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17 ASSIGNED NAMES AND NUMBERS

18 UNITED STATES DISTRICT COURT
19 CENTRAL DISTRICT OF CALIFORNIA

20 REGISTERSITE.COM, et al.,

21 Plaintiff,

22 v.

23 INTERNET CORPORATION FOR
24 ASSIGNED NAMES AND
25 NUMBERS, a California
26 Corporation; VERISIGN, INC., a
27 Delaware Corporation; and DOES 1-
28 150, inclusive,

Defendants.

Case No. CV 04-1368 ABC (CWx)

**NOTICE OF ERRATA TO
DEFENDANT INTERNET
CORPORATION FOR ASSIGNED
NAMES AND NUMBERS' MOTION
TO DISMISS CERTAIN CAUSES OF
ACTION FOR FAILURE TO STATE
A CLAIM UNDER FRCP RULE
12(b)(6)**

BY _____

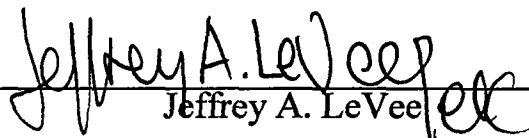
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CLERK U.S. DISTRICT COURT
CENTRAL DISTRICT OF CALIF.
LOS ANGELES

FILED

1 Please take notice that Defendant Internet Corporation for Assigned Names
2 and Numbers' ("ICANN") Motion to Dismiss Certain Causes of Action for Failure
3 to State A Claim Under FRCP Rule 12(b)(6) ("Motion to Dismiss") was
4 inadvertently submitted without a Table of Contents and a Table of Authorities. As
5 such, ICANN hereby submits a copy of its Notice of Motion and Motion to
6 Dismiss, with the Table of Contents and Table of Authorities attached thereto, as
7 Exhibit A. No changes have been made to either ICANN's Notice of Motion or
8 Motion to Dismiss, other than the addition of the Table of Contents and Table of
9 Authorities. ICANN respectfully requests that the Court recognize this copy of
10 ICANN's Notice of Motion and Motion to Dismiss.

11 Dated: June 1, 2004

JONES DAY

13 By: 
14 Jeffrey A. LeVeque

15 Attorneys for Defendant INTERNET
16 CORPORATION FOR ASSIGNED
17 NAMES AND NUMBERS

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11
12 **UNITED STATES DISTRICT COURT**
13 **CENTRAL DISTRICT OF CALIFORNIA**

14
15 REGISTERSITE.COM, et al.,
16 Plaintiff,
17 v.
18 INTERNET CORPORATION FOR
ASSIGNED NAMES AND
19 NUMBERS, a California
Corporation; VERISIGN, INC., a
20 Delaware Corporation; and DOES 1-
150, inclusive,
21 Defendants.

Case No. CV041368 ABC (CWx)
**DEFENDANT INTERNET
CORPORATION FOR ASSIGNED
NAMES AND NUMBERS' NOTICE
OF MOTION AND MOTION TO
DISMISS CERTAIN CAUSES OF
ACTION FOR FAILURE TO STATE
A CLAIM UNDER FRCP 12(B)(6);
MEMORANDUM OF POINTS AND
AUTHORITIES**

Date: July 12, 2004
Time: 10:00 a.m.
Dept: 680

Honorable Audrey B. Collins

1 PLEASE TAKE NOTICE that, on July 12, 2004, at 10:00 a.m. or as soon
2 thereafter as counsel may be heard at the courtroom of the Honorable Audrey B.
3 Collins, United States District Judge, located at 255 East Temple Street, Los
4 Angeles, CA 90012, Defendant Internet Corporation for Assigned Names and
5 Numbers ("ICANN") will and hereby does move this Court, pursuant to
6 Rule 12(b)(6) of the Federal Rules of Civil Procedure, for an order dismissing the
7 following claims for relief contained in the complaint filed by Registersite.com,
8 Name.com, R. Lee Chambers Company LLC, Fiducia LLC, Spot Domain, LLC,
9 !\$6.25 Domains! Network, Inc., AusRegistry Group Pty Ltd and !\$!Bid It Win It,
10 Inc.'s ("Plaintiffs"):

- 11 • first claim for relief for violation of California Business and Professions
12 Code Section 17200 et seq., as against ICANN;
- 13 • fifth claim for relief for violation of California Business and Professions
14 Code Section 17200 et seq., as against ICANN;
- 15 • seventh claim for relief for violation of California Business and
16 Professions Code Section 17200 et seq., as against ICANN; and
17 • twelfth claim for relief for breach of contract.

18 Pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, none of
19 these claims for relief states a claim upon which relief may be granted, as against
20 ICANN. These are the only claims for relief in the complaint that are asserted
21 against ICANN.
22

23 ICANN originally met and conferred with Plaintiffs on April 1, 2004, during
24 which ICANN notified Plaintiffs that ICANN intended to file a motion to dismiss
25 plaintiffs' original complaint. Plaintiffs elected to file an amended complaint,
26 which they did on April 8, 2004.

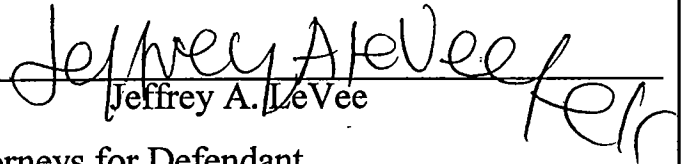
27 Although the first amended complaint deleted some of the defects in its
28 claims against ICANN, it retained several others, and even introduced some

1 additional defects. This motion is made following the conference of counsel
2 pursuant to Local Rule 7-3, which took place on May 20, 2004. Counsel were
3 unable to reach any agreements that would obviate the need for the motion.

4 This motion is based upon this Notice of Motion and Motion, the
5 Memorandum of Points and Authorities attached hereto, the concurrently-filed
6 Request for Judicial Notice, all the papers, pleadings, and records on file herein,
7 and on such other matters as may properly come before the Court before or at the
8 hearing.

9 Dated: May 28, 2004

JONES DAY

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11 By: 
12 Jeffrey A. LeVee

13 Attorneys for Defendant
14 INTERNET CORPORATION FOR
15 ASSIGNED NAMES AND NUMBERS
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1 **STATEMENT OF RELEVANT FACTS**

2 Although Plaintiffs' first amended complaint is lengthy, its allegations with
3 respect to ICANN may be summarized as follows:

4 Defendant VeriSign is the Internet "registry" for the ".com" and ".net"
5 domains. FAC ¶¶ 4.9, 4.44. A "registry" is analogous to a telephone book in that it
6 maintains a list (and other relevant information) of all of the Internet domain names
7 registered in that particular domain (i.e., ".com"). If a consumer wishes to register
8 a name in either of those domains, the consumer contacts an Internet "registrar"
9 (such as one of the Plaintiffs), which in turn contacts VeriSign to see if the domain
10 name is available or if it is already registered. FAC. ¶¶ 4.10-4.11. Domain name
11 registrations typically are for one or two years. FAC ¶ 4.38. At the end of the
12 registration period, some registrants elect not to renew their domain name
13 registrations, in which case VeriSign deletes the name from the registry. FAC
14 ¶¶ 4.26-4.28.

