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7 VERISIGN, INC. and
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9 UNITED STATES DISTRICT COURT
10 CENTRAL DISTRICT OF CALIFORNIA

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

14 Plaintiffs,

15 v.

16 INTERNET CORPORATION FOR
17 ASSIGNED NAMES AND
NUMBERS, a California corporation;
18 VERISIGN, INC., a Delaware
Corporation; NETWORK
19 SOLUTIONS, INC., a Delaware
Corporation; ENOM, INC., a
Washington Corporation; ENOM
20 FOREIGN HOLDINGS
CORPORATION, a Washington
21 Corporation; and DOES 1-10,
inclusive,

22 Defendants.
23

Case No. CV 04-1368 ABC (CWx)

**REPLY MEMORANDUM OF
DEFENDANTS VERISIGN, INC.
AND NETWORK SOLUTIONS,
INC. IN SUPPORT OF MOTION
TO DISMISS THE FIRST
AMENDED COMPLAINT FOR
FAILURE TO STATE A CLAIM
PURSUANT TO FED. R.
CIV. P. 12(b)(6)**

Date: July 12, 2004
Time: 10:00 a.m.
Courtroom: 680 – Roybal Fed. Bldg.
Hon. Audrey B. Collins

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1 Defendants VERISIGN, INC. (“VeriSign”) and NETWORK SOLUTIONS, INC.
2 (“NSI”) submit this joint Reply Memorandum in support of their Motion To Dismiss all
3 claims asserted against them in the First Amended Complaint filed herein by Plaintiffs
4 (the “Complaint” or “FAC”).

5 **I. INTRODUCTION**

6 In the opposition, Plaintiffs brush aside firmly established rules for evaluating the
7 sufficiency of a pleading under Rule 12(b)(6). They urge the Court to deny the motion
8 by assuming the truth of legal conclusions alleged in the Complaint, even when those
9 conclusions are contradicted by Plaintiffs’ own specific factual allegations. They
10 contend that they need not allege any facts in support of the bare legal elements of their
11 purported claims, and they invite the Court to ignore the unfavorable facts disclosed in
12 their exhibits to the Complaint in favor of their self-serving legal conclusions.

13 Each of these contentions, however, fundamentally misapprehends the nature of
14 Plaintiffs’ pleading burden. “Even under liberal notice pleading, [Plaintiffs] must
15 provide *facts* that ‘outline or adumbrate’ a viable claim for relief, not mere boilerplate
16 sketching out the elements of a cause of action.” *Gen-Probe, Inc. v. Amoco Corp.*, 926
17 F. Supp. 948, 961 (S.D. Cal. 1996) (emphasis added). Plaintiffs’ burden is higher still
18 for their UCL claims, as to which they “must state *with reasonable particularity* the
19 facts supporting the statutory elements of the violation.” *Silicon Knights, Inc. v.*
20 *Crystal Dynamics, Inc.*, 983 F. Supp. 1303, 1316 (N.D. Cal. 1997) (emphasis added);
21 *GlobeSpan, Inc. v. O’Neill*, 151 F. Supp. 2d 1229, 1236 (C.D. Cal. 2001); *Nicolosi*
22 *Distrib. Co. v. Finishmaster, Inc.*, 2000 WL 41222, at *2 (N.D. Cal. Jan. 13, 2000)
23 (UCL claims “must satisfy a heightened pleading standard”). Nor may Plaintiffs avoid
24 their obligation to plead facts by asserting a Sherman Act antitrust claim. *See, e.g.,*
25 *Rutman Wine Co. v. E. & J. Gallo Winery*, 829 F.2d 729, 736 (9th Cir. 1987) (facts, not
26 “bare legal conclusion[s],” are necessary to state a violation of the Sherman Act).

