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12 **UNITED STATES DISTRICT COURT**
13 **CENTRAL DISTRICT OF CALIFORNIA**
14

15 REGISTERSITE.COM, et al.,
16 Plaintiff,
17
18 v.
19 INTERNET CORPORATION FOR
ASSIGNED NAMES AND
20 NUMBERS, et al.,
21 Defendants.

Case No. CV-04-1368 ABC (CWx)
**DEFENDANT INTERNET
CORPORATION FOR ASSIGNED
NAMES AND NUMBERS' REPLY IN
SUPPORT OF ITS MOTION TO
DISMISS FOR FAILURE TO STATE
A CLAIM UNDER FRCP 12(B)(6)**

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

Honorable Audrey B. Collins

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2004 JUN 30 PM 3:38
U.S. DISTRICT COURT
CENTRAL DISTRICT OF CALIF.
LOS ANGELES
BY _____

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INTRODUCTION

1
2 Plaintiffs' opposition to the motion to dismiss filed by Defendant Internet
3 Corporation for Assigned Names and Numbers ("ICANN") flagrantly
4 mischaracterizes the facts and the arguments set forth in ICANN's motion. For
5 example, Plaintiffs assert that "Plaintiffs here have no relationship with the *Dotster*
6 plaintiffs, other than the fact that (like the *Dotster* plaintiffs), Plaintiffs are ICANN
7 accredited registrars." Opp. at 14:8-10. Plaintiffs know this assertion is false:
8 some of the Plaintiffs are active members of a consortium of registrars who publicly
9 took responsibility for pursuing the *Dotster* litigation,¹ in which *exactly* the same
10 arguments were made in this Court — that ICANN's decision to permit WLS
11 violated the Registrar Accreditation Agreement between Plaintiffs and ICANN.
12 Judge Walter completely rejected Plaintiffs' interpretation of the RAA. This Court
13 should not permit the relitigation of the same issues.

14 Plaintiffs then misstate the law and the allegations required for claims based
15 on California's Unfair Competition Law ("UCL"). Plaintiffs' first claim for relief
16 rests on the assertion that the WLS would amount to an unlawful "lottery."
17 Plaintiffs ask the Court to disregard the *facts* regarding WLS — as asserted in
18 Plaintiffs' complaint and in materials over which the Court may take judicial
19 notice — and accept Plaintiffs' conclusory allegation that WLS is a distribution of
20 domain names by "chance." Since it is clear that WLS will not be *dominated* by
21 chance (the necessary element to prove a "lottery"), the Court should not accept
22 conclusory (and false) allegations that would result in the parties engaging in
23 expensive discovery on this issue.

24 As for the three UCL claims against ICANN (the first, fifth, and seventh
25 claims for relief), Plaintiffs' opposition does not set forth *any* basis to save these
26 claims from dismissal, at least with respect to ICANN. A single allegation against

27
28 ¹ See VeriSign's Motion to Dismiss at 1:25-28.

1 ICANN in each of the claims is insufficient to meet the UCL pleading standard, and
2 the fact that Plaintiffs are businesses that obviously are suing to protect their own
3 business interests means that they cannot bring a representative action.

4 Because this is the second time that Plaintiffs have failed to state a claim
5 against ICANN, ICANN urges the Court to dismiss Plaintiffs' First Amended
6 Complaint ("FAC") with prejudice.

7 ARGUMENT

8 **I. PLAINTIFFS' FIRST, FIFTH, AND SEVENTH CLAIMS BASED ON** 9 **VIOLATIONS OF CALIFORNIA'S UCL ARE FATALLY** 10 **DEFICIENT AND MUST BE DISMISSED AS A MATTER OF LAW** 11 **AS AGAINST ICANN.**

12 **A. Incorrect Legal Conclusions Aside, WLS Is Not Dominated By** 13 **Chance, And Is Therefore Not A Lottery.**

14 Plaintiffs argue that the Court must accept as true their allegation that WLS is
15 a distribution of domain names by "chance" and thus is an unlawful lottery. Opp. at
16 11:3-6.² Plaintiffs apparently believe that any time a plaintiff makes a conclusory
17 allegation, the Court is bound to permit that claim to proceed in spite of the actual
18 facts and law. Plaintiffs are wrong. Motion at 6; *Anderson v. Clow (In re Stac*
19 *Electronics Sec. Litig.)*, 89 F.3d 1399, 1403 (9th Cir. 1996) ("[C]onclusory
20 allegations of law and unwarranted inferences are insufficient to defeat a motion to
21 dismiss for failure to state a claim.") (quoting *In re VeriFone Sec. Litig.*, 11 F.3d
22 865, 868 (9th Cir. 1993)).³

23 ² In their Request for Judicial Notice, Plaintiffs propose that the Court take
24 judicial notice of a demurrer filed in the *Smiley* matter, a case involving "different
25 parties and different issues," to show that "defendants" common to both cases have
26 taken different positions in two separate cases. However, the pleading in the *Smiley*
27 matter cannot be considered here in deciding ICANN's motion to dismiss because
28 Plaintiffs' RJN applies only to VeriSign and Network Solutions.

