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10 **UNITED STATES DISTRICT COURT**
11 **FOR THE CENTRAL DISTRICT OF CALIFORNIA**

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

15 Plaintiffs,

16 v.

17 INTERNET CORPORATION FOR
18 ASSIGNED NAMES AND
19 NUMBERS, a California corporation,
20 *et al.*,

21 Defendants.

Case No. CV 04-1368 ABC (CWx)

Hon. Audrey B. Collins

**PLAINTIFFS' OPPOSITION TO
MOTION BY DEFENDANT
INTERNET CORPORATION FOR
ASSIGNED NAMES AND
NUMBERS TO DISMISS
CERTAIN CAUSES OF ACTION
FOR FAILURE TO STATE A
CLAIM UNDER FRCP 12(B)(6)**

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

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1 Plaintiffs respectfully submit this joint opposition to defendant Internet
2 Corporation for Assigned Names and Numbers' Motion to Dismiss Certain Causes
3 of Action for Failure to State a Claim under FRCP 12(b)(6) (the "Motion").

4 I. INTRODUCTION

5 Defendant Internet Corporation for Assigned Names and Numbers
6 ("ICANN") seeks to prevent any inquiry into the legitimacy of Verisign's so-called
7 Wait Listing Service ("WLS") by asking this Court to dismiss Plaintiffs' claims at
8 the pleading stage, before Plaintiffs have an opportunity to conduct discovery. The
9 Court should deny ICANN's request.

10 ICANN bases its Motion on two inconsistent and contradictory theories:
11 first, that Plaintiffs' interests are *not identical* to those of other registrars (or to those
12 of the general public) and Plaintiffs are therefore not competent to bring a
13 representative action under the Unfair Competition Law (BUS. & PROF.
14 CODE §§ 17200 *et seq.*) (the "UCL"); and second, that Plaintiffs' interests *are*
15 *identical* to those of other registrars, and Plaintiffs should therefore be precluded
16 from litigating issues raised by those registrars in Dotster, Inc. v. ICANN, Case No.
17 CV 03-5045 (C.D. Cal. Dec. 5, 2003) ("Dotster"). Both theories are based on
18 strained interpretations of case law, selective presentation of the facts, and
19 references to purported "facts" not referenced in the pleadings or in any documents
20 subject to judicial notice. Neither ultimately provides any basis for dismissal of
21 Plaintiffs' claims at this early stage of the litigation. Accordingly, ICANN's Motion
22 should be denied.

23 ICANN also argues that i) the WLS is not a lottery because it does not
24 distribute property, and ii) the rights distributed via the WLS are not distributed by
25 chance. These arguments also fail. Ninth Circuit law is clear that domain names
26 **are** property, and California law is clear that whether property is distributed by
27 chance is determined from the perspective of the "ticket holder", rather than the
28 initial property holder, as ICANN argues. When considered from that perspective,

1 the WLS distributes domain names by chance, and is therefore an illegal lottery.

2 An examination of the First Amended Complaint (“FAC”) demonstrates that
3 Plaintiffs’ claims against ICANN are well pleaded, and ICANN cannot meet its
4 burden of proving that it is “beyond doubt” that “no set of facts” would entitle
5 Plaintiffs to relief. Accordingly, ICANN’s Motion must be denied.

6 7 II. FACTS

8 Plaintiffs are domain name registrars, each of whom offers a service to assist
9 consumers in registering expired domain names. (FAC ¶ 1.4.) Defendant Verisign,
10 Inc. (“Verisign”) controls the authoritative database of domain name registrations in
11 <.com> and <.net>. (FAC ¶ 4.9.) Each plaintiff is empowered to act as a registrar,
12 and Verisign is empowered to act as a registry, by virtue of an agreement with
13 Defendant ICANN, which manages the Domain Name System on behalf of the
14 public. (FAC ¶¶ 2.15, 4.19, 4.44.)

15 Defendant Verisign operates the so-called “Wait Listing Service” (“WLS”) at
16 the heart of this litigation. (FAC ¶ 4.65.) Defendants have already launched the
17 WLS. (FAC ¶¶ 1.1, 4.68.) The WLS “purports to give consumers, for an annual
18 fee, the right to be ‘first in line’ on the ‘waiting list’ for currently-registered <.com>
19 and <.net> domain names.” (FAC ¶ 1.1.) Verisign is able to offer the WLS to
20 consumers only because ICANN granted Verisign the authority to do so. (FAC ¶
21 4.45.) WLS consumers will receive no benefit from purchasing a WLS
22 “subscription” *unless and until* the current domain name owner abandons it, which
23 is unlikely. (FAC ¶ 1.1.)

