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8 **UNITED STATES DISTRICT COURT**  
9 **FOR THE CENTRAL DISTRICT OF CALIFORNIA**

10  
11 REGISTERSITE.COM, an Assumed  
Name of ABR PRODUCTS INC., a  
12 New York Corporation, *et al.*,

13 Plaintiffs,

14 v.

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

17 Defendants.  
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Case No. CV 04-1368 ABC (CWx)

Hon. Audrey B. Collins

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

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

**TABLE OF CONTENTS**

1

2

3 **I. INTRODUCTION** ..... 1

4 **II. FACTS** ..... 2

5     A. Alleged Facts Relevant to Defendants’ Motion ..... 2

6     B. Factual Inaccuracies Alleged in Defendants’ Motion ..... 4

7 **III. ARGUMENT** ..... 5

8     A. Plaintiffs Have Standing under Article III ..... 7

9     B. Plaintiffs Allege Facts Sufficient to State Seven UCL Claims ..... 9

10         1. Plaintiffs State a Claim for Violation of B&P 17200  
11             predicated on Illegal Lottery ..... 10

12             a. There Are Multiple Participants in the WLS Lottery .. 11

13             b. The WLS Lottery Relies on Chance from the  
14                 Perspective of the Consumer ..... 12

15         2. Plaintiffs State a Claim for Violation of B&P 17200  
16             Predicated on the Consumers Legal Remedies Act ..... 14

17             a. Plaintiffs Need Not Be Consumers but Are ..... 14

18             b. Plaintiffs Suffered Damages and Alleged  
19                 Accordingly ..... 14

20             c. Plaintiffs Allege a Representation by Verisign ..... 15

21             d. Defendants’ Representations Are Deceptive ..... 16

22         3. Plaintiffs State a Claim for Deception re Likelihood of  
23             Success ..... 17

24         4. Plaintiffs State a Claim for Deception re Expiration Dates ... 19

25         5. Plaintiffs State a UCL Claim Based on Defendants’  
26             Marketing of WLS as “Protection” ..... 19

27         6. Plaintiffs State a UCL Claim Based on Defendants’ Sales  
28             of Property They Do Not Own ..... 20

29         7. Plaintiffs State a UCL Claim Based on FTC Act  
30             Violations ..... 21

31             a. Plaintiffs May Allege the FTC Act as a Predicate to  
32                 a UCL Claim ..... 21

33             b. Plaintiffs Properly Alleged an FTC Act Violation .... 22

34     C. Plaintiffs State a Claim for Tying ..... 23

35         1. Plaintiffs Have Standing to Allege the Tying Claim ..... 23

36         2. Plaintiffs Properly Allege the Elements of a Tying Claim .... 23

37     D. Plaintiffs State a Claim for Tortious Interference ..... 24

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
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18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

E. Plaintiffs Are Entitled to Declaratory Relief on the Eleventh  
Claim ..... 25

**IV. CONCLUSION ..... 26**

**TABLE OF AUTHORITIES**

**SUPREME COURT CASES**

Babbitt v. United Farm Workers Nat'l Union,  
442 U.S. 289 (1979) ..... 9

Bennett v. Spear,  
520 U.S. 154 (1997) ..... 7

Conley v. Gibson,  
355 U.S. 41 (1957) ..... 5, 6

Gladstone, Realtors v. Village of Bellwood,  
441 U.S. 91 (1979) ..... 8

L.A. v. Lyons,  
461 U.S. 95 (1983) ..... 7

Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit,  
507 U.S. 163 (1993) ..... 6