15 Some time ago, VeriSign proposed to offer WLS. Via WLS, a consumer
16 (through a registrar) could purchase the ability to "stand in line" for a domain name
17 that might be deleted from the registry. FAC ¶¶ 4.46. If the current subscriber of
18 the domain name elected not to renew her subscription, VeriSign would
19 automatically register the domain name in the name of the person who had
20 purchased the WLS subscription. FAC ¶ 4.48. The Internet registrars could elect
21 to offer WLS to consumers if they wished, but they would be under no obligation to
22 offer WLS.

23 Plaintiffs are Internet registrars (FAC ¶ 1.4) that "act[] as an interface
24 between registrants [consumers] and the registry operator [in this case, VeriSign],
25 providing domain name registration and other related services to consumers." FAC
26 ¶¶ 4.8-4.10. For various periods of time,¹ Plaintiffs have been offering similar

27 ¹ ICANN notes that some of the Plaintiffs actually became registrars and
28 commenced offering their wait listing services well after VeriSign began public
discussions of WLS in 2001, or even after ICANN agreed that it would revise its

1 types of “wait listing” services to consumers. The difference between Plaintiffs’
2 services and WLS is that Plaintiffs offer no guarantee that they can obtain a
3 domain name for their customers if the name is deleted from the registry. Instead,
4 under Plaintiffs’ version of “wait listing,” if VeriSign deletes a domain name from
5 the registry, multiple registrars attempt, on behalf of their various customers, to
6 acquire the name in a “split-second” race to be first-in-line when the domain name
7 becomes available. Only one registrar will be successful in obtaining the deleted
8 name for its customer; the other customers will be out of luck. Unlike under WLS,
9 the current system for re-registration of deleted domain names, a customer would
10 simply have to sign up with any one registrar to be placed on the waiting list. This
11 would guarantee the customer the right to be next in line to acquire the domain
12 name should it be deleted.

13 ICANN is a not-for-profit California corporation that, in 1998, entered into a
14 Memorandum of Understanding with the United States Department of Commerce
15 (“DOC”), which charged ICANN with certain responsibilities for managing and
16 administering the Domain Name System. FAC ¶¶ 4.1-4.7, 4.15-4.18; Bylaws, Art.
17 1, § 1.² The mission of ICANN is to coordinate, at the overall level, the global
18 Internet's systems of unique identifiers, and in particular to ensure the stable and
19 secure operation of the Internet's unique identifier systems. Bylaws, Art. 1, § 1.
20 ICANN conducts no commercial business, and its bylaws do not permit it to
21 function as an Internet registrar or registry. Bylaws, Art. 2, § 2.

22
23
24 (continued...)

25 agreement with VeriSign to remove the contractual prohibition against its
26 introduction. In fact, a few of the Plaintiffs actually commenced offering this
27 service after the *Dotster* case was filed. These Plaintiffs obviously entered the
28 registrar business knowing that WLS was approaching introduction.

² See <http://www.icann.org/general/bylaws.htm> for ICANN's Bylaws.

1 One of ICANN’s purposes has been to “accredit” companies that serve as
2 Internet registrars. When ICANN “accredits” a registrar, ICANN and the registrar
3 enter into a Registrar Accreditation Agreement (“RAA”). Each of the Plaintiffs has
4 signed an essentially identical RAA with ICANN. FAC ¶ 2.15.

5 After VeriSign submitted its WLS proposal to ICANN, ICANN solicited
6 comment from the Internet community with respect to VeriSign’s proposal. FAC
7 ¶¶ 4.60-4.62. After receipt of those comments, ICANN’s Board adopted a
8 resolution in August 2002 authorizing ICANN’s president to negotiate amendments
9 to its agreements with VeriSign to permit WLS to proceed. FAC ¶ 4.64. After
10 several procedures to review that decision – including reconsideration at the
11 requests of registrars and VeriSign and the filing of a lawsuit in this Court by a
12 group of registrars (the *Dotster* litigation) requesting preliminary and permanent
13 injunctions against ICANN’s negotiations with VeriSign – Plaintiffs filed their
14 original complaint on March 1, 2004, only five days before the WLS proposal was
15 to be considered at a regularly-scheduled meeting of ICANN’s Board.

16 On March 6, 2004, the ICANN Board passed a resolution approving the
17 results of negotiations with VeriSign concerning its WLS proposal, which
18 authorized ICANN to seek approval of the United States Department of Commerce
19 (as required by ICANN’s agreement with that agency) to amend the VeriSign
20 registry agreements to permit the offering of WLS. FAC ¶ 4.65.

21 A few days before plaintiffs filed their original complaint in this action, on
22 February 27, 2004, VeriSign filed suit against ICANN, Case No. CV 04-1292
23 AHM (CTx), which is pending before Judge Matz in the Central District. In that
24 suit, VeriSign alleges, among other things, that ICANN has, in refusing to amend
25 its agreement with VeriSign at an earlier time, (1) conspired with yet-to-be-named
26 registrars and others in violation of section 1 of the Sherman Act; and (2) breached
27 the .com contract between ICANN and VeriSign. On May 10, 2004, Judge Matz
28

1 granted ICANN's motion to dismiss VeriSign's complaint, while allowing VeriSign
2 an opportunity to amend.

3 After ICANN raised objections to the original complaint's sufficiency, on
4 April 8, 2004, Plaintiffs filed their first amended complaint against ICANN
5 ("FAC") and VeriSign. Plaintiffs also added as defendants two other registrars
6 (Network Solutions, Inc., and eNom, Inc.) and an affiliated company (eNom
7 Foreign Holdings Corp.). Plaintiffs claim that WLS threatens Plaintiffs' businesses
8 because "Plaintiffs each offer a service to assist consumers in registering expired
9 domain names." Thus, Plaintiffs seek "to enjoin the defendants' proposed unfair
10 and unlawful WLS activities." FAC ¶¶ 1.4, 1.9. Plaintiffs also claim that ICANN
11 has breached the RAA that each of the Plaintiffs has entered into with ICANN.
12 FAC ¶¶ 2.15, 16.2, 16.3. Plaintiffs allege that WLS would violate the terms of the
13 RAA because WLS does not treat all registrars equally. Further, Plaintiffs claim
14 ICANN breached section 2.3 of the RAA by failing to follow certain procedures in
15 its decision to negotiate with VeriSign regarding the WLS. FAC ¶¶ 16.6, 16.15-16.

16 As noted in the introduction, Plaintiffs are the second group of registrars that
17 have filed suit against ICANN to try to stop the implementation of WLS. In
18 *Dotster, Inc. v. Internet Corporation for Assigned Names and Numbers*, CV 03-
19 5045-JFW (MANx), three registrars that offered "wait listing" services to assist
20 consumers in registering expired domain names claimed that ICANN had breached
21 sections 2 and 4 of the RAA in its decision to authorize negotiations with VeriSign
22 about the proposed WLS. The *Dotster* plaintiffs unsuccessfully sought a
23 preliminary injunction. In denying the motion for a preliminary injunction, Judge
24 Walter explained that plaintiffs had failed to demonstrate a likelihood of success on
25 the merits of their claims because the RAA clearly did *not* require ICANN to follow
26 the procedures set forth in sections 2 or 4 because WLS did not "affect a right or
27 obligation" of the plaintiff-registrars. November 10, 2003 Order at 6 (attached as
28 Exhibit A to ICANN's concurrently-filed Request For Judicial Notice ("RJN")).

