/a* DOMAINSTOBESEEN.COM; FIDUCIA LLC, a Nevada Limited Liability Company; SPOT DOMAIN, LLC, a Wyoming Limited Liability Company; !$6.25 DOMAINS NETWORK, INC., a Delaware Corporation *d/b/a* ESITE Corporation; AUSREGISTRY GROUP PTY LTD., an Australian Proprietary Limited Company; ! $! BID IT WIN IT, INC., a Minnesota Corporation,

Plaintiffs,

v.

INTERNET CORPORATION FOR ASSIGNED NAMES AND NUMBERS, a California Corporation; VERISIGN, INC., a Delaware Corporation; NETWORK SOLUTIONS, LLC, a Limited Liability Company of unknown origin; NETWORK SOLUTIONS, INC., a Delaware Corporation; ENOM, INCORPORATED, a Nevada Corporation; ENOM, INC., a Washington Corporation; and DOES 1-10, inclusive;

Defendants.

Case No. SC 082479

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF DEMURRERS OF DEFENDANTS VERISIGN, INC. AND NETWORK SOLUTIONS, INC. TO COMPLAINT

Date: November 16, 2004
Time: 8:30 a.m.
Department: F
Judge: Hon. Gerald Rosenberg

Action Filed: August 4, 2004

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Defendants VERISIGN, INC. ("VeriSign") and NETWORK SOLUTIONS, INC. ("NSI") respectfully submit this joint Memorandum of Points and Authorities in support of their Demurrers to all causes of action asserted against them in the Complaint filed herein by Plaintiffs.

I. INTRODUCTION

This is the third in a series of repetitive lawsuits filed by Plaintiffs in an attempt to block VeriSign from implementing a proposed new and beneficial service, the Wait Listing Service ("WLS"), that allegedly would compete with services being offered by Plaintiffs. The first two lawsuits, filed in federal court in Los Angeles, were dismissed after favorable rulings for the defendants. In the first, the plaintiffs dismissed the action with prejudice shortly after the district court refused to enjoin WLS because, it found, "WLS has the potential to benefit registries, registrars . . . , and, most importantly, the public." *Dotster, Inc. v. Internet Corp. for Assigned Names & Numbers*, 296 F. Supp. 2d 1159, 1166 (C.D. Cal. 2003).[1] In the second, Plaintiffs asserted a veritable laundry list of claims, including allegations that VeriSign and NSI, by proposing WLS, had committed extortion and violated federal antitrust laws and the Federal Trade Commission Act. The district court dismissed the action after it found that Plaintiffs had failed to state any federal claim. *Registersite.com v. Internet Corp. for Assigned Names & Numbers*, No. CV 04-1368 ABC (CWx), slip op. (C.D. Cal. July 12, 2004) (Req. for Judicial Notice ("RJN") Ex. C, filed concurrently).

Undeterred, Plaintiffs commenced this action alleging that, if implemented, WLS would violate the Unfair Competition Law and breach VeriSign's contracts with Plaintiffs. Viewed in the light most favorable to Plaintiffs, their allegations do not reflect any actionable conduct by VeriSign or NSI. Based solely on VeriSign's proposal to implement WLS, Plaintiffs accuse VeriSign and NSI of operating an "illegal lottery," deceiving consumers about the value of WLS, and, as in federal court, restraining competition. Plaintiffs' own Complaint reveals that these allegations are baseless. The alleged facts establish that VeriSign and NSI would be engaged in no illegal lottery by offering WLS,

[1] Although the named plaintiffs in the first prior action were not the same as here, the plaintiffs in both actions appear to be acting in concert. In fact, at least two of the present Plaintiffs – R. Lee Chambers Co. LLC and Fiducia LLC – are members of an organization known as the "Domain Justice Coalition," which publicly claimed responsibility for the *Dotster* action. *See* http://www.stopwls.com/lawsuit.html. The instant Demurrers are not based upon res judicata or collateral estoppel arising out of the dismissal of the "first" case with prejudice, but VeriSign and NSI reserve the right to rely on those defenses, among others, if this action proceeds further.

that no reasonable consumer could be misled by VeriSign's and NSI's advertising for WLS, and that competition would be enhanced, not restrained by WLS.

The Complaint demonstrates the lengths to which Plaintiffs will go to prevent VeriSign from offering a competing service, especially one the federal court has already found is potentially beneficial to the public. Plaintiffs want to preserve the profits they derive from the market as it currently is, even if that means denying consumers a choice. Plaintiffs are thus seeking to turn the Unfair Competition Law on its proverbial head, by using it as an anti-competitive device. The Court should sustain the Demurrers without leave to amend as to all causes of action asserted against VeriSign and NSI.

II. SUMMARY OF COMPLAINT'S ALLEGATIONS

A. The Parties

The Complaint asserts claims on behalf of eight businesses that purportedly offer services to assist customers who desire to register Internet domain names that were previously registered to someone else and have recently been deleted. (Compl. ¶¶ 1.4, 2.1-2.8.) Plaintiffs assert claims against five defendants: VeriSign, NSI, Network Solutions, LLC ("NSLLC"), eNom, Incorporated ("eNom"), and Internet Corporation for Assigned Names and Numbers ("ICANN"). (*Id.* ¶¶ 2.9-2.14.) VeriSign, pursuant to an agreement with ICANN, operates the exclusive "registry" for the .com and .net top-level domains ("TLDs"). (*Id.* ¶¶ 4.11, 4.40.) A "registry" is an organization responsible for maintaining the authoritative list of second-level domain names within a TLD. (*Id.* ¶ 4.7.)