24 By offering WLS subscription pre-orders, Defendants are now selling
25 contingent future interests in property that Defendants do not own and do not
26 currently have the right to sell. (FAC ¶ 1.5.) Verisign has no authority to refuse to
27 delete any expired domain name from the registry. (FAC ¶¶ 11.6, 11.7, 11.9.)

28 ICANN lacks the authority to approve Verisign’s attempt to leverage its de facto

1 control over domain names into de jure rights. (FAC ¶ 11.10.)

2 Additionally, because the decision of the current domain name owner to
3 abandon its property is beyond Defendants' control, the WLS is an illegal lottery.
4 (FAC ¶ 1.1.) Specifically, Defendants require consideration (*i.e.* payment of
5 money), for the chance (*i.e.*, whether the current domain name owner abandons its
6 property) to win the valuable domain name prize (currently owned by a party
7 unrelated to Defendants). (FAC ¶¶ 5.11-5.13.) ICANN and the other defendants
8 have aided or assisted in setting up, managing, or drawing the lottery in the WLS
9 lottery enterprise, in violation of California Penal Code § 322. (FAC ¶ 5.19.)

10 Consumers who sign up for Defendants' WLS have no idea they are unlikely
11 to ever win the domain names they hope to register through the WLS.

12 (FAC ¶ 8.13.) Rather, consumers are more likely to pay Defendants money for
13 several years for the WLS, but never receive anything in return for those payments.
14 (FAC ¶¶ 8.11-8.14.) Consumers will fall for this scheme because Defendants do not
15 disclose the likelihood of "winning" (*i.e.*, of obtaining the desired domain name).
16 (FAC ¶¶ 1.2, 8.6.) Defendants likewise do not disclose that domain names
17 registration terms are for up to 100 years, and therefore most domain names will not
18 be available through the WLS for several years and potentially not even for a
19 century. (FAC ¶¶ 4.25, 9.25.) ICANN approved the WLS for a one year trial
20 without requiring Verisign to disclose that consumers may not have the opportunity
21 to renew their WLS subscriptions after the one-year trial period. (FAC ¶ 9.6.)

22 Each Plaintiff executed an agreement with ICANN, called the Registrar
23 Accreditation Agreement (the "RAA"). (FAC ¶ 2.15.) Section 2.3 of the RAA
24 requires ICANN to act in a manner that does not "unreasonably restrain
25 competition" or "apply standards, policies, procedures or practices arbitrarily,
26 unjustifiably, or inequitably". (FAC ¶ 16.6.) Unless the WLS is enjoined, however,
27 the WLS will affect the right of Plaintiffs and other registrars to delete domain
28 names, by eliminating that right altogether as to domain names on which WLS

1 subscriptions have been placed. (FAC ¶ 16.7.) Moreover, registrars such as
2 Plaintiffs who do not offer the WLS will not be able to determine whether a WLS
3 subscription has been purchased on a particular domain name. (FAC ¶ 16.17.)
4 Nothing in the RAA or any other agreement allows ICANN to make equivalent
5 access to the registry conditional on a registrar's offering additional services that
6 they do not wish to offer, or on bearing the expense associated with offering such
7 services. (FAC ¶ 16.18.)

8 On April 8, 2004, Plaintiffs filed the FAC in this action, alleging that the
9 creation of the WLS violated the RAA, as well as the California Unfair Competition
10 Law (Bus. & Prof. Code § 17200 *et seq.*) (the "UCL"). Plaintiffs filed the FAC on
11 behalf of themselves and the general public (*see, e.g.*, FAC ¶¶ 4.51 - 4.58).
12 Plaintiffs offer services that compete with the WLS (FAC ¶ 1.4) and, as owners of
13 domain names, are potential consumers of WLS services (FAC ¶ 2.15).

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

20 III. ARGUMENT

21 A complaint should be dismissed on a 12(b)(6) motion *only* if it appears
22 "beyond doubt" that the plaintiffs can "prove no set of facts in support of their claim
23 which would entitle them to relief". Emrich v. Touche Ross & Company, 846 F.2d
24 1190, 1198 (9th Cir. 1988), citing Conley v. Gibson, 355 U.S. 41, 45-46, (1957)
25 (emphasis added). "In reviewing the sufficiency of the complaint, 'the issue is not
26 whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer
27 evidence to support the claims.'" Id., citing Scheuer v. Rhodes, 416 U.S. 232, 236
28 (1974). It is "axiomatic that [t]he motion . . . is viewed with disfavor and is rarely

1 granted.” McDougal v. County of Imperial, 942 F.2d 668, 676 n.7 (9th Cir. 1991). A
2 claim advancing multiple theories of recovery is sufficient if it shows the plaintiff
3 would be “entitled to any relief which
4 the court can grant.” See Air Line Pilots Ass’n, Int’l v. Transam. Airlines, Inc., 817
5 F.2d 510, 516 (9th Cir. 1987).