1 After evaluating this order, the *Dotster* plaintiffs stipulated to dismissal of their
2 action with prejudice; the Court entered that dismissal on December 5, 2003
3 (attached as Exhibit B to ICANN's concurrently-filed RJN).

4 LEGAL STANDARD

5 Although this Court must accept as true material factual allegations in the
6 complaint, “[c]onclusory allegations of law and unwarranted inferences are
7 insufficient to defeat a motion to dismiss for failure to state a claim.” *Anderson v.*
8 *Clow (In re Stac Electronics Sec. Litig.)*, 89 F.3d 1399, 1403 (9th Cir. 1996)
9 (internal quotation omitted). To withstand scrutiny under Rule 12(b)(6), the
10 complaint “must contain either direct or inferential allegations respecting all the
11 material elements to sustain a recovery under some viable legal theory.” *Scheid v.*
12 *Fanny Farmer Candy Shops, Inc.*, 859 F.2d 434, 436 (6th Cir. 1988) (internal
13 quotations omitted). In undertaking this analysis, the Court is not required to
14 “accept as true allegations that contradict matters properly subject to judicial notice
15 or by exhibit.” *Sprewell v. Golden St. Warriors*, 266 F.3d 979, 988 (9th Cir. 2001).
16 If the complaint falls victim to a motion to dismiss, it should be dismissed with
17 prejudice if amendment would be futile. *See Reddy v. Litton Indus., Inc.*, 912 F.2d
18 291, 296 (9th Cir. 1990).

19 ARGUMENT

20 **I. PLAINTIFFS' CLAIMS AGAINST ICANN BASED ON VIOLATIONS** 21 **OF CALIFORNIA'S UNFAIR COMPETITION LAW ARE FATALY** 22 **DEFICIENT.**

23 Plaintiffs' first three claims against ICANN (the first, fifth and seventh
24 claims) are brought against all defendants and allege violations of California's
25 Unfair Competition Law (“UCL”). Plaintiffs are allegedly bringing these claims on
26 behalf of the individual plaintiffs as well as the general public. FAC ¶¶ 5.2, 5.20,
27 9.2, 9.10, 11.2, 11.12. However, Plaintiffs are not “competent” to bring these
28 claims on behalf of the general public and, therefore, lack standing to bring a

1 representative action. Indeed, even as claims brought by the individual Plaintiffs,
2 these causes of action, at least as against ICANN, fail to meet the pleading
3 requirements for UCL claims.

4 **A. Plaintiffs Are Not “Competent” To Bring A UCL Claim On Behalf**
5 **Of The General Public.**

6 A plaintiff must be “competent” to prosecute a UCL claim on behalf of the
7 general public. Cal. Bus. & Prof. Code section 17204; *Kraus v. Trinity Mgmt.*
8 *Serv., Inc.*, 23 Cal. 4th 116, 138 (2000). To make a showing of competency, the
9 plaintiff must demonstrate that the claim truly is brought on behalf of the “general
10 public.” *Rosenbluth Int’l, Inc. v. Super. Ct.*, 101 Cal. App. 4th 1073, 1075 (2002).
11 By contrast, a representative UCL action “based on a contract is not appropriate
12 where the public in general is not harmed by the defendant's alleged unlawful
13 practices.” *Id.* at 1077; *see South Bay Chevrolet v. GMAC*, 72 Cal. App. 4th 861,
14 888-90 (1999) (ruling that a representative action was inappropriate because there
15 was no showing that members of the public were likely to be deceived by a
16 wholesale security agreement between a lender and automotive dealers). Although
17 actions brought to assert claims of individual consumers lend themselves to
18 representative UCL actions, actions brought to vindicate commercial business
19 interests do not. *Prata v. Super. Ct.*, 91 Cal. App. 4th 1128, 1143 (2001)
20 (recognizing a distinction between “actions brought to vindicate the rights of
21 individual consumers” and actions involving “sophisticated business finance
22 issues”); *see also South Bay Chevrolet*, 72 Cal. App. 4th at 883.

23 In *Rosenbluth*, plaintiff alleged that a travel agency serving large corporate
24 clients used fraudulent accounting methods in order to understate the amount of
25 rebates due to its customers. 101 Cal. App. 4th at 1076. The plaintiff brought the
26 UCL action on behalf of the travel agency's customers, mostly corporations that had
27 contracts with the travel agency. The court recognized that a UCL action brought
28 on behalf of sophisticated parties to business contracts raises significant

1 “constitutional issues” in that it deprives the businesses of the decision of whether
2 or not to sue, and the right to be represented by their own counsel. *Rosenbluth*, 101
3 Cal. App. 4th at 1078-79; see *Bronco Wine Co. v. Frank A. Logoluso Farms*, 214
4 Cal. App. 3d 699, 718 (1989) (ruling that a UCL action against a winery brought on
5 behalf of absent grape growers raised due process concerns because the absent
6 grape growers were deprived of the decision of whether to participate in the action
7 and to represent themselves). In addition, the *Rosenbluth* court found that actions
8 to redress business interests foreclose absent plaintiffs from recovering
9 individualized damages in that each of the “victims' damages would have to be
10 calculated separately” because they have separate, specific contracts. *Rosenbluth*,
11 101 Cal. App. 4th at 1079; *Bronco Wine Co.*, 214 Cal. App. 3d at 720. The court,
12 therefore, ruled that plaintiff was not “competent” to bring the action because the
13 purported victims – the large corporations that had individual relationships with the
14 travel agency – were not the general public. *Id.* at 1078-79.

15 The present case is like *Rosenbluth*. While claiming to bring the action on
16 behalf of “consumers,” Plaintiffs are simply attempting to protect their own
17 business interests, which are opposed to the interests of consumers. Plaintiffs
18 allege that *they* will lose money and business if WLS is instituted, because
19 consumers will then choose the more effective WLS in preference to Plaintiffs' wait
20 listing services. By bringing this action, Plaintiffs seek to block WLS and deny
21 consumers a choice in the matter.

22 As in *Rosenbluth*, “[t]he alleged victims here are not unwary targets of false
23 advertising, innocent youths corrupted by lawbreaking retailers, aggrieved used car
24 purchasers, or a 'singularly dense' group of consumers who fall prey to misleading
25 advertising designed to lure them into high-interest loan contracts.” *Rosenbluth*,
26 101 Cal. App. 4th at 1078 (citations omitted). The alleged victims – the various
27 other registrars accredited by ICANN – are sophisticated entities that have
28 demonstrated, by the filing of the *Dotster* case, that they are capable of asserting

1 their own interests and have no need for Plaintiffs' representation. They also have
2 different interests than Plaintiffs, as shown by the naming of two of them as
3 defendants in this lawsuit. Plaintiffs' differing corporate interests, and the due
4 process concerns raised by a representative suit in the face of those differences,
5 render Plaintiffs incompetent to bring a representative action. *See Kraus*, 23 Cal.
6 4th at 138 (“[B]ecause a UCL action is one in equity, in any case in which a
7 defendant can demonstrate a potential for harm or show that the action is not
8 brought by a competent plaintiff for the benefit of injured parties, the court may
9 decline to entertain the action as a representative suit.”).