Plaintiffs allege that domain name registrants do not interact directly with the registry to register a domain name; instead, they register names through "registrars," such as some of the Plaintiffs, which in turn interface with the registry operator to determine the availability of requested domain names and to register domain names. (*Id.* ¶¶ 4.8-4.9.) Plaintiffs allege that "NSI"[2] and eNom

[2] The Complaint refers to Defendants NSI and NSLLC under the single heading "NSI." (Compl. ¶ 2.12.) In their federal court complaint, however, Plaintiffs admitted that NSI's registrar business was sold last year. (RJN Ex. A ¶ 2.11.) As a result, NSI does not currently act as a domain name registrar and does not offer, advertise, or promote WLS. Plaintiffs are bound by this admission in their prior pleading, notwithstanding their conscious decision to delete this admission from their current pleading (*see* Compl. ¶ 2.11). *Cantu v. Resolution Trust Corp.*, 4 Cal. App. 4th 857, 877-78 (1992) (facts admitted by a party in its pleadings in a prior action are binding in a later action). Plaintiffs' contrived and evasive grouping of two independent entities under one heading itself renders the Complaint susceptible to demurrer. *See infra* pp. 18-19.

are domain name registrars. (*Id.* ¶ 4.8.) 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.* ¶¶ 4.10-4.18.)

B. Plaintiffs' Registration of Recently Deleted Domain Names

Plaintiffs allege that there are currently fourteen "generic" TLDs, such as the .com, .net, and .gov TLDs, and 243 "country code" TLDs ("ccTLDs"), such as .us and .uk. (*Id.* ¶¶ 4.4-4.5.) 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 still available for registration in those TLDs has been reduced, resulting in a "shortage" of desirable domain names. (*Id.* ¶¶ 4.19-4.22.) According to Plaintiffs, this shortage is ameliorated by the number of registered domain names that expire because the registrations are not renewed by the current registrants. (*Id.* ¶ 4.21.) Plaintiffs allege that approximately 800,000 domain names expire each month and are then available for registration.[3] (*Id.* ¶ 4.22.)

Plaintiffs allege that VeriSign permits the registration of domain names for fixed periods of up to ten years, although "NSI" allegedly offers longer-term registration services. (*Id.* ¶¶ 4.23-4.24.) If not renewed at the end of its 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.* ¶¶ 4.32-4.33.) According to the Complaint, when a desirable domain name expires, many registrars compete to register the name on behalf of their customers by sending a series of "add" commands to the particular TLD Registry (VeriSign, in the case of .com and .net domain names), and, as a result, the name is often "re-registered" within a few milliseconds of being deleted. (*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) a range of different service options to obtain the registration of recently deleted domain names. (*Id.* ¶ 4.39.) Unlike some registrars, Plaintiffs allegedly do not charge their customers for their services unless and until the requested domain name is registered. (*Id.* ¶ 4.36.) However, Plaintiffs freely admit that a customer of theirs has

[3] Plaintiffs admit that references to a "shortage" or "pool" of "unregistered" or "expired" domain names are a misnomer. (Compl.¶¶ 4.19 n.2, 4.22 n.4.) Domain names either are registered, and thus included in the registry's database, or are not registered, and thus do not exist. (*Id.*) *See generally Smith v. Network Solutions, Inc.*, 135 F. Supp. 2d 1159, 1160-64 (N.D. Ala. 2001).

no certainty he or she will ultimately be able to register a selected domain name, even if Plaintiffs succeed in acquiring the right to register the sought-after domain name. (*Id.* ¶ 4.37.)

C. VeriSign's Proposed WLS

Plaintiffs allege that VeriSign has proposed WLS as another option for registering recently deleted domain names. (*See generally id.* ¶¶ 4.40-4.46, 4.65-4.75.) According to Plaintiffs, WLS would operate as follows: Registrars, acting on behalf of customers, would place reservations for currently registered domain names in the .com and .net TLDs. (*Id.* ¶ 4.42.) 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.* ¶¶ 4.42, 9.7.) For domain names covered by a WLS subscription, upon cancellation of the domain name registration and deletion of the domain name from the registry database, the recently deleted domain name would automatically be registered to the WLS subscriber through the registrar that had sold the WLS subscription. (*Id.* ¶ 4.44.) WLS remains a proposal. The Complaint admits that WLS has not been implemented and is not available for registrars to deliver to their customers at this time. (*Id.* ¶¶ 4.74-4.75.)

III. LEGAL STANDARD

To withstand demurrer, a complaint must "allege[] facts sufficient to establish every element of each cause of action." *Consumer Cause, Inc. v. Arkopharma, Inc.*, 106 Cal. App. 4th 824, 827 (2003). The complaint "must allege facts and not conclusions." *Appl v. Lee Swett Livestock Co.*, 192 Cal. App. 3d 466, 470 (1987). When ruling on a demurrer, the court does not assume the truth of "contentions, deductions or conclusions of fact or law," *Adelman v. Associated Int'l Ins. Co.*, 90 Cal. App. 4th 352, 359 (2001) (quoting *Blank v. Kirwan*, 39 Cal. 3d 311, 318 (1985)), and the complaint's "specific allegations control general pleadings," *Gentry v. eBay, Inc.*, 99 Cal. App. 4th 816, 827 (2002). Further, "[a] party may not avoid demurrer by suppressing facts, including those that are judicially noticeable, which prove the pleaded facts false." *Id.* at 824. VeriSign and NSI respectfully

submit that, applying these standards, the Court should conclude that the Complaint fails to state any cause of action against them and, accordingly, cannot survive demurrer.[4]

IV. PLAINTIFFS FAIL TO STATE A UCL CAUSE OF ACTION

Plaintiffs have brought six of their purported causes of action against VeriSign and/or NSI – the First, Second, and Fourth through Seventh – pursuant to California's Unfair Competition Law, Bus. & Prof. Code §§ 17200-17210 (the "UCL"). The UCL proscribes "unlawful, unfair or fraudulent business act[s] or practice[s]" and "unfair, deceptive, untrue or misleading advertising." *Id.* § 17200.