Lujan v. Defenders of Wildlife,  
504 U.S. 555 (1992) ..... 7

Moore v. N.Y. Cotton Exch.,  
270 U.S. 593 (1926) ..... 21

Northern Pacific Railway Co. v. United States,  
356 U.S. 1 (1958) ..... 23

Public Clearing House v. Coyne,  
194 U.S. 497 (1904) ..... 13

Swierkiewicz v. Sorema N.A.,  
534 U.S. 506 (2002) ..... 6

Warth v. Seldin,  
422 U.S. 490 (1975) ..... 8

Wyoming v. Oklahoma,  
502 U.S. 437 (1992) ..... 7

Zenith Radio Corp. v. Hazeltine Research, Inc.,  
395 U.S. 100 (1969) ..... 23

///  
///  
///  
///

1 **NINTH CIRCUIT CASES**

2 Balistreri v. Pacifica Police Dep't,  
3 901 F.2d 696 (9th Cir. 1988) ..... 6  
4 Branch v. Tunnell,  
5 14 F.3d 449 (9th Cir. 1994) ..... 6  
6 Branch v. Tunnell,  
7 14 F.3d 449 (9th Cir. 1994) ..... 6  
8 Cahill v. Liberty Mut. Ins. Co.,  
9 80 F.3d 336 (9th Cir. 1996) ..... 6  
10 Carlson v. Coca-Cola Co.,  
11 483 F. 2d 279 (9<sup>th</sup> Cir. 1973) ..... 21  
12 Churchill County v. Babbitt,  
13 150 F.3d 1072 (9<sup>th</sup> Cir. 1998) ..... 7  
14 Freeman v. Time, Inc.,  
15 68 F.3d 285 (9th Cir. 1995) ..... 14  
16 Haddock v. Bd. of Dental Exam'rs,  
17 777 F.2d 462 (9th Cir. 1985) ..... 5  
18 Hall v. Norton,  
19 266 F.3d 969 (9th Cir. 2001) ..... 7  
20 Kremen v. Network Solutions, Inc.,  
21 337 F.3d 1024 (9th Cir. 2003) ..... 20  
22 Lee v. Am. Nat'l Ins. Co.,  
23 260 F.3d 997 (9th Cir., 2001) ..... 9  
24 Mier v. Owens,  
25 57 F.3d 747 (9th Cir. 1995) ..... 6  
26 Moore v. City of Costa Mesa,  
27 886 F.2d 260 (9th Cir. 1989) ..... 5

28 **CENTRAL DISTRICT OF CALIFORNIA CASES**

29 Braco v. MCI Worldcom Communs., Inc.,  
30 138 F. Supp. 2d 1260 (C.D. Cal 2001) ..... 6  
31 Dotster, Inc. v. Internet Corp.,  
32 296 F. Supp. 2d 1159 (C.D. Cal. 2003) ..... 25  
33 Summit Tech, Inc. v. High-line Med. Instruments Co.,  
34 933 F. Supp 918 (C.D. Cal. 1996) ..... 21

1	Vongrave v. Sprint PCS, 2004 U.S. Dist. LEXIS 5438 (C.D. Cal 2004) .....	7
2		
3	<b>CALIFORNIA STATE CASES</b>	
4	Bank of the West v. Superior Court, 2 Cal. 4th 1254 (1992) .....	10, 14
5		
6	Barquis v. Merchants Collection Assn., 7 Cal. 3d 94 (1972) .....	9
7	California Gasoline Retailers v. Regal Petroleum Corporation, 50 Cal.2d 844 (1950) .....	10
8		
9	Cel-Tech Communications, Inc. v. Los Angeles Cellular Telephone Co., 20 Cal. 4th 163 (1999) .....	10
10	Chern v. Bank of America, 15 Cal. 3d 866 (1976) .....	14
11		
12	Committee on Children's Television, Inc. v. General Foods Corp., 35 Cal. 3d 197 (1983) .....	10, 21
13	Diodes, Inc. v. Franzen, 260 Cal. App. 2d 244 (Ct. App., 1968) .....	24
14		
15	Kasky v. Nike, Inc., 27 Cal. 4th 939 (2002) .....	10
16	People v. Dollar Rent-A-Car Systems, Inc., 211 Cal. App. 3d 119 (1989) .....	18, 22
17		
18	People v. Hecht, 119 Cal. App. Supp. 778 (1931) .....	12, 13
19	People v. Toomey, 157 Cal. App. 3d 1 (1984) .....	15, 16
20		
21	Podolsky v. First Healthcare Corp., 50 Cal. App. 4th 632 (1996) .....	18, 20, 22
22	Saunders v. Superior Court, 27 Cal. App. 4th 832 (1994) .....	21
23		
24	Smiley v. Internet Corporation for Assigned Names and Numbers et al., Los Angeles Superior Court Case No. BC 254659 (2001) .....	8
25	Stop Youth Addiction, Inc. v. Lucky Stores, Inc., 17 Cal. 4th 553 (1998) .....	10
26		
27	Western Telcon, Inc. v. California State Lottery, 13 Cal.4th 475 (1996) .....	10, 11
28	Westside Center Associates v. Safeway Stores 23, Inc.,	