10 **B. Plaintiffs’ UCL Claims Do Not Meet The Heightened Pleading**
11 **Requirements Under Section 17200 .**

12 In order to bring any claim under the UCL, the plaintiff “must state with
13 reasonable particularity the facts supporting the statutory elements of the violation.”
14 *Silicon Knights, Inc. v. Crystal Dynamics, Inc.*, 983 F. Supp. 1303, 1316 (N.D. Cal.
15 1997) (citing *Khoury v. Maly’s of Cal.*, 14 Cal. App. 4th 612, 619 (1993)); *Nicolosi*
16 *Distrib. Co. v. FinishMaster, Inc.*, 2000 U.S. Dist. LEXIS 505 *1, *5 (N.D. Cal.
17 2000) (“claims brought under California's unfair competition statute must satisfy a
18 heightened pleading standard”). The allegations cannot simply mirror other claims
19 in the complaint but must state specific facts that support the alleged UCL
20 violation. *GlobeSpan, Inc. v. O’Neill*, 151 F. Supp. 2d 1229, 1236 (C.D. Cal.
21 2001); *see The Official Comm. of Unsecured Creditors v. Donaldson, Lufkin &*
22 *Jenrette Sec. Corp.*, 2002 WL 362794 *1, *17-18 (S.D.N.Y. March 6, 2002) (citing
23 *Silicon Knights* for the proposition that plaintiffs must do more than reference the
24 rest of their claims and assert that this represents an unlawful or unfair business
25 practice under California's UCL).

26 If the complaint contains claims against multiple defendants, the plaintiff is
27 required to allege the specific facts tying each defendant to the alleged UCL
28 violation. *See Silicon Knights*, 983 F. Supp. at 1316. In *Silicon Knights*, plaintiff, a

1 video game designer, sued its partner-corporation, as well as the corporation's
2 individual officers alleging, among other things, violations of the UCL. *Id.* at
3 1305-06. The trial court agreed with the individual defendants that plaintiff failed
4 to allege facts sufficient to support a UCL claim against the individual defendants.
5 *Id.* at 1316. Even though the body of the complaint contained factual detail
6 regarding the conduct of the individual defendants, the majority of plaintiff's claims
7 were brought against the corporate-partner and not the individual defendants. *Id.*
8 As such, there was no underlying basis for the UCL claims as alleged against the
9 individual defendants. *Id.*

10 The present case is similar to *Silicon Knights* in that the majority of the
11 claims are brought against defendants other than ICANN. In addition, Plaintiffs
12 allege no basis for any UCL-based claim against ICANN, let alone facts sufficient
13 to support three separate UCL claims. Indeed, even if Plaintiffs had included
14 allegations specifically directed to ICANN's conduct, these still would be
15 insufficient, because by its very nature that conduct – failure of ICANN to use its
16 contractual relationships to prohibit the other defendants from offering WLS in a
17 manner that the Plaintiffs allege violate the UCL – does not itself violate the UCL.
18 Laws of general application such as the UCL are enforced by courts and the
19 executive branch; Plaintiffs have not shown why ICANN is obliged (or, indeed,
20 even equipped) to affirmatively use its agreements with VeriSign and other
21 registrars to compel those companies to comply with the UCL and the myriad other
22 laws around the world that may apply to them. And because ICANN itself does not
23 engage in the commercial registrar or registry businesses, there can be no allegation
24 that ICANN will participate in the actions about which Plaintiffs complain.

25 In Plaintiffs' first claim, there is only one allegation that could possibly be
26 directed against ICANN: “The Defendants and each of them have aided or assisted
27 in setting up, managing, or drawing the lottery in the WLS lottery enterprise.” FAC
28 ¶ 5.19. All the other allegations in the first claim are aimed at the activities of the

1 other defendants – VeriSign, NSI, and/or eNom and its holding company (FAC
2 ¶¶ 5.2-5.18). ICANN is not even mentioned by name and therefore no specific
3 facts are alleged, as required by *Silicon Knights*, tying ICANN to the alleged UCL
4 violation. In fact, even the complaint makes clear that ICANN will not be involved
5 in “setting up” or “managing” WLS, but at most will fail to use its contracts to
6 prohibit it.

7 As for the fifth claim, there is only one mention of ICANN: “ICANN
8 approved the WLS for a one-year trial without requiring Verisign to disclose (or to
9 require registrars to disclose) that consumers may not have the opportunity to renew
10 their WLS subscriptions after the one-year trial period.” FAC ¶ 9.6. It appears that
11 Plaintiffs are attempting to allege that the sale of WLS subscriptions by VeriSign
12 constitutes false advertising. FAC ¶ 9.8. But ICANN does not (and will never) sell
13 WLS subscriptions. ICANN has not required (and does not propose to require)
14 VeriSign to engage in the acts alleged to constitute false advertising. Therefore, the
15 statement regarding ICANN's approval of the WLS for a one-year trial is irrelevant
16 to the alleged false advertising by VeriSign and is not sufficient to satisfy the
17 pleading requirements for a violation of the UCL. ICANN does not, by merely
18 allowing VeriSign under its agreements to sell WLS subscriptions, become liable
19 under the UCL in the event VeriSign advertises WLS in a manner that Plaintiffs
20 consider to constitute false advertising.

21 Finally, Plaintiffs’ seventh claim is also brought against all defendants. It
22 alleges that VeriSign and the “Participating Registrars” are violating the UCL by
23 misleading consumers by purporting to sell ownership in domain names, when they
24 have no interest (Plaintiffs argue) to sell. FAC ¶¶ 11.6-11.11. In this claim, the
25 only mentions of ICANN are Plaintiffs' references to the registry agreement
26 between Verisign and ICANN and the Registry-Registrar Agreements between
27 VeriSign and all ICANN-accredited registrars (FAC ¶¶ 11.6-11.7) and their
28 assertion that “[n]either ICANN nor the Department of Commerce has authority to

1 approve Verisign’s attempt to leverage its *de facto* control into *de jure* rights” (FAC
2 ¶ 11.10). Whatever this means, this is the *only* allegation against ICANN, and the
3 allegation does not contain any *facts* to demonstrate that Plaintiffs have a legitimate
4 claim against ICANN. Moreover, ICANN's authority, or lack thereof, regarding
5 WLS does not convert its removal of contractual constraints to VeriSign's
6 introduction of WLS into a violation of the UCL.

7 As in *Silicon Knights*, Plaintiffs are required to plead *with specificity* the
8 factual support for a UCL claim against *each defendant*. *Silica Knights*, 983 F.
9 Supp. at 1316. Plaintiffs’ “allegations” in these three UCL claims do not satisfy this
10 burden as to ICANN. This failure is fatal to Plaintiffs’ first, fifth and seventh
11 claims against ICANN.