An "unlawful" business practice is one that is "forbidden by law." *Farmers Ins. Exch. v. Superior Court*, 2 Cal. 4th 377, 383 (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 (2003). If a communication is *un*likely to deceive a reasonable person to whom it is targeted, the court may decide *as a matter of law* that it is not fraudulent within the meaning of the UCL. *See Kunert v. Mission Fin. Serv. Corp.*, 110 Cal. App. 4th 242, 264-65 (2003); *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 (2003). Finally, an "unfair" business practice is one that "offends an established public policy or . . . is immoral, unethical, oppressive, unscrupulous or substantially injurious to consumers." *E.g., S. Bay Chevrolet v. Gen. Motors Acceptance Corp.*, 72 Cal. App. 4th 861, 886-87 (1999); *cf. Shvarts v. Budget Group, Inc.*, 81 Cal. App. 4th 1153, 1158 (2000) (a practice is unfair when "the gravity of the alleged victim's harm" outweighs "the utility of the defendant's conduct").

UCL claims are subject to a higher pleading standard: A plaintiff must plead the *facts* supporting the statutory elements of a UCL violation with "reasonable particularity." *See Gregory v. Albertson's, Inc.*, 104 Cal. App. 4th 845, 857 (2002); *Khoury v. Maly's of Cal., Inc.*, 14 Cal. App. 4th 612, 619 (1993). As discussed below, each of the six UCL causes of action is legally defective.

[4] Although Plaintiffs purport to sue under California law, and this memorandum therefore analyzes Plaintiffs' pleading under the substantive law of California, VeriSign's contracts with Plaintiffs each include a choice-of-law provision that selects Virginia law. (Compl. Ex. A § 6.7.) By submitting this memorandum, VeriSign does not concede that Plaintiffs' claims are properly governed by California law, and expressly reserves the right to invoke the parties' choice-of-law agreement at a later date.

A. The Complaint Fails To Allege Facts Supporting Plaintiffs' Theory That WLS Is An "Illegal Lottery"

Plaintiffs' First Cause of Action 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." Penal Code § 319. The three defining features of an illegal lottery are (1) a prize, (2) distributed by chance, (3) among multiple persons who have paid consideration. *See W. Telcon, Inc. v. Cal. State Lottery*, 13 Cal. 4th 475, 484 (1996). The Complaint fails to plead the elements of an illegal lottery.

First, a lottery necessarily involves *two or more* persons who have paid for the chance to win the *same* prize or set of prizes. *See Gayer v. Whelan*, 59 Cal. App. 2d 255, 259 (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. . . .") (emphasis added); Penal Code § 319 ("*persons*" who have paid consideration). Plaintiffs admit, however, that "[o]nly one WLS subscription will be accepted for each domain name." (Compl. ¶ 4.42; *see also id.* ¶ 4.46.) Thus, according to Plaintiffs' own allegations, WLS subscribers do not compete with each other to win the same "prize" (*i.e.*, the right to register a specific domain name); instead, each subscriber *alone* is eligible to "win" the right to register the particular domain name covered by its WLS subscription. It makes no difference that, according to Plaintiffs, "multiple WLS subscribers" will purchase "multiple chances to win domain names" (*id.* ¶¶ 5.18-5.19), because each subscriber seeks a *different*, *unique* domain name and does not "compete" with any other "player" for that name. This fact could not appear any more clearly in the Complaint. Plaintiffs have admitted that "[o]nly one WLS subscription will be accepted for each domain name." (*Id.* ¶¶ 4.42, 4.46.) Therefore, WLS does not involve, as all lotteries must, *multiple participants* vying for *the same prize or set of prizes*.

Second, Plaintiffs fail to allege facts indicating that WLS would distribute prizes by "chance," because they admit that *human decision*, not blind chance, determines whether WLS subscribers will "win" the right to register a domain name. Specifically, Plaintiffs allege that a third party – the current registrant of a domain name – decides whether to let the domain name expire, which is the event that

determines the "success" or "failure" of a WLS subscription. (*See id.* ¶¶ 4.21 (domain names expire "because they are not renewed by their current registrants"), 5.17 (defining chance as "whether a current domain name owner abandons its property").) WLS, therefore, would not distribute "prizes" (*i.e.*, domain names) based on random mathematical probability, as it must do to be an illegal lottery.[5] *See Bell Gardens Bicycle Club v. Dep't of Justice*, 36 Cal. App. 4th 717, 747 (1995) (lottery where distribution of poker jackpot depended on "fortuity or random event"). Rather, WLS "prize distribution" is based on human decisionmaking. *See Att'y Gen. v. Preferred Mercantile Co.*, 73 N.E. 669, 671 (Mass. 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."). Moreover, as Plaintiffs admit, the alleged "lottery operators" here have no control over whether WLS subscribers actually "win" an expired domain name. (Compl. ¶ 1.2.) Thus, Plaintiffs cannot properly contend that operator influence over WLS prize distribution somehow fulfills the element of "chance" for an illegal lottery. *Cf. People v. Hecht*, 119 Cal. App. Supp. 778, 784-87 (1931) (lottery operators *themselves* determined distribution of prizes).[6]

B. Plaintiffs Fail To State A UCL Cause Of Action Based On The CLRA

Plaintiffs' Second Cause of Action alleges that NSI has committed an "unlawful" business practice by violating the Consumers Legal Remedies Act, Civ. Code §§ 1750-1784 (the "CLRA"). In particular, Plaintiffs allege that an NSI advertisement for WLS violates the CLRA's prohibition against "representing 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.* § (a)(17). (Compl. ¶ 6.4.) This cause of action fails for two reasons.