³ In *United States ex rel. Chunie v. Ringrose*, 788 F.2d 638, 643 (9th Cir.),
cert. denied, 479 U.S. 1009 (1986), plaintiffs argued that the district court had to

1 The facts alleged in the FAC show that WLS is not dominated by chance but
2 by the execution of personal, business and economic decisions.⁴ Motion at
3 13:6-14:11. Plaintiffs now argue that WLS relies on chance because the
4 distribution of "the domain name is based upon a decision by someone other than
5 the WLS subscriber." Opposition to VeriSign's Motion to Dismiss ("VeriSign
6 Opp.") at 13:15-16. But the fact that decisions are made by persons other than the
7 WLS subscriber does not convert those decisions into "chance" similar to the roll of
8 the dice, the drawing of a number or the turn of a card.

9 The case law, including the cases on which Plaintiffs rely, does not define
10 "chance" with regard to whether a third-party selects a winner, but whether a
11 winner is selected arbitrarily. VeriSign Opp. at 12:19-13:25; 76 Op. Atty. Gen.
12 Cal. 266, *3 (1993) ("When the person conducting the promotion *arbitrarily* selects
13 the winner, the chance element is present . . .") (emphasis added); *People v. Hecht*,
14 119 Cal. App. Supp. 778, 787 (1931) (finding that "chance" is present where a
15 winner is selected through a blind drawing, and placing no importance on the fact
16 that the promoter of the game selected the winner). Were this not the case, a
17 sporting event wherein an athlete pays to enter a competition judged by third parties
18 would constitute an illegal lottery.

19
20 (continued...)

21 accept as true their allegation that a portion of land was not within the territory
22 "ceded" to the United States under a treaty. The Ninth Circuit, after stating that the
23 district court "need not assume the truth of legal conclusions cast in the form of
24 factual allegations," ruled that the territory was "ceded" to the United States despite
25 plaintiffs' conclusory allegation to the contrary. *Id.* at 643 n.2.

26 ⁴ Plaintiffs intimate that, to be an illegal lottery, an activity need only
27 "involve" or "rely" on chance. VeriSign Opp. at 12:6-13:27. This is not the law.
28 California courts require a demonstration that the activity is *dominated* by chance.
Motion at 13:3-5; *In re Allen*, 59 Cal. 2d 5, 6 (1962) ("The test is not whether the
game contains an element of chance or an element of skill but which of them is the
dominant factor in determining the result of the game.").

1 WLS subscribers will be successful (or unsuccessful) not because of random
2 or arbitrary selection, but because a number of personal, business and economic
3 judgments have been made. Motion at 13:6-14:11. The fact that persons other than
4 the WLS subscriber will be involved in making these decisions does not convert
5 WLS into an unlawful lottery. Luck and good fortune do not *dominate* WLS, and
6 thus Plaintiffs' cannot assert this claim as a matter of law.

7 **B. Plaintiffs' Opposition Misconstrues The "Competency"**
8 **Requirements To Bring A Representative Action.**

9 Plaintiffs argue that their requested remedy — injunctive relief — for their
10 representative UCL claims eliminates the otherwise applicable requirement that
11 Plaintiffs be "competent" to represent the general public.⁵ Opp. at 6:13-20. In
12 support of this proposition, Plaintiffs cite *Marshall v. Standard Insurance*
13 *Company*, 214 F. Supp. 2d 1062, 1067 (C.D. Cal. 2000) and *Wilner v. Sunset Life*
14 *Insurance Company*, 78 Cal. App. 4th 952, 969 (2000). These cases are inapposite.

15 The California Supreme Court has held that competency is a requirement for
16 a representative action under Section 17200. *Kraus v. Trinity Mgt. Servs., Inc.*, 23
17 Cal. 4th 116, 138 (2000) ("[B]ecause a UCL action is one in equity, in any case in
18 which a defendant can demonstrate a potential for harm or show that the action is
19 not one brought by a *competent* plaintiff for the benefit of injured parties, the court
20 may decline to entertain the action as a representative suit.") (emphasis added).

21 The issue of competency does not turn on the proposed remedy but on whether the
22 matter is truly one brought on behalf of the general public. *See Rosenbluth Int'l,*
23 *Inc. v. Super. Ct.*, 101 Cal. App. 4th 1073, 1075 (2002). Thus, the fact that

24 _____
25 ⁵ Confusingly, Plaintiffs also state that they are *not* pursuing a representative
26 action. Opp. at 6:18-20 ("Here, however, Plaintiffs' UCL claims seek only
27 injunctive relief, and not restitution. Accordingly, this is not a 'representative
28 action' and Plaintiffs need not satisfy the competency requirement."). However,
Plaintiffs cite cases discussing representative actions and Plaintiffs allege in their
FAC that this is a representative action. *See* FAC ¶¶ 5.2, 9.2, and 11.2.

1 Plaintiffs have limited their request to injunctive relief⁶ does not give Plaintiffs the
2 right to bring a representative action on behalf of the general public. *See Kraus*, 23
3 Cal. 4th at 138.

4 The cases Plaintiffs rely on were brought by individual consumers, not
5 sophisticated businesses. *See Marshall*, 214 F. Supp. 2d at 1065; *Wilner*, 78 Cal.
6 App. 4th at 957. Any discussion in those cases of requested remedies focused on
7 whether due process concerns would be raised by permitting restitution and/or
8 retrospective injunctive relief. *Marshall*, 214 F. Supp. 2d at 1072-74; *Wilner*, 78
9 Cal. App. 4th at 969.⁷

10 ICANN does not dispute that representative actions may be brought by
11 certain individual consumers. *See Dean Witter Reynolds, Inc. v. Super. Ct.*, 211
12 Cal. App. 3d 758, 773 (1989). However, Plaintiffs are not individual consumers,
13 nor do they constitute (or appropriately represent) the general public: Plaintiffs are
14 businesses that have contracts with ICANN and are seeking to protect their
15 businesses from new competition that WLS would provide. *See* FAC ¶¶ 2.1-2.8.
16 Plaintiffs plainly are not "competent" to bring a representative action, and thus their

17 ⁶ Damages would not be available in all events because WLS is not
18 operational yet.

19 ⁷ In *Marshall*, an individual consumer of an insurance policy brought suit
20 against the insurer for, among other things, violations of the UCL. 214 F. Supp. 2d
21 at 1065. The consumer's requested remedies included restitution and injunctive
22 relief on behalf of herself individually and the general public. *Id.* The court
23 dismissed the representative action with respect to the requests for restitution and
24 injunctive relief, but allowed it to continue as to future claims of other insureds. *Id.*
25 at 1072-74. The court did not discuss the competency of the individual consumer
26 to represent the general public but denied the continuation of a representative action
27 for two of the requested remedies because of the due process concerns implicated.
28 *Id.* at 1070-71. Similarly, in *Wilner*, an individual consumer sued her insurer
alleging violations of the UCL. 78 Cal. App. 4th at 957. In conjunction with this
claim, the individual consumer requested injunctive relief. *Id.* at 969. The court
allowed the representative action to go forward for prospective claims on behalf of
all "aggrieved members of the public." *Id.*

1 attempts to use the UCL to assert rights on behalf of the general public must be
2 rejected. *Rosenbluth*, 101 Cal. App. 4th at 1078-79.

3 **C. Plaintiffs' Opposition Misconstrues The UCL's Pleading**
4 **Requirements.**

5 Plaintiffs argue that short and plain statements are sufficient to withstand a
6 motion to dismiss their fifth and seventh claims for violations of the UCL.
7 Plaintiffs also contend that their UCL claims are governed by Rule 8 of the Federal
8 Rule of Civil Procedure and thus their allegations against ICANN are sufficient to
9 survive a motion to dismiss. *See* Opp. at 8:10-12, 9:4-6, 9:20-22, 11:5-6. Plaintiffs
10 are wrong.

11 Rule 8 of the Federal Rules of Civil Procedure generally requires a short and
12 plain statement of the facts showing the plaintiff to be entitled to relief. Fed. R.
13 Civ. Proc. Rule 8. However, alleged violations of the UCL are subject to a
14 heightened pleading standard. *Khoury v. Maly's of Cal.*, 14 Cal. App. 4th 612, 619
15 (1993); *Nicolosi Distrib. Co. v. FinishMaster, Inc.*, Case No. C 99-0927 MJJ, 2000
16 U.S. Dist. LEXIS 505 *1, *5 (N.D. Cal. 2000). This heightened pleading standard
17 requires more than short and plain statements, and facts must be alleged as to *each*
18 defendant. *See GlobeSpan, Inc. v. O'Neill*, 151 F. Supp. 2d 1229, 1236 (2001) ("A
19 plaintiff alleging unfair business practices under the unfair competition statutes
20 'must state with reasonable particularity the facts supporting the statutory elements
21 of the violation.'") (quoting *Silicon Knights v. Crystal Dynamics*, 983 F. Supp.
22 1303, 1316 (N.D. Cal. 1997). Plaintiffs' FAC — with its single paragraph of
23 allegations against ICANN — obviously falls well short of meeting this standard.
24 Indeed, these allegations truly are insufficient under Rule 8 as well.

25 Plaintiffs make a bare attempt to salvage their UCL claims by misconstruing
26 ICANN's role to be one of enforcer, rather than a regulator, of the Internet's Domain
27 Name System. For example, in their fifth cause of action, Plaintiffs allege that
28