12 **C. Plaintiffs’ First Claim Fails for the Additional Reason that**
13 **Plaintiffs Have Not, and Cannot, Allege an Illegal Lottery.**

14 Plaintiffs’ first claim for relief contains an additional fatal flaw. In their first
15 claim, Plaintiffs allege that WLS is an “illegal lottery” under California Penal Code
16 section 319, and therefore a UCL violation. FAC ¶¶ 5.10, 5.14-5.15. But Plaintiffs
17 have failed to plead facts supporting a violation of the underlying statute. *Aguilar*
18 *v. Atl. Richfield Co.*, 25 Cal. 4th at 826, 856-57 (ruling that if there is no violation
19 of the underlying law, there can be no UCL claim based on the alleged violation).

20 To state a violation of California Penal Code section 319, a plaintiff must
21 allege facts establishing three elements: (1) the disposition of property; (2) upon a
22 contingency determined by chance; (3) to a person who has paid a valuable
23 consideration for the chance of winning the prize. Cal. Pen. Code section 319;
24 *Finster v. Keller*, 18 Cal. App. 3d 836, 843 (1971).

25 The WLS would have to be dominated by chance in order to violate section
26 319.³ “Chance,” the California Supreme Court has explained, “means that winning

27 ³ A system or game cannot be considered “as one of chance solely because
28 chance is a factor in producing the result.” *People v. Settles*, 29 Cal. App. 2d Supp.
781, 787 (1938).

1 and losing depend on luck and fortune rather than, or at least more than, judgment
2 and skill.” *Hotel Employees & Restaurant Employees Int’l Union v. Davis*, 21 Cal.
3 4th 585, 592 (1999). In other words, “[t]he test is not whether the game contains an
4 element of chance or an element of skill but which of them is the dominant factor in
5 determining the result of the game.” *In re Allen*, 59 Cal. 2d 5, 6 (1962).

6 Plaintiffs have not, and cannot, plead that WLS is dominated by “chance.” In
7 fact, Plaintiffs’ own allegations demonstrate that WLS is *not* dominated by chance.
8 As Plaintiffs’ allege, under WLS, “registrars who choose to offer the WLS will be
9 able to subscribe (on behalf of customers) to currently registered <.com> and
10 <.net> domain names” and “[o]nly one WLS subscription will be accepted for each
11 domain name” on a “first-come/first-served basis.” FAC ¶ 4.46. Then, if the
12 reserved domain name expires, “VeriSign would not delete the name, but instead
13 would assign the name to the registrar who placed the reservation.” FAC ¶ 4.48.
14 Thus, the WLS is little different than an option of first refusal to purchase real
15 estate: if the current owner decides to sell, the option-holder can buy, but the
16 option-holder may have no influence on the decision of the current owner to sell. It
17 depends on the decision of the current owner, not on chance. The fact that
18 “contingencies” are present does not convert the option into a lottery.

19 While the WLS contains contingencies, the contingencies are not determined
20 by simple “chance.” First, a potential registrant must make the business decision to
21 reserve a domain name through WLS. Presumably, this business decision is based
22 upon a review of the likelihood that the current registrant will allow the domain
23 name to expire and that the expiring domain name promotes the reserving
24 registrant’s personal or business interests. Few people would spend money to stand
25 in line to obtain the names “microsoft.com” or “cnn.com”; this is a *decision*, not
26 *chance*. Second, the registrant has to have the business acumen to make these
27 decisions on an expedited basis in order to ensure that she is the first to reserve the
28 domain name: WLS reservations are accepted on a “first-come/first-served basis,”

1 and “[o]nly one WLS subscription [will] be accepted for each domain name.” FAC
2 ¶ 4.46. This is *execution of a decision*, not *chance*. Finally, the current registrant
3 of the domain name then must make the decision whether to renew the domain
4 name or let it expire; this, too, is a *decision*, not *chance*. If the current registrant
5 allows the domain name to expire, the WLS registrant then secures the expiring
6 domain name for her own benefit.

7 Thus, WLS is not dominated by chance, but by personal, economic and
8 business decisions – numbers are not drawn, dice are not thrown and luck is not
9 present. FAC ¶¶ 4.46, 4.48. Indeed, WLS provides dramatically more certainty
10 than the “system” Plaintiffs offer – in which any of dozens of registrars might be
11 able to obtain a deleted domain name on behalf of its customer.⁴

12 **II. PLAINTIFFS' TWELFTH CLAIM FOR BREACH OF THE**
13 **REGISTRAR ACCREDITATION AGREEMENT MUST FAIL.**

14 In their twelfth claim, Plaintiffs allege that ICANN has breached the RAA by
15 authorizing VeriSign to proceed with the WLS without following procedures set
16 forth in the RAA. FAC ¶ 4.59-68, 16.5-16.28. Plaintiffs argue that, as registrars,
17 they have certain rights when ICANN seeks to enter into amendments to
18 agreements with registry operators such as VeriSign, if ICANN’s conduct might
19 have some effect on the registrars.

20 Plaintiffs are wrong. The contract Plaintiffs signed with ICANN plainly
21 gives Plaintiffs no right to interfere with ICANN’s contractual relationship with any
22 of ICANN’s registries, including VeriSign. Instead, the provisions of the RAA
23 upon which Plaintiffs seek to rely only gives Plaintiffs rights if and when ICANN
24 takes actions “that impact the *rights, obligations, or role* of Registrar.” RAA § 2.3

25 _____
26 ⁴ Plaintiffs' first cause of action fails for another reason: the first element of
27 the underlying claim requires that there be a “disposition” of property, which is not
28 possible here. *See Lockheed Martin Corp. v. Network Solutions, Inc.*, 194 F.3d
980, 984 (9th Cir. 1999); *Dorer v. Arel*, 60 F. Supp. 2d 558, 561 (E.D. Va. 1999) ;
Network Solutions, Inc. v. Umbro Int'l, Inc., 529 S.E. 2d 80, 86 (Va. 2000).

1 (emphasis added). Such an impact on registrar rights, obligations, or roles can
2 occur, for example, when ICANN proposes to adopt what is defined by the RAA as
3 a “Consensus Policy”. Under section 4 of the RAA, adoption of such a policy
4 affects the rights, obligations, and role of *all* accredited registrars by mandating that
5 the registrars conduct their businesses in conformity with the Consensus Policy.
6 But ICANN's decision to amend the VeriSign *registry* agreements to allow WLS to
7 be offered does not constitute a Consensus Policy under the *Registrar Accreditation*
8 *Agreement*, and does not affect registrars' rights, obligations, or role under that
9 agreement.

10 Judge Walter decided this precise issue in the *Dotster* case. Judge Walter’s
11 opinion was issued at the preliminary injunction stage, but there can be no mistake
12 that he categorically rejected the very contract theories that Plaintiffs allege in their
13 twelfth claim.⁵ This Court should reject those theories as well, as a matter of law.

14 In analyzing the *Dotster* plaintiffs' claim that “ICANN will be in breach of
15 various provisions of the RAA if it approves an amendment to the Registry
16 Agreement between ICANN and Verisign,” Judge Walter analyzed the Consensus
17 Policy provisions of Subsection 4.1 of the RAA, which specify the circumstances in
18 which the obligations and role of registrars (and the rights of ICANN) under the
19 RAA are altered. Judge Walter explained that:

20 Subsection 4.1 only applies in situations where ICANN
21 *seeks to compel* registrar action without amending the
22 RAA. There is nothing in this provision that imposes any
23 obligation upon ICANN to act only by consensus where
24 its actions do not seek to compel registrar action.