[5] Plaintiffs allege that the likelihood a domain name will be renewed varies "according to (among other things) the number of years that it has already been registered, the number of characters it contains, and whether or not it is a word in the English language." (Compl. ¶ 4.61.) Plaintiffs also contend that, using these factors, it is possible to calculate "the likelihood that [a] specific WLS subscription . . . will result in the subscriber obtaining the domain name." (*Id.* ¶ 8.18, Prayer ¶ 4.) These allegations further demonstrate that WLS would not distribute domain names by "chance."

[6] In any event, *Hecht* is inapposite because the scheme at issue in that case, unlike WLS, but like all true lotteries, involved multiple contestants vying for the same prizes (there, a finite number of men's business suits). *Hecht*, 119 Cal. App. Supp. at 779.

1. Plaintiffs Are Not Injured "Consumers" Under the CLRA

Only a "consumer who suffers . . . damage" may sue for a CLRA violation. 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). Under this definition, Plaintiffs are not "consumers." They freely admit that they are not "individual[s]," but are business entities that allegedly offer services to assist customers with registering recently deleted domain names. (Compl. ¶¶ 1.4, 2.1-2.8.) Moreover, Plaintiffs do not allege that *they* have sought or acquired 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."[7]

In addition, Plaintiffs' "damages" allegations are deficient. They allege that they are "losing business" as a result of WLS. (*Id.* ¶ 4.78.) Lost business, however, is not a cognizable form of "damage" under the CLRA, which is designed to redress consumer injuries, not competitive harm. *See Von Grabe v. Sprint PCS*, 312 F. Supp. 2d 1285, 1302-03 (S.D. Cal. 2003) ("consumers" who may sue under CLRA cannot allege "competitive injury"). Because Plaintiffs are not damaged "consumers," they may not enforce the CLRA.

2. The Lone Alleged Representation by NSI Is Not Deceptive

Plaintiffs have alleged a single advertisement by NSI that purportedly violates the CLRA. However, as Plaintiffs' allegations reveal, NSI's advertisement explicitly states, on its face, that a WLS subscription will result in the registration of a domain name only "*[i]f the domain name becomes available during your subscription period.*" (Compl. ¶ 6.6.) Far from deceiving consumers about the contingent nature of the benefit to be received from a WLS subscription, NSI's advertisement discloses up front that a WLS subscription may not result in a domain name registration.[8]

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[7] Plaintiffs make a feeble attempt to allege that they are "consumers," by noting that "[e]ach Plaintiff is the registrant of at least one *domain name* in <.com> or <.net>, and is a consumer of *domain names* to that extent." (Compl. ¶ 2.16 (emphasis added).) This allegation is misguided, because the purported "goods or services" that are the subject of Plaintiffs' CLRA claim are *WLS subscriptions*, not domain names. Plaintiffs have not alleged that they are "consumers" of WLS subscriptions.

[8] The Complaint's partial description of the advertisement's disclosures fully demonstrates, as a matter of law, that the advertisement is not misleading and negates Plaintiffs' allegations of deception. The entire advertisement, however, which Plaintiffs decided *not* to quote in full or attach to their Complaint, contains additional disclosures that further confirm this conclusion. For example, the advertisement states: "*If the domain name is not renewed and completes the registry deletion cycle*

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NSI's advertisement therefore cannot possibly violate the CLRA, which was enacted to protect consumers from *deception*, not to prohibit all "goods" having conditional benefits. *See Broughton v. CIGNA Healthplans*, 21 Cal. 4th 1066, 1077 (1999) (CLRA designed to "alleviate social and economic problems stemming from deceptive business practices"); Civ. Code § 1760. Indeed, section 1770(a)(17), the very provision Plaintiffs invoke here, was "intended to prohibit merchants from advertising a rebate or discount *when they conceal from consumers the conditions to be satisfied to receive the rebate or discount.*" *Kramer v. Intuit Inc.*, 121 Cal. App. 4th 574, 580 (2004) (emphasis added). The Legislature did not intend to outlaw advertising that is "neither deceptive nor misleading." *Id.* There is no alleged deception here. Accordingly, the Second Cause of Action should be dismissed.

C. The UCL Does Not Obligate NSI Individually To Counsel Each WLS Subscriber As To The Likelihood Its Subscription Will Succeed

In their Fourth Cause of Action, Plaintiffs allege that NSI has committed a "fraudulent" business practice by advertising WLS without disclosing the "likelihood that a subscriber will obtain the domain name to which it subscribes." (Compl. ¶ 8.6; *see also id.* ¶¶ 8.16, 8.18.) Although Plaintiffs conclusorily assert that this omission is "likely to deceive" consumers (*id.* ¶ 8.15), the facts actually alleged in the Complaint not only fail to support, but in fact negate, any claim of deception.

Specifically, Plaintiffs *admit* that domain name registrants already are aware of "the fact that most currently registered domains will be renewed." (*Id.* ¶ 4.58.) Indeed, Plaintiffs acknowledge they

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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.*" (RJN Ex. D at 1 (emphases added).) Plaintiffs did not object to NSI's request that the federal court take judicial notice of the entire advertisement, the authenticity of which was not disputed. (RJN Ex. B at 10 n.6.) This Court, likewise, may consider the advertisement in ruling on this demurrer, because it is the basis of Plaintiffs' cause of action, and relied upon and quoted in the Complaint. (*See* RJN at 1-2.) *See Edgar Rice Burroughs, Inc. v. Metro-Goldwyn-Mayer, Inc.*, 205 Cal. App. 2d 441, 450-52 (1962) (on demurrer, trial court properly viewed motion pictures referenced in, but not attached to, the complaint); *Walt Rankin & Assocs. v. City of Murrieta*, 84 Cal. App. 4th 605, 623-24 & n.12 (2000) (Web site's contents may be judicially noticed); *cf. Haskell v. Time, Inc.*, 857 F. Supp. 1392, 1396-98 (E.D. Cal. 1994) (on 12(b)(6) motion to dismiss UCL claim, examining allegedly misleading communication that was partially quoted in the complaint). This advertisement appears on a Web site that is not operated by NSI because, as stated above, NSI does not currently act as a domain name registrar and does not offer, advertise, or promote WLS. *Supra* note 2.