27 Despite these clearly applicable pleading standards, which Plaintiffs do not
28 dispute, Plaintiffs repeatedly respond to VeriSign and NSI’s arguments that they have

1 not alleged essential elements of their claims by relying on the Complaint’s incantation
2 of the bare legal elements of their claims. A prime example is their reliance, in support
3 of their UCL claims for allegedly “fraudulent” business practices, on the conclusory
4 allegation that consumers are “likely to be deceived.” It is black letter law, however,
5 that “conclusory allegations of law and unwarranted inferences are insufficient to defeat
6 a motion to dismiss for failure to state a claim.” *Anderson v. Clow (In re Stac Elecs.*
7 *Sec. Litig.)*, 89 F.3d 1399, 1403 (9th Cir. 1996); *see also Iieto v. Glock, Inc.*, 349 F.3d
8 1191, 1200 (9th Cir. 2003) (court should not “assume the truth of legal conclusions cast
9 in the form of factual allegations”). Moreover, Plaintiffs’ insistence that the Court
10 credit the Complaint’s general legal conclusions in the face of its contrary allegations of
11 fact, and its incorporation of exhibits also containing contrary facts, contravenes the
12 law. *See* 5A Wright & Miller, *Fed. Prac. & Proc.* § 1363 (2d ed. 1990) (“The district
13 court will not accept as true allegations that are contradicted . . . by other allegations or
14 exhibits attached to or incorporated in the pleading.”).

15 Plaintiffs’ mischaracterization of the proper pleading standard does not and
16 cannot obscure their failure to plead facts sufficient to state any claim against VeriSign
17 and NSI. Indeed, Plaintiffs tacitly admit that their Complaint fails to plead sufficient
18 facts by failing to identify any such facts in their opposition. Nor do Plaintiffs dispute,
19 or can they dispute, that their own factual allegations *negate* their legal conclusions of
20 harm and deception, essential to the maintenance of their UCL claims. Plaintiffs
21 effectively concede VeriSign’s and NSI’s positions and that the Complaint must be
22 dismissed by failing to respond to the reasons set forth in the motion as to why their
23 claims fail – sometimes without even acknowledging that a defect in their claims was
24 ever raised. Even where Plaintiffs purport to address substantive issues regarding their
25 claims, they do so by mischaracterizing VeriSign and NSI’s positions, and then
26 proceeding to defeat “straw man” arguments that bear little resemblance to those
27 actually made in the moving papers. No claim is stated against VeriSign or NSI, and
28 the Court should grant the motion and dismiss these Defendants from the action.

1 **II. ARGUMENT**

2 **A. Plaintiffs’ Article III Standing Arguments**
3 **Are Factually And Legally Meritless**

4 In none of their seven claims under the UCL do Plaintiffs allege that they have
5 suffered, or imminently will suffer, a direct injury from the activity that purportedly
6 violates the UCL.¹ Plaintiffs admit they have not done so. In fact, the only injury
7 alleged in these claims is to *consumers*, and not to Plaintiffs at all. For example, in
8 support of their illegal lottery claim, Plaintiffs allege that *WLS subscribers* (“would-be
9 registrants”) are harmed by WLS, which Plaintiffs allege is an illegal lottery. (FAC
10 ¶¶ 5.10, 5.12, 5.13, 5.18.) They have not alleged, nor have they explained, how the
11 purported fact that WLS is a lottery could possibly harm their own businesses. As
12 another example, Plaintiffs have not alleged or explained how the asserted fact that
13 VeriSign and NSI purportedly are offering, via WLS, “contingent future interests in
14 property” they do not own (*i.e.* domain names) (FAC ¶ 11.8) could harm their
15 businesses. A review of the allegations of Plaintiffs’ other UCL claims reveals the
16 identical pattern: Plaintiffs have alleged *no* injury to themselves. Plaintiffs’ sole
17 response – that their businesses will be harmed “unless the WLS is enjoined” (Opp’n at
18 1) – does not appropriately link the specific conduct supporting the UCL claims (*e.g.*,
19 that WLS constitutes a lottery) to any injury to Plaintiffs. In any event, even if
20 Plaintiffs had alleged that the purported injuries to consumers from Defendants’
21 supposed UCL violations caused “ripple effects” that indirectly harmed their
22 businesses, such an allegation of remote, derivative harm would be legally insufficient
23