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27 ⁵ See *Emrich v. Touche Ross & Co.*, 846 F.2d 1190, 1198(9th Cir. 1998) (a
28 district court may take notice of the proceedings and determinations of prior related
litigation without treating the Rule 12(b)(6) motion as one for summary judgment).

1 Registrars may elect to offer WLS to their customers but
2 *they will be under no obligation to do so.*

3 Ex. A (November 10, 2003 Order) at 6. Even though an amendment to the
4 VeriSign-ICANN agreements may, by allowing VeriSign to offer the WLS, have
5 practical effects on the businesses of registrars that offer their own, competitive
6 wait listing services, the *Dotster* ruling held that, because it did not change rights,
7 obligations, or roles between ICANN and registrars under the RAA, the RAA's
8 requirements concerning ICANN's adoption of Consensus Policies did not apply.

9 Plaintiffs here allege that “[b]y approving the WLS without obtaining
10 consensus, ICANN acted unjustifiably, arbitrarily, inequitably, and unfairly, and in
11 so doing breached its contractual obligations to each Plaintiff.” FAC ¶ 16.14.
12 Plaintiffs obviously are making the same allegation as the *Dotster* plaintiffs. *See*
13 FAC ¶¶ 16.6, 16.10. Plaintiffs do not reference Section 4, but the only logical
14 reason for avoiding reference to Section 4 and the term “Consensus Policy” is that
15 Plaintiffs know that Judge Walter has already ruled that Section 4 of the RAA does
16 not require ICANN to initiate a consensus-driven process before amending
17 VeriSign's registry agreement to allow for the WLS. Ex. A (November 10, 2003
18 Order) at 6.

19 Instead, Plaintiffs focus on Section 2.3 of the RAA and claim that ICANN
20 has breached that provision. FAC ¶¶ 16.6-16.28. But Section 2.3 of the RAA does
21 not prevent ICANN from permitting VeriSign to offer WLS, as Judge Walter also
22 ruled:

23 The plain language of Subsection 2.3 makes it clear that
24 the obligations imposed on ICANN under that section do
25 not apply to matters falling outside the RAA. Because the
26 implementation of WLS does not affect a right or
27 obligation of Plaintiffs under the RAA or otherwise
28

1 require an amendment to the RAA, its implementation
2 falls outside the scope of the RAA.

3 Ex. A (November 10, 2003 Order) at 7.⁶ Shortly after Judge Walter issued his
4 November 10, 2003 Order, the parties stipulated to dismiss the *Dotster* case with
5 prejudice. (Ex. B (December 5, 2003 dismissal with prejudice).

6 In addition to ruling on the contract claims directly, this Court may grant
7 ICANN's motion to dismiss based on principles of collateral estoppel and *res*
8 *judicata*. Collateral estoppel, also known as “issue preclusion,” is appropriate when
9 the following elements are met: “(1) there was a full and fair opportunity to litigate
10 the issue in the previous action; (2) the issue was actually litigated in that action; (3)
11 the issue was lost as a result of a final judgment in that action; and (4) the person
12 against whom collateral estoppel is asserted in the present action was a party or in
13 privity with a party in the previous action.” *In re Palmer*, 207 F.3d 566, 568 (9th
14 Cir. 2000) (citing *Pena v. Gardner*, 976 F.2d 469, 472 (9th Cir. 1992)).
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17 ⁶ Plaintiffs' only direct attempt to allege that a right under the RAA is
18 impacted by the introduction of WLS involves a claimed “right to delete domain
19 names according to RRP.” FAC ¶ 16.7. But that reference is unavailing. The more
20 specific allegations earlier in the complaint describing the deletion process (FAC ¶¶
21 4.25-4.34) make it clear that WLS does not change registrars' ability to *delete*
22 domain names; it only affects the right to *re-register* them once they are deleted.
23 WLS, which is a voluntary service that no registrar will be required to offer, is *not* a
24 “Consensus Policy” and will *not* affect the rights, obligations, or role of registrars
25 under the RAA. Registrars are responsible, both now and after WLS is
26 implemented, for sending deletion commands to the registry under the RRP
27 (“registry-registrar protocol”) concerning those domains their customers do not
28 wish to renew. FAC ¶ 4.30. It is only when VeriSign runs its batch deletion
process – entirely a registry function in which registrars have no role (FAC ¶¶ 4.33)
– that WLS makes any change. Specifically, names with a WLS subscription in
effect are not returned to the pool of available names, but are registered to the WLS
subscriber in fulfillment of the subscription. FAC ¶ 4.48. If there is no
subscription, the registry operator includes the name in the batch deletion occurs.
FAC ¶ 4.49.

1 There was a full opportunity in *Dotster* to litigate these same issues
2 concerning the applicability of the RAA to WLS, and in that case they were in fact
3 vigorously contested and decided contrary to Plaintiffs' position here. Plaintiffs
4 specifically invoke Section 2.3 of the RAA. The meaning and obligations of this
5 section as they pertain to WLS were specifically litigated in the *Dotster* litigation.
6 After fully reviewing the extensive briefing, submission of evidence, and oral
7 argument that was presented, the Court determined the meaning of that section and
8 its effect on WLS. *See* Ex. A (November 10, 2003 Order) at 7. Similarly, the
9 meaning and effect of the section to which Plaintiffs allude – section 4 – was also
10 specifically litigated and decided. Ex. A (November 10, 2003 Order) at 6. In view
11 of the *Dotster* court's adjudication of these very same issues presented here, the
12 plaintiffs elected to stipulate that the *Dotster* action be dismissed with prejudice and
13 that voluntary dismissal with prejudice in *Dotster* operates as a final adjudication
14 on the merits. *McMahon v. Pier 39 Ltd. Partnership*, 2003 U.S. Dist LEXIS 22178,
15 *10 (N.D. Cal. 2003) (citing *Semtek Int'l Inc. v. Lockheed Martin Corp.*, 531 U.S.
16 497, 505 (2001), the court stated that “[a] *voluntary* dismissal with prejudice, even
17 one based on an agreed or stipulated judgment, operates as an adjudication on the
18 merits.”) (emphasis added).

19 The plaintiffs who lost these issues in *Dotster* are in privity with Plaintiffs
20 here. Determinations of privity require an analysis of the particular relationships of
21 the parties in each case. Substantial identity between the parties and sufficient
22 commonality of interests are the relevant inquiries for this element. *Id.*; *In re*
23 *Schimmels*, 127 F.3d 875, 881 (9th Cir. 1997) (quoting *United States v. ITT*
24 *Rayonier, Inc.*, 627 F.2d 996, 1003 (9th Cir. 1980)) (the “doctrine of privity extends
25 the conclusive effect of a judgment to nonparties who are in privity with parties in
26 an earlier action.”); *Shaw v. Hahn*, 56 F.3d 1128, 1131-32 (9th Cir. 1995) (finding
27 privity when the interests of the party in the subsequent action were shared with and
28 adequately represented by the party in the former action).