developed their "pay if successful" business models in response to consumer recognition of this very fact. (*Id.* ¶¶ 1.4, 4.57-4.58.) Therefore, the Complaint concedes that potential domain name registrants already understand that few registrants of desirable domain names will allow their domain name registrations to lapse and their domain names to be deleted. *Nowhere have Plaintiffs alleged that this fact is unknown to the reasonable WLS subscriber.*

NSI does not violate the UCL by failing to disclose, or to quantify, a risk already generally known to reasonable WLS subscribers, because only nondisclosures that make a transaction *misleading* run afoul of the UCL. In *Searle v. Wyndham International, Inc.*, 102 Cal. App. 4th 1327 (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. This practice allegedly induced patrons to pay additional tips they otherwise would not have felt obliged to provide. The court affirmed dismissal of the claim, holding that even though "some patrons will care about what the server receives" from the hotel, 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.

Likewise, here, the UCL does not require NSI to furnish WLS subscribers with the statistical probability that a specific WLS subscription will succeed, because, as in *Searle*, nondisclosure of that information is unlikely to deceive a reasonable subscriber about the nature of what it is purchasing. Based on the Complaint's allegations, reasonable registrants already realize that the success or failure of any WLS subscription, as well as the resultant value of Plaintiffs' services, will be inherently uncertain. Indeed, a mathematical disclosure of the type Plaintiffs posit would itself be deceptive since they do not allege that their method of risk assessment and calculation is generally accepted. The NSI advertisement makes the one objectively correct statement that is possible: The WLS subscriber *will* get to register the domain name *if* the current registration expires during the term of the subscription.

If the UCL were read affirmatively to require NSI to counsel each individual customer on the probability that a subscription would succeed, the same reasoning would prevent insurance companies from selling earthquake insurance policies in California without advising each insured of the

(relatively low) statistical probability that an earthquake will damage his or her home – and benefits will 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 NSI does not quantify and individualize the *known* and disclosed risk that a currently registered domain name may not and, in the aggregate, is not likely to become available for registration.

In addition, the Court should dismiss this cause of action because the NSI advertisement from which Plaintiffs have selectively quoted (Compl. ¶¶ 8.8, 8.11) prominently discloses, on its face, that WLS subscriptions result in registrations of domain names only when the current registration "is not renewed and completes the registry deletion cycle during [the] subscription term."[9] (RJN Ex. D at 1.) As shown above, this and other qualifying language included in NSI's advertisement renders the advertisement non-misleading as a matter of law. *Supra* pp. 8-9 & n.8. Accordingly, the Court should dismiss the Fourth Cause of Action.

D. 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 Cause of Action that VeriSign and NSI are "defrauding consumers" by proposing to offer WLS subscriptions for domain names not set to expire within the subscription period, without advising subscribers to check the "expiration dates" for such names. (Compl. ¶¶ 9.5, 9.9.) However, the supposedly hidden information – "expiration dates" – is readily accessible to the entire world, a fact confirmed by the Complaint's exhibits. Further, Plaintiffs have not alleged facts indicating that reasonable WLS subscribers are unlikely to realize that domain names may be set to expire after the end of the one-year WLS subscription period.

First, the Complaint reveals that, far from concealing domain name expiration dates from

[9] Plaintiffs quote two excerpts from the advertisement, neither of which is alleged to be false. WLS undeniably *would* allow a subscriber to get the domain name it wants "when it becomes available" (Compl. ¶ 8.8); Plaintiffs admit this (*e.g.*, *id.* ¶ 4.44 (acknowledging that WLS will automatically reassign domain names to the subscriber upon completion of the deletion cycle)). And, for exactly the same reason, WLS undeniably *can* "help" a subscriber "[g]et a domain name [she] always wanted . . . but somebody else already has." (*Id.* ¶ 8.11.) Although Plaintiffs have tried to distort these excerpts (*e.g.*, *id.* ¶ 8.12 (omitting "help" from advertisement's language)), they have not alleged any facts suggesting that they are false.

consumers, VeriSign and NSI are actively providing that data to the public for free. Upon registering a name, the sponsoring registrar must submit the "expiration date" to VeriSign as one of the required "data elements" of the registration. (Compl. Ex. A § 2.4.5.) VeriSign maintains this information, for *all* domain names registered in its TLDs, in a publicly accessible registry "WHOIS" database. That database, at http://registrar.verisign-grs.com/whois/, is available for free to the public.[10] In addition, every ICANN-accredited registrar 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 a 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, 576 (N.D. Cal. 1999) (listing data elements of a domain name registration and stating this information "can be looked up in a public database using a 'WHOIS' query"). Thus, as the Complaint's exhibits reveal, interested WLS subscribers have unfettered access to "expiration dates" for registered domain names.

Second, because Plaintiffs could not truthfully allege that domain name "expiration dates" are not freely and readily available to WLS subscribers, they instead complain that VeriSign and NSI do not advise WLS subscribers to check this public information. (Compl. ¶ 9.5.) This theory is flawed, however, because it *assumes* that reasonable WLS subscribers do not already understand that domain names can be registered for terms longer than a year and that such names therefore may not naturally expire within the one-year WLS subscription period. Plaintiffs allege no facts supporting this assumption. For example, they have alleged no facts indicating that reasonable WLS subscribers are unaware that (i) WLS subscriptions last only a year and (ii) domain names can be registered for more than a year.[11] If reasonable subscribers know these basic facts (a likelihood the Complaint does not exclude), then they *necessarily* must realize that some WLS subscriptions will expire *before* the

[10] The Court may take judicial notice of the fact that VeriSign's WHOIS database is publicly available at VeriSign's Internet Web site. *See Walt Rankin & Assocs.*, 84 Cal. App. 4th at 623-24 & n.12 (taking judicial notice of public availability of information contained in Web site).