1	42 Cal. App. 4th 507 (1996) .....	24
2	Williams Constr. Co. v. Standard-Pacific Corp.,	
3	254 Cal. App. 2d 442 (1967) .....	19
4	<b>OTHER FEDERAL CASES</b>	
5	Holloway v. Bristol-Myers Corp.,	
6	485 F. 2d 986 (D.C. Cir. 1973) .....	21
7	Wolf v. F.T.C.,	
8	135 F.2d 564 (7th Cir. 1943) .....	13
9	<b>STATUTES AND RULES</b>	
10	15 U.S.C. § 26 .....	23
11	15 U.S.C. §§ 41, <i>et seq.</i> .....	21
12	21 U.S.C. § 337 .....	21
13	23 Op.Atty.Gen.Cal. 260 (1900) .....	13
14	71 Op.Atty.Gen.Cal. 139 (1988) .....	11
15	72 Op.Atty.Gen.Cal. 143 (1989) .....	11
16	76 Op.Atty.Gen.Cal. 266 (1993) .....	12
17	CAL. BUS. & Prof. Code §§ 17200, <i>et seq.</i> .....	8-10, 13-16, 21
18	CAL. BUS. & Prof. Code § 17500 .....	15
19	CAL. CIV. CODE § 1605 .....	19
20	CAL. CIV. CODE § 1780 .....	14
21	CAL. CIV. CODE §§ 1750, <i>et seq.</i> .....	14, 15
22	CAL. GOV. CODE §§ 8880, <i>et seq.</i> .....	10, 11
23	CAL. PENAL CODE § 319, <i>et seq.</i> .....	10, 13
24	FED. R. CIV. P. 8(a) .....	6
25	FED. R. CIV. P. 12(b)(6) .....	5, 6, 18
26		
27		
28		

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## I. INTRODUCTION

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

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

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

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

## 4 II. FACTS

### 5 A. ALLEGED FACTS RELEVANT TO DEFENDANTS' MOTION

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

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

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

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

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

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

14 (FAC ¶ 4.53.)

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

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

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22  
23 <sup>1</sup>Taking Defendants’ argument that consumers providing consideration (*i.e.*, entering into binding  
24 agreements) for the WLS does not constitute launch of the WLS to its logical conclusion would require that  
25 Defendants provide value before the WLS can be challenged. Under this theory, Defendants could  
26 maintain that the WLS is not ripe for judicial review until and unless a domain name is transferred to a  
27 consumer pursuant to the WLS. The problem with this argument, of course, is that Plaintiffs allege most  
28 consumers are unlikely to ever obtain domain name registrations as a result of the WLS. Accordingly,  
Defendants could avoid judicial review of the WLS service by never conferring value to consumers.  
Rather, Defendants could continue to require binding contracts of consumers, without ever providing  
anything of value to them. Under Defendants’ theory, any consumer scam could avoid scrutiny by never  
offering any value to the consumers.

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

10 **B. . . FACTUAL INACCURACIES ALLEGED IN DEFENDANTS’ MOTION**

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

22 Defendants misrepresent that “Plaintiffs have failed to allege, and cannot  
23 allege, that WLS involves the necessary element of chance.” (Motion at 8:13-  
24 8:14.) In truth, Plaintiffs allege that “Defendants’ WLS distribution of domain  
25 names is by chance.” (FAC ¶ 5.11.)

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

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

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

11 Defendants misstate that "[f]or domain names with a WLS subscription, upon  
12 cancellation of the domain name registration and deletion of the domain name, the  
13 recently deleted domain name would automatically be registered through the  
14 registrar that sold the WLS subscription...". (Motion at 4:26-5:1.) In support of this  
15 allegation, Defendants cite paragraph FAC ¶ 4.48. (Motion at 5:1.) In truth, FAC  
16 ¶ 4.48 alleges the opposite: that Verisign will *not* delete domain names with a WLS  
17 subscription. (FAC ¶ 4.48.) That allegation is fundamental to Plaintiffs'  
18 Declaratory Relief and Breach of Contract claims (against Verisign and ICANN,  
19 respectively).

### 20 III. ARGUMENT

21 A court may not dismiss a complaint for failure to state a claim "unless it  
22 appears beyond doubt that the plaintiff can prove no set of facts in support of his  
23 claim which would entitle him to relief." Conley v. Gibson, 355 U.S. 41, 45-46  
24 (1957); *see also* Moore v. City of Costa Mesa, 886 F.2d 260, 262 (9th Cir. 1989);  
25 Haddock v. Bd. of Dental Exam'rs, 777 F.2d 462, 464 (9th Cir. 1985) (court should  
26 not dismiss a complaint if it states a claim under any legal theory, even if plaintiff  
27 erroneously relies on a different theory). Dismissal is proper under FED. R. CIV. P.  
28 12(b)(6) only where there is either a "lack of a cognizable legal theory" or "the