1 In *In re Schimmels*, the court affirmed the district court's dismissal of the
2 relator proceedings as *res judicata* to the subsequent government action because the
3 qui tam provisions of the False Claims Act created a "sufficiently close"
4 relationship between the United States and the private relators." *Id.* at 882. The
5 court explained: "[A] rule precluding parties from the contestation of matters
6 already fully and fairly litigated 'conserves judicial resources' and 'fosters reliance
7 on judicial action by minimizing the possibility of inconsistent decisions.'" *Id.* at
8 881 (quoting *Montana v. United States*, 440 U.S. 147, 153-54 (1979)). "Federal
9 courts have deemed several relationships 'sufficiently close' to justify a finding of
10 'privity' and, therefore, preclusion under the doctrine of *res judicata*" including "a
11 non-party whose interests were represented adequately by a party in the original
12 suit." *In re Schimmels*, 127 F.3d at 881 (quoting *Southwest Airlines Co. v. Texas*
13 *International Airlines, Inc.*, 546 F.2d 84, 95 (5th Cir. 1977)).

14 In *In re Schimmels*, the court explained that there were five factors to
15 consider, none conclusive alone, in assessing whether privity is appropriate:

16 [(1)] participation by the precluded party in the prior
17 proceeding through intervention, combined discovery,
18 *amicus* submissions, presence of counsel at hearings,
19 testifying as a witness, advising previous parties; [(2)] the
20 extent of congruence between the legal interests and
21 positions of the party to the earlier suit and those of the
22 precluded party; [(3)] the quality of representation of the
23 precluded party's interests; [(4)] the burdens relitigation
24 poses on the judicial system; and [(5)] the cost and
25 harassment that relitigation poses to the parties.

26 *Id.*, at 885 (quoting *Southwest Airlines*, 546 F.2d at 101).

27 These factors clearly warrant a finding of privity here. The *Dotster* litigation
28 was a well-publicized case where all pleadings were posted on ICANN's website,

1 and else where, and the issues were enthusiastically discussed within the Internet
2 community. The registrars that challenged ICANN's agreement to WLS in *Dotster*
3 had identical interests to those of Plaintiffs here. At the time of the *Dotster*
4 litigation they, too, offered their own wait listing service, an activity which they
5 asserted would be made unprofitable by the introduction of WLS. They made the
6 same argument as Plaintiffs make here: ICANN did not follow the procedures and
7 other requirements under the RAA. The *Dotster* plaintiffs were vigorously
8 represented by a competent team of attorneys. And, regarding factors (4) and (5),
9 permitting serial relitigation of these issues, potentially by each of hundreds of
10 ICANN-accredited registrars, would impose severe and inappropriate burdens to
11 the court system and to ICANN. These considerations mandate a conclusion of
12 privity between the *Dotster* plaintiffs and the Plaintiffs here.

13 In *Miller Brewing Co. v. Jos. Schlitz Brewing Co.*, 605 F.2d 990 (7th Cir.
14 1979), the court had previously reversed a preliminary injunction order against
15 infringement of a Miller Brewing Company's trademark and held that the ruling
16 should have preclusive effect in another trademark action by Miller to enforce the
17 same trademark against a different defendant. Despite the fact that the defendant in
18 the second action was not a party to the first, the court found that this “will not
19 preclude giving collateral estoppel effect to a determination necessarily made in
20 that case, if Miller had a full and fair opportunity to litigate on the issue
21 determined.” *Id.* at 992. Moreover, the court explained that final judgment, for
22 purposes of issue preclusion, “includes any prior adjudication of an issue in another
23 action between the parties that is determined to be sufficiently firm to be accorded
24 conclusive effect.” *Id.* at 996 (quoting *Restatement (Second) of Judgments*
25 *Section 41*).⁷ See *Lummas Co. v. Commonwealth Oil Ref. Co.*, 297 F2d 80, 89 (2d
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27 ⁷ There is a question whether state law elements of res judicata or collateral
28 estoppel apply where jurisdiction in the first case was based on diversity. See
Semtek Int'l, 531 U.S. at 507-08. However, even if this Court decides that state law

1 *Cir. 1961), cert denied, 368 U.S. 986 (1962) (“Finality’ in the context here relevant*
2 *may mean little more than that the litigation of a particular issue has reached such*
3 *a stage that a court sees no really good reason for permitting it to be litigated*
4 *again.”).*

5 The issue presented by Plaintiffs – whether ICANN breached the RAA by
6 not following the consensus procedures or fulfilling the obligations of section 2 laid
7 out in the RAA – was actually litigated in *Dotster*, there was a full and fair
8 opportunity to do so, Judge Walter has already ruled on the precise contract issues
9 resulting in a dismissal with prejudice, and the plaintiffs in the two actions are in
10 privity. For these reasons, Plaintiffs' twelfth claim for breach of contract should be
11 dismissed with prejudice.

12 The related doctrine of res judicata (or claim preclusion) also is applicable.
13 “Res judicata is applicable whenever there is (1) an identity of claims, (2) a final
14 judgment on the merits, and (3) privity between parties.” *Tahoe-Sierra Pres.*
15 *Council, Inc. v. Tahoe Regional Planning Agency*, 322 F.3d 1064, 1077 (9th Cir.
16 2003) (quoting *Stratosphere Litig. LLC v. Grand Casinos, Inc.*, 298 F.3d 1137,
17 1143 n.3 (9th Cir. 2002) (applying *res judicata* because “[I]itigation involving the
18 same material set of facts is now on its fifth journey through the federal court
19 system”) *Id.* at 1074.

20 The first element, an identity of claims, is established when there are “two
21 suits arising from ‘the same transactional nucleus of facts.’” *Tahoe-Sierra Pres.*
22 *Council*, 322 F.3d at 1077 (quoting *Stratosphere Litig.*, 298 F.3d at 1143). As
23 already explained, plaintiffs in both suits are ICANN-accredited registrars that
24 claim that ICANN breached the RAA by not following the procedures referenced in
25 the RAA. As to the second element, a voluntary dismissal with prejudice operates

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(continued...)

27 applies, the elements in California are almost identical to the federal law elements.
28 *See Brinton v. Bankers Pension Services, Inc.*, 76 Cal. App. 4th 550, 556 (1999).

1 as an adjudication on the merits and is entitled to *res judicata* effect as a final
2 judgment. *Semtek International*, 531 U.S. at 505. In remanding the case to
3 determine whether *res judicata* would bar the claims of the plaintiffs who brought
4 their first action in California and their second in the district court of Maryland, the
5 Supreme Court explained that dismissal with prejudice constitutes an adjudication
6 on the merits. (*Id.* at 505 (quoting 9 *Wright & Miller*, § 2373, at 396, n.4 (“ ‘[W]ith
7 prejudice’ is an acceptable form of shorthand for ‘an adjudication upon the merits’
8 “); *see also* *Goddard v. Security Title Ins. & Guarantee Co.*, 14 Cal. 2d 47, 54
9 (1939) (stating that a dismissal “with prejudice” evinces “[t]he intention of the
10 court to make [the dismissal] on the merits”); *United States v. Banco*
11 *Internacional/Bital S.A.*, 110 F. Supp. 2d 1272, 1279 (C.D. Cal. 2000) (after the
12 parties stipulated to dismissal of the Civil Forfeiture action with prejudice, this
13 Court subsequently ordered the action dismissed with prejudice); *McMahon* 2003
14 U.S. Dist LEXIS 22178, *10.