[11] Although the Complaint refers to NSI's alleged offering of "100 year domain name registration terms" (¶ 4.24), Plaintiffs admitted in their federal complaint that "most registrars" limit registration terms "from a minimum of one year to a maximum of ten years." (RJN Ex. A ¶ 4.25.)

underlying domain name registrations. *See Lavie*, 105 Cal. App. 4th at 512 (deceptiveness is measured from the vantage point of a reasonable consumer of the subject service, "not others to whom [the practice] is not primarily directed"). Absent any contrary allegation, there can be nothing deceptive about VeriSign's and NSI's selling WLS subscriptions without reminding subscribers to check public sources of information. *See Kunert*, 110 Cal. App. 4th at 264-65 (affirming sustaining of demurrer to UCL cause of action because plaintiffs "allege[d] no facts suggesting why a reasonable person would believe" an untrue fact "merely because [the true fact] is not disclosed to consumers").[12] The Fifth Cause of Action accordingly does not allege either an "unfair" or a "fraudulent" business practice.

E. The Complaint Fails To State A UCL Cause Of Action Based On VeriSign's And NSI's Alleged Marketing Of WLS As Domain Name "Protection"

In the Sixth Cause of Action, Plaintiffs allege that VeriSign and NSI are committing a "fraudulent" and "unfair" business practice by advertising WLS subscriptions to current domain name registrants as "protection" from the inadvertent loss of their domain names. (Compl. ¶¶ 10.1-10.15.) This practice violates the UCL, Plaintiffs contend, because existing renewal "grace periods" already reduce the risk of inadvertent deletion, allegedly, to very low levels. (*Id.* ¶¶ 10.7-10.8, 10.13.) Thus, according to Plaintiffs, VeriSign and NSI supposedly are "inculcating an unreasonable fear among domain name registrants regarding the likelihood of 'unintentional expiration.'" (*Id.* ¶ 10.11.) This theory is legally defective for three independent reasons.

First, the cause of action is barred by the well-established legal principle that a supposed "threat" is not actionable "where that which is threatened is only what the party has a legal right to do." *See McKay v. Retail Auto. Salesmen's Local Union No. 1067*, 16 Cal. 2d 311, 321 (1940); *see also Rothman v. Vedder Park Mgmt.*, 912 F.2d 315, 318 (9th Cir. 1990) (it is not unlawful for a party

[12] This cause of action rests on a false premise – namely, that no rational person would buy a WLS subscription for a domain name set to "expire" outside the initial subscription period. (Compl. ¶ 9.9.) In fact, as Plaintiffs admit, current registrants can delete their registrations before the expiration dates, thereby making their domain names available for registration during the subscription period. (*Id.* ¶ 10.9.) In addition, because WLS subscriptions will be renewable (*id.* ¶ 9.7), purchasing a subscription early, before the domain name is set to expire, enables the subscriber to reserve indefinitely its place at the front of the line for future years, when the underlying domain name *is* scheduled to expire.

to warn that it *will* do an act it is legally entitled to do). Plaintiffs admit that VeriSign is entitled to delete a domain name from the registry after all renewal grace periods have elapsed. (*Id.* ¶ 10.9.) Therefore, any alleged "threat" that a domain name could then be deleted cannot be actionable as a matter of law.

Second, Plaintiffs fail to allege facts indicating that a reasonable domain name registrant is likely to be deceived by advertisements marketing WLS as "protection," or that such advertisements are untrue in any respect. As Plaintiffs concede, registrants receive "clear notice" before any domain name is deleted that their domain name "requires attention," and registrants may choose to register names for many years. (*Id.* ¶¶ 10.8, 10.12; *see also id.* ¶¶ 4.23-4.31.) Plaintiffs have not alleged, and cannot allege, facts indicating that a reasonable registrant is unaware of these circumstances and is therefore likely to be confused about the "protective" value of a WLS subscription.[13]

Third, although Plaintiffs also assert this cause of action against VeriSign, they fail to allege facts showing that VeriSign is marketing WLS as "protection." They do not set forth the contents of, or even generally describe, any pertinent advertisement *by VeriSign*. Indeed, Plaintiffs tacitly admit that VeriSign itself is not publishing any such advertisements, by conclusorily asserting that VeriSign somehow was "involved in" NSI's and eNom's decisions to advertise WLS as protection. (*Id.* ¶ 10.10.) Plaintiffs may not sue VeriSign for NSI's and eNom's advertisements under the UCL, however, because the UCL does not cover vicarious liability. *See People v. Toomey*, 157 Cal. App. 3d 1, 14 (1984) ("The concept of vicarious liability has no application to actions brought under the [UCL]."); *Emery v. Visa Int'l Serv. Ass'n*, 95 Cal. App. 4th 952, 960 (2002) ("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].") (emphasis added).

[13] Other facts alleged by Plaintiffs confirm that Defendants' supposed marketing statements are indisputably true. For example, however low the risk of inadvertent deletion, a possibility of an error always exists, and Plaintiffs admit that a registrant *will* lose its domain name through deletion if all renewal grace periods expire and the registrant does not hold a WLS subscription. (Compl. ¶ 4.45 ("If there is no WLS subscription on a domain name, VeriSign will delete the name from the registry" and the name will be re-registered "on a first-come, first-served basis.").) Thus, precisely as NSI's advertisement states, WLS *can* "help[] . . . [p]rotect the domain names you have." (*Id.* ¶ 10.6.) These specific factual admissions trump Plaintiffs' argumentative, conclusory allegation that NSI's advertisement is somehow false (*e.g.*, *id.* ¶ 10.7). *See Gentry*, 99 Cal. App. 4th at 827.