6 **A. PLAINTIFFS’ CLAIMS UNDER CALIFORNIA’S UNFAIR COMPETITION LAW**
7 **ARE LEGALLY SUFFICIENT.**

8 **1. Plaintiffs Do Not Seek Restitution or Disgorgement, and Are**
9 **Not Required to Establish that They Are “Competent” to**
10 **Bring a Claim Under the UCL.**

11 California's UCL defines "unfair competition" to mean and include "any
12 unlawful, unfair or fraudulent business act or practice and unfair, deceptive, untrue
13 or misleading advertising and any act prohibited by [the false advertising law (BUS.
14 & PROF. CODE § 17500 et seq.)." BUS. & PROF. CODE § 17200. The UCL's
15 purpose is to protect both consumers and competitors by promoting fair competition
16 in commercial markets for goods and services. Barquis v. Merchants Collection
17 Assn., 7 Cal. 3d 94, 110 (1972). By defining unfair competition to include any
18 "*unlawful . . . business act or practice*", the UCL permits violations of other laws to
19 be treated as unfair competition that is independently actionable. Id., citing
20 Cel-Tech Communications, Inc. v. Los Angeles Cellular Telephone Co., 20 Cal. 4th
21 163, 180 (1999). By defining unfair competition to include also any "*unfair or*
22 *fraudulent business act or practice*", the UCL sweeps within its scope acts and
23 practices not specifically proscribed by any other law. Cel-Tech Communications,
24 Inc., *supra*, at p. 180. A private plaintiff may bring a UCL action even when "the
25 conduct alleged to constitute unfair competition violates a statute for the direct
26 enforcement of which there is no private right of action." Stop Youth Addiction,
27 Inc. v. Lucky Stores, Inc., 17 Cal. 4th 553, 565 (1998).

28 CAL. BUS. & PROF. CODE § 17204 permits plaintiffs to bring actions under the
unfair competition statute as representatives of the general public. CAL. BUS. &

1 PROF. CODE § 17204 ("any person acting for the interests of itself, its members, or
2 the general public" may seek relief under the statute). To bring a representative
3 action on behalf of the general public, a plaintiff must be "competent," that is, he
4 must seek to vindicate the rights of the general public (as opposed to the rights of
5 sophisticated corporations, for example). Rosenbluth Int'l v. Superior Court, 101
6 Cal. App. 4th 1073, 1075 (2002).

7 ICANN asserts that Plaintiffs are not competent to bring representative UCL
8 claims on behalf of the public because "[w]hile claiming to bring the action on
9 behalf of 'consumers', Plaintiffs are simply attempting to protect their own business
10 interests, which are opposed to the interests of consumers ." (Motion at 8:15-17)¹,
11 and because "the 'alleged victims' are the various other registrars accredited by
12 ICANN . . .". (Motion at 8:26-2.)

13 ICANN's argument suffers from another fatal flaw: only "[s]uits brought by
14 private individuals *who seek disgorgement and/or restitution on behalf of persons*
15 *other than or in addition to themselves*, and that are not certified as class actions,
16 are denominated 'representative actions'" wherein a plaintiff must demonstrate
17 competence. Marshall v. Std. Ins. Co., 214 F. Supp. 2d 1062, 1067 (C.D. Cal.,
18 2000) (emphasis added). Here, however, Plaintiffs' UCL claims seek only
19 injunctive relief, and not restitution. Accordingly, this is not a "representative
20 action" and Plaintiffs need not satisfy the competency requirement. Id.; *see also*
21 Wilner v. Sunset Life Ins. Co., 78 Cal. App. 4th 952, 969 (2000) (plaintiff could
22 pursue a representative action to the extent she sought forward-looking injunctive
23 relief applicable to the general public, because such relief does not present the due
24 process risks inherent in a broad restitution claim); ABC International Traders, Inc.
25 v. Matsushita Electric Corp. of America, 14 Cal. 4th 1247, 1268, n. 11 (1997)

26
27 ¹ As stated in Plaintiffs' Motion to Strike filed concurrently herewith, this and other unsupported
28 statements in ICANN's Motion should be stricken.