15 As to the third element, privity exists between Plaintiffs here and the *Dotster*
16 plaintiffs for the same reasons discussed above in connection with collateral
17 estoppel.

18 As described above, the twelfth claim for relief should be dismissed because
19 the provisions of the RAA upon which Plaintiffs rely do not apply to ICANN's
20 acceptance of the WLS trial. In *Dotster*, Judge Walters decided *precisely* these
21 issues contrary to the positions of Plaintiffs here, and that case was promptly
22 dismissed on the merits by stipulation of plaintiffs there. The twelfth claim for
23 relief should be dismissed from this lawsuit.⁸

24 ⁸ ICANN notes that the twelfth claim for relief is not within the Court's core
25 subject-matter jurisdiction over this lawsuit. In their complaint (FAC ¶ 3.1),
26 Plaintiffs invoke this Court's general jurisdiction over federal questions (28 U.S.C.
27 section 1331) and its jurisdiction under statutes governing claims arising under
28 federal antitrust and related statutes (28 U.S.C. section 1337 and 15 U.S.C. sections
26, 57b). The state-law issues presented by Plaintiff's twelfth claim (whether
ICANN followed the procedures and other requirements of the RAA in accepting
WLS and forwarding it to the Department of Commerce for approval) are
significantly different than, and separable from, the federal issues raised by their
ninth claim (whether the other defendants' offering of WLS violates the Sherman

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CONCLUSION

Each of Plaintiffs' claims for relief against ICANN – the first, fifth, seventh, and twelfth claims – are deficient as a matter of law. The deficiencies cannot be cured by amendment. Therefore, ICANN urges the Court to dismiss these claims for relief with prejudice.

Dated: May 28, 2004

JONES DAY

By: 
Jeffrey A. LeVee

Attorneys for Defendant INTERNET CORPORATION FOR ASSIGNED NAMES AND NUMBERS

(continued...)

Antitrust Act) and the issues presented by Plaintiffs' other claims (whether the offering of WLS will be an unlawful lottery, will involve false advertising, intentionally interferes with prospective economic advantage, etc.). There is a substantial issue as to whether the twelfth claim and the other claims “derive from a common nucleus of operative fact” and, thus, whether the twelfth claim is within this Court's supplemental jurisdiction under 28 U.S.C. section 1367. *See generally Mendoza v. Zirkle Fruit Co.*, 301 F.3d 1163, 1174 (9th Cir. 2002). Even if it is, in view of the extensive additional evidence and analysis required by the twelfth claim – which Judge Walter already has assessed – the Court may wish to exercise its discretion under 28 U.S.C. section 1367(c) to decline supplemental jurisdiction.

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PROOF OF SERVICE BY OVERNIGHT DELIVERY

I am a citizen of the United States and employed in Los Angeles County, California. I am over the age of eighteen years and not a party to the within-entitled action. My business address is 555 West Fifth Street, Suite 4600, Los Angeles, California 90013-1025. On May 28, 2004, I deposited with Federal Express, a true and correct copy of the within documents:

DEFENDANT ICANN'S MOTION TO DISMISS CERTAIN CAUSES OF ACTION FOR FAILURE TO STATE A CLAIM UNDER FRCP 12(B)(6);

DEFENDANT ICANN'S REQUEST FOR JUDICIAL NOTICE IN SUPPORT OF ITS MOTION TO DISMISS CERTAIN CAUSES OF ACTION FOR FAILURE TO STATE A CLAIM UNDER FRCP 12(B)(6);

[PROPOSED] ORDER GRANTING DEFENDANT ICANN'S MOTION TO DISMISS CERTAIN CAUSES OF ACTION FOR FAILURE TO STATE A CLAIM UNDER FRCP 12(B)(6); AND

[PROPOSED] ORDER GRANTING DEFENDANT ICANN'S REQUEST FOR JUDICIAL NOTICE

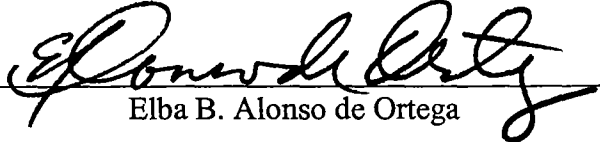
in a sealed envelope, addressed as follows:

SEE ATTACHED SERVICE LIST

Following ordinary business practices, the envelope was sealed and placed for collection by Federal Express on this date, and would, in the ordinary course of business, be retrieved by Federal Express for overnight delivery on this date.

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

Executed on May 28, 2004, at Los Angeles, California.


Elba B. Alonso de Ortega

SERVICE LIST
REGISTERSITE.COM v. ICANN

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1 **PROOF OF SERVICE BY MAIL**

2 I am a citizen of the United States and employed in Los Angeles County, California. I am
3 over the age of eighteen years and not a party to the within-entitled action. My business address
4 is 555 West Fifth Street, Suite 4600, Los Angeles, California 90013-1025. I am readily familiar
5 with this firm's practice for collection and processing of correspondence for mailing with the
6 United States Postal Service. On June 1, 2004, I placed with this firm at the above address for
7 deposit with the United States Postal Service a true and correct copy of the within document(s):

8 **NOTICE OF ERRATA TO DEFENDANT INTERNET
9 CORPORATION FOR ASSIGNED NAMES AND NUMBERS'
10 MOTION TO DISMISS CERTAIN CAUSES OF ACTION
11 FOR FAILURE TO STATE A CLAIM UNDER FRCP RULE
12 12(B)(6)**

13 in a sealed envelope, postage fully paid, addressed as follows:

14 Derek A. Newman, Esq.
15 NEWMAN & NEWMAN,
16 Attorneys at Law
17 505 Fifth Avenue, South, Suite
18 610
19 Seattle, WA 98104

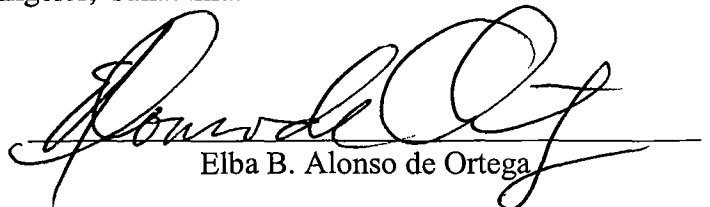
Laurence Hutt, Esq.
ARNOLD & PORTER
777 S. Figueroa, 44th Fl.,
Los Angeles, CA 90017

20 Frederick F. Mumm, Esq.
21 DAVIS WRIGHT
22 TREMAINE LLP
23 865 S. Figueroa Street, Suite
24 2400
25 Los Angeles, CA 900017

26 Following ordinary business practices, the envelope was sealed and placed for collection
27 and mailing on this date, and would, in the ordinary course of business, be deposited with the
28 United States Postal Service on this date.

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

Executed on June 1, 2004, at Los Angeles, California.

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27 Elba B. Alonso de Ortega
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