Plaintiffs do not allege any facts indicating that VeriSign controls NSI's or eNom's advertising. Therefore, Plaintiffs have failed to state a UCL cause of action against VeriSign or NSI for marketing WLS as a form of "protection."

F. Allegations That Consumers Would Receive No Consideration From WLS And That WLS Is Anticompetitive Fail To State A UCL Cause Of Action

In the Seventh Cause of Action, Plaintiffs allege that WLS is an "unfair" business practice for two unrelated reasons: first, because consumers allegedly "do not receive any consideration in return" for their purchase of WLS subscriptions (Compl. ¶¶ 11.5-11.9); and second, because WLS supposedly restrains competition in the market for domain name registration services (*id.* ¶¶ 11.10-11.11). Neither theory states a cause of action under the UCL.

First, the "lack of consideration" theory is legally defective because it simply is not the law that every contract lacking in consideration gives rise to a UCL cause of action. Rather, conduct that would support a common-law cause of action under contract law may form the predicate for a UCL cause of action only if it "*also constitutes conduct that is 'unlawful, or unfair, or fraudulent.'*" *Nat'l Rural Telecomms. Coop. v. DirecTV, Inc.*, 319 F. Supp. 2d 1059, 1074-75 & n.24 (C.D. Cal. 2003) (UCL claim based on mere breach of contract fails as a matter of law) (citing *Allied Grape Growers v. Bronco Wine Co.*, 203 Cal. App. 3d 432, 451-54 (1988) (breach of contract supported UCL cause of action only because the breach independently violated three statutes)). Thus, Plaintiffs may not base a UCL cause of action on mere lack of consideration, but must allege that Defendants' actions violate the UCL for independent reasons. As discussed throughout this memorandum, they have not done so.

Moreover, even if lack of consideration were a legally viable theory, the Complaint's specific factual allegations belie the claim that consumers will receive nothing for purchasing WLS. Plaintiffs admit that WLS would give subscribers the exclusive right to register the underlying domain name if the name is deleted during the subscription period. (Compl. ¶ 4.44.) They also admit that about 20,000 domain names are deleted every day – about 800,000 each month. (*Id.* ¶¶ 4.33, 4.22.) As a matter of law, the bargained-for right to be "first in line" to register one of these expiring domain names is legally adequate consideration to support a WLS subscription, even if Plaintiffs contend the right will not ripen in many cases. *See Harris v. Time, Inc.*, 191 Cal. App. 3d 449, 456 (1987)

("Courts will not require equivalence in the values exchanged or otherwise question the adequacy of the consideration. If a performance is bargained for, there is no further requirement of benefit to the promisor . . . .").

Second, just as controlling federal antitrust law doomed Plaintiffs' antitrust claim in federal court, controlling California case law squarely defeats Plaintiffs' pseudo-antitrust UCL theory. To state an unfair business practice claim based on alleged anticompetitive conduct, Plaintiffs must allege

> conduct that threatens an incipient violation of an antitrust law, or violates the policy or spirit of one of those laws because its effects are comparable to or the same as a violation of the law, or otherwise significantly threatens or harms competition.

Cel-Tech Communications, Inc. v. Los Angeles Cellular Tel. Co., 20 Cal. 4th 163, 187 (1999). Such a claim cannot be alleged in conclusory terms. *Gregory*, 104 Cal. App. 4th at 856. In *Gregory*, the court, applying the *Cel-Tech* standard quoted above, affirmed the sustaining of a demurrer to a cause of action very similar to Plaintiffs'. The plaintiff did not base its UCL claim "on violation of specific antitrust statutes or policies of antitrust legislation." *Id.* at 856. The same is true here.

Further, conclusory allegations of anticompetitive conduct, such as those made by Plaintiffs in their Seventh Cause of Action, are insufficient to state a cause of action under *Cel-Tech*:

> The [defendants]' acts, it is alleged, constitute an unfair business practice by "unfairly restraining market competitors and economic competition based on price, service and quality." However, such allegations are too vague and conclusionary to support a claim for restraint of trade. Similarly, the allegation that defendants' actions "reduce market choices otherwise available to consumers" does not imply a diminution of competition. The same can be said of every occasion that an enterprise ceases to offer its goods or services by going out of business.

Id. (internal quotation marks and citation omitted). Here, as in *Gregory*, Plaintiffs provide no more than "vague and conclusionary" allegations that WLS would "impede[] competition, increase[] prices, and replace[] a vibrant competitive market with a . . . monopoly," resulting in reduced consumer choice.[14] (Compl. ¶ 11.11; *id.* ¶¶ 4.55-4.58.) As in *Gregory*, this cause of action cannot withstand demurrer.

V. PLAINTIFFS HAVE NOT ALLEGED A RIGHT TO DECLARATORY RELIEF

In the Eighth Cause of Action, Plaintiffs seek a declaration that VeriSign, by offering WLS,

[14] In dismissing Plaintiffs' federal antitrust claim, the district court reached a similar conclusion, ruling that Plaintiffs had failed to allege facts supporting their contention that WLS would significantly affect the market for domain name registration services. *Registersite.com*, slip op. at 6-7 (RJN Ex. C).

would breach the Registry-Registrar Agreement (the "RRA," Compl. Ex. A) that VeriSign has entered into with each ICANN-accredited registrar that uses VeriSign's domain name registration systems. (Compl. ¶¶ 12.1-12.21, Prayer ¶ 9.) Specifically, Plaintiffs assert that WLS would stop VeriSign from fulfilling its supposed contractual obligation to "delete expired domain names in response to a 'delete' command sent by the sponsoring registrar." (*Id.* ¶ 12.2.) The facts alleged in the Complaint, however, including the RRA itself, establish that this cause of action is legally untenable on its face.

