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16 INTERNET CORPORATION FOR
17 ASSIGNED NAMES AND NUMBERS

18
19 **UNITED STATES DISTRICT COURT**
20 **CENTRAL DISTRICT OF CALIFORNIA**
21

22 REGISTERSITE.COM, et al.,

23 Plaintiff,

24 v.

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

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

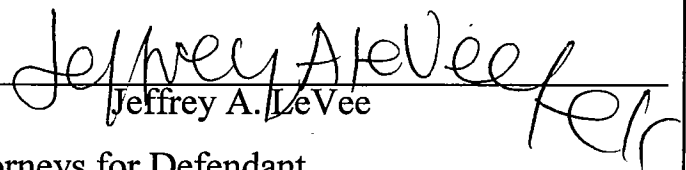
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additional defects. This motion is made following the conference of counsel pursuant to Local Rule 7-3, which took place on May 20, 2004. Counsel were unable to reach any agreements that would obviate the need for the motion.

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

Dated: May 28, 2004

JONES DAY

By: 
Jeffrey A. LeVee

Attorneys for Defendant
INTERNET CORPORATION FOR
ASSIGNED NAMES AND NUMBERS

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.

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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 FATALLY** 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