24 ¹ Plaintiffs strain to convince the Court that WLS has launched. (Opp’n at 1:2-4, 2:6, 3
25 n.1.) Even if the Complaint alleged this fact, rather than the opposite fact (FAC ¶ 4.67
26 (“VeriSign plans to launch the WLS”)), and even if the opposition did not contradict
27 this statement (Opp’n at 9 (Plaintiffs seek to prevent “formal[] launch” of WLS)), the
28 issue is not relevant to any matter properly before the Court on this motion, including
standing. Contrary to Plaintiffs’ characterization of the standing issue (Opp’n at 3 n.1),
the defect in their claims under Article III is not that their alleged injury is merely
“unripe,” but that they have alleged *no* cognizable injury, past, present or future, from
the supposed UCL violations.

1 to confer standing under Article III.² Plaintiffs' hypothesized injuries to their
2 businesses could only occur if: (1) domain name registrants (or "consumers") saw and
3 read VeriSign's and NSI's alleged representations regarding WLS; (2) they were
4 actually deceived by them; (3) they bought WLS subscriptions as a direct result of the
5 alleged "deception"; (4) they used WLS to the exclusion of Plaintiffs' back-order
6 services; and (5) their altered buying decisions caused Plaintiffs to lose customers and
7 profits.

8 Thus, even under Plaintiffs' new theory of injury (Opp'n at 6-9), consumers
9 *alone* suffer direct harm from the supposed UCL violations. Plaintiffs' harm, if any,
10 flows entirely from the harm inflicted on consumers.³ This is a purely derivative and
11 remote injury that cannot confer standing in federal court. *See, e.g., Biggs v. Best, Best*
12 *& Krieger*, 189 F.3d 989, 997-99 (9th Cir. 1999) (husband and daughter lacked
13 standing to maintain their own claims against the defendants because the only harm
14 they suffered was "indirect harm" flowing from their wife and mother's direct injury –

15 ² Plaintiffs contend in the opposition that they allege injury to themselves under their
16 Fourth Claim. (Opp'n at 8 (citing FAC ¶¶ 8.7, 8.12, 8.17).) But their allegations either
17 do not mention any harm to Plaintiffs or merely contain legal conclusions, unsupported
18 by facts, which, as discussed above, are entitled to no weight for purposes of this
19 motion. (FAC ¶¶ 8.7 (no mention of harm to Plaintiffs), 8.12 (legal conclusion: "cause
20 harm to plaintiffs including loss of goodwill"), 8.17 (legal conclusion: "consumers and
21 Plaintiffs have been and will continue to be harmed as a result").)

22 Plaintiffs also cite general allegations, not within their UCL claims, that do not appear
23 to have any connection with these claims. (Opp'n at 8-9 (citing FAC ¶¶ 4.53, 4.68,
24 14.7).) These similar allegations either contain no mention of harm to Plaintiffs (*see*
25 FAC ¶ 4.68) or, again, are purely conclusory and unsupported by any specific factual
26 allegations (*see id.* ¶¶ 4.53 (Plaintiffs will be "put out of business if the WLS is
27 implemented" or "lose . . . goodwill associated with their businesses and business
28 models"), 14.7 ("Plaintiffs have suffered damages in an amount to be determined at
trial.")). Hence, these allegations do not indicate that Plaintiffs have suffered a *direct*
injury from the conduct that is alleged to violate the UCL, as is required to state a UCL
claim in this Court.

³ In its motion, VeriSign showed that a plaintiff may not proceed in federal court as a
private attorney general under the UCL unless the plaintiff *itself* has suffered an
individualized injury due to the defendant's challenged conduct. (Mot. at 5-6 (citing
Lee v. Am. Nat'l Ins. Co., 260 F.3d 997, 1001-02 (9th Cir. 2001)).) After VeriSign filed
its motion, the Ninth Circuit reaffirmed the holding of *Lee* in *Hangarter v. Provident*
Life and Accident Insurance Co., ___ F.3d ___, 2004 WL 1418017, at *18 (9th Cir.
June 25, 2004) (vacating, for lack of Article III standing, injunction in favor of private
attorney general who would not suffer any future individualized injury).