First, the Complaint unequivocally demonstrates that, contrary to Plaintiffs' theory, WLS will have *no effect* on existing domain name registrations, because WLS subscriptions do not mature until the underlying, existing registration is deleted, at which time WLS merely determines who is next in line to register the domain name. (*Id.* ¶¶ 1.2 (WLS operates only after "the current registrant decides to abandon" the domain name), 4.27-4.32, 4.44 (current registration must complete deletion cycle before WLS reassigns domain name to subscriber).) In short, Plaintiffs' allegations confirm that WLS would merely alter what happens to a domain name *after* the deletion process, and would not interfere with Plaintiffs' antecedent right, pursuant to the RRA, to delete any domain name they register.

Second, Plaintiffs may not legitimately claim any greater right to control the deletion process under the RRA. As they admit, the RRA expressly entitles them only to "cancel the registration of a domain name [they] ha[ve] registered." (*Id.* ¶ 12.10 (quoting *id.* Ex. A § 3.1); *id.* ¶ 12.8 ("delete" means "cancel the registration" of a domain name).) WLS, as just discussed, would not impair this right. On its face, the RRA does not afford Plaintiffs the far broader claimed right to insist that every "deleted domain name[] become available for registration by any accredited registrar." (*Id.* ¶ 12.3.) Plaintiffs do not and cannot identify any provision of the RRA that grants them this power. Because the RRA plainly authorizes Plaintiffs to do no more than delete the registrations of domain names they sponsor, and because Plaintiffs have incorporated the RRA into their Complaint, its provisions control. *See Williams v. Hous. Auth.*, 121 Cal. App. 4th 708, 714 n.6 (2004) (contracts incorporated into pleadings take precedence over inconsistent allegations).

As a matter of law, therefore, VeriSign would not breach any provision of the RRA by offering WLS. The deletion-related right that Plaintiffs *do* have under the RRA – deleting domain names they have registered – would be untouched by WLS, and Plaintiffs cannot rightly claim the broader right to

dictate what happens to a domain name *after* it is deleted.

VI. PLAINTIFFS HAVE ALLEGED NO ACTIONABLE CONDUCT BY NSI

As explained above, each cause of action asserted against VeriSign and NSI fails for its own specific reasons. Independent of those reasons, each and every cause of action also fails as to NSI because Plaintiffs have alleged no conduct by NSI that could support liability.

The Complaint names two distinct business entities whose names include the words "Network Solutions" as defendants. (Compl. ¶¶ 2.11-2.12.) One, NSI, is allegedly a Delaware corporation. (*Id.* ¶ 2.11.) The other, Network Solutions, LLC ("NSLLC"), is said to be a limited liability company "of unknown origin." (*Id.* ¶ 2.12.) After identifying these entities, Plaintiffs allege:

> This lawsuit arises out of [NSLLC]'s ability to sell domain names as a registrar pursuant to a Registrar Accreditation Agreement executed in Los Angeles County. [NSLLC] may have acquired certain rights and assets from Defendant [NSI]. Together, [NSI] and [NSLLC] will be referred to herein as "NSI" (in the singular form, though identifying both defendants).

(*Id.*) Once having lumped these distinct entities together, Plaintiffs proceed to ignore them individually and to level allegations only against the fictionalized, hybrid "NSI" entity that they created. (*E.g.*, *id.* ¶¶ 5.16 ("NSI" is accepting WLS pre-orders), 6.5-6.6 (describing a WLS advertisement run by "NSI").)

At a minimum, this pleading tactic renders the Complaint vulnerable to a special demurrer for uncertainty. *See George Pepperdine Found. v. Pepperdine*, 126 Cal. App. 2d 154, 162 (1954) (trial court properly sustained special demurrer where complaint did not make "certain what acts were done by each [defendant]"), *disapproved on other grounds by Holt v. Coll. of Osteopathic Physicians & Surgeons*, 61 Cal. 2d 750 (1964); Civ. Proc. Code § 430.10(f). Further, by proceeding in this manner, Plaintiffs have stated no cause of action against NSI because they have alleged no actionable conduct *by NSI*. If a plaintiff is uncertain which of several entities is liable for a tort, he may not merely sue the entire group, allege similar conduct by all, and leave it to discovery to sort out who is responsible. *See Setliff v. E.I. du Pont de Nemours & Co.*, 32 Cal. App. 4th 1525, 1529-34 (1995) (general demurrer properly sustained where complaint alleged identical conduct by several manufacturers, but failed to allege conduct by a particular manufacturer that injured the plaintiff). Rather, if a plaintiff does not have a sufficient basis to allege *particular* conduct by a *specific* person or entity, he "must

name Doe defendants . . . until [he] can identify" the correct party to sue. *Bockrath v. Aldrich Chem. Co.*, 21 Cal. 4th 71, 81 (1999) (general demurrer properly sustained).

The only allegations that Plaintiffs have made against NSI are (i) the fact and location of its incorporation and (ii) that it "*may have*" transferred certain assets to NSLLC. (Compl. ¶¶ 2.11-2.12 (emphasis added).) These neutral facts hardly suffice to state a cause of action against NSI. Because Plaintiffs may not manufacture a cause of action against NSI by definitionally fusing it with a distinct entity and accusing the fictionalized, hybrid entity of UCL violations, all causes of action against NSI are defective and should be dismissed.[15]

VII. CONCLUSION

For all of the foregoing reasons, Plaintiffs have failed to allege facts sufficient to constitute any cause of action against VeriSign and NSI. Accordingly, the Court should sustain the Demurrers without leave to amend and dismiss VeriSign and NSI from the action.

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[15] As noted, this defect is anything but trivial in this case, since, as Plaintiffs recognized in their federal court pleading, *supra* note 2, NSI does not currently operate as a domain name registrar and does not offer or promote WLS. Although this fact obviously did not deter Plaintiffs from suing NSI again, it apparently did prevent them from alleging any conduct by NSI that could support a cause of action.