Jeffrey A. LeVee (State Bar No. 125863)
Emma Killick (State Bar No. 192469)
Kimberly A. Cole (State Bar No. 217780)
Sean W. Jaquez (State Bar No. 223132)
JONES DAY
555 West Fifth Street, Suite 4600
Los Angeles, CA 90013-1025
Telephone: (213) 489-3939
Facsimile: (213) 243-2539

Joe Sims (admitted *pro hac vice*)
JONES DAY
51 Louisiana Avenue, N.W.
Washington, D.C. 20001-2113
Telephone: (202) 879-3939
Facsimile: (202) 626-1700

Attorneys for Defendant
INTERNET CORPORATION FOR
ASSIGNED NAMES AND NUMBERS

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

REGISTERSITE.COM, et al.,

Plaintiff,

v.

INTERNET CORPORATION FOR ASSIGNED NAMES AND NUMBERS, et al.,

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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INTRODUCTION

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

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

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

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[1] *See* VeriSign's Motion to Dismiss at 1:25-28.

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

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

ARGUMENT

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

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

Plaintiffs argue that the Court must accept as true their allegation that WLS is a distribution of domain names by "chance" and thus is an unlawful lottery. Opp. at 11:3-6.[2] Plaintiffs apparently believe that any time a plaintiff makes a conclusory allegation, the Court is bound to permit that claim to proceed in spite of the actual facts and law. Plaintiffs are wrong. Motion at 6; *Anderson v. Clow (In re Stac Electronics Sec. Litig.)*, 89 F.3d 1399, 1403 (9th Cir. 1996) ("[C]onclusory allegations of law and unwarranted inferences are insufficient to defeat a motion to dismiss for failure to state a claim.") (quoting *In re VeriFone Sec. Litig.*, 11 F.3d 865, 868 (9th Cir. 1993)).[3]

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

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

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

(continued...)

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

[4] Plaintiffs intimate that, to be an illegal lottery, an activity need only "involve" or "rely" on chance. VeriSign Opp. at 12:6-13:27. This is not the law. 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.").

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

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

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

The California Supreme Court has held that competency is a requirement for a representative action under Section 17200. *Kraus v. Trinity Mgt. Servs., Inc.*, 23 Cal. 4th 116, 138 (2000) ("[B]ecause a UCL action is one in equity, in any case in which a defendant can demonstrate a potential for harm or show that the action is not one brought by a ***competent*** plaintiff for the benefit of injured parties, the court may decline to entertain the action as a representative suit.") (emphasis added). The issue of competency does not turn on the proposed remedy but on whether the matter is truly one brought on behalf of the general public. *See Rosenbluth Int'l, Inc. v. Super. Ct.*, 101 Cal. App. 4th 1073, 1075 (2002). Thus, the fact that

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[5] Confusingly, Plaintiffs also state that they are *not* pursuing a representative action. Opp. at 6:18-20 ("Here, however, Plaintiffs' UCL claims seek only injunctive relief, and not restitution. Accordingly, this is not a 'representative 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.

Plaintiffs have limited their request to injunctive relief[6] does not give Plaintiffs the right to bring a representative action on behalf of the general public. *See Kraus*, 23 Cal. 4th at 138.

The cases Plaintiffs rely on were brought by individual consumers, not sophisticated businesses. *See Marshall*, 214 F. Supp. 2d at 1065; *Wilner*, 78 Cal. App. 4th at 957. Any discussion in those cases of requested remedies focused on whether due process concerns would be raised by permitting restitution and/or retrospective injunctive relief. *Marshall*, 214 F. Supp. 2d at 1072-74; *Wilner*, 78 Cal. App. 4th at 969.[7]

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

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[6] Damages would not be available in all events because WLS is not operational yet.

[7] In *Marshall*, an individual consumer of an insurance policy brought suit against the insurer for, among other things, violations of the UCL. 214 F. Supp. 2d at 1065. The consumer's requested remedies included restitution and injunctive relief on behalf of herself individually and the general public. *Id.* The court dismissed the representative action with respect to the requests for restitution and injunctive relief, but allowed it to continue as to future claims of other insureds. *Id.* at 1072-74. The court did not discuss the competency of the individual consumer to represent the general public but denied the continuation of a representative action for two of the requested remedies because of the due process concerns implicated. *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.*

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

C. Plaintiffs' Opposition Misconstrues The UCL's Pleading Requirements.

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

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

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

ICANN should require "Verisign to disclose (or to require registrars to disclose) that consumers may not have the opportunity to renew their WLS subscriptions after the one-year trial period." *See* FAC 33: 1-3. As stated in ICANN's Motion, and not contested in Plaintiffs' Opposition, this is not ICANN's role. Motion at 10:11-24.

Plaintiffs argue that they have satisfied their heightened pleading requirements by incorporating previous allegations by reference. Which allegations against ICANN? Plaintiffs do not explain. Plaintiffs have alleged a total of twelve claims for relief, only four of which are asserted against ICANN. In all three of their UCL causes of action that include ICANN as a defendant — the first, fifth and seventh claims — Plaintiffs' allegations against ICANN cannot be sufficient to pass the heightened pleading requirements for UCL claims.[8] *See Silicon Knights*, 983 F. Supp. at 1316; *GlobeSpan,* 151 F. Supp. 2d at 1236; *Khoury*, 14 Cal. App. 4th at 619.

II. PLAINTIFFS' TWELFTH CLAIM FOR BREACH OF THE REGISTRAR ACCREDITATION AGREEMENT MUST FAIL.

In their twelfth claim, Plaintiffs allege that ICANN has breached the RAA by authorizing VeriSign to proceed with WLS. FAC ¶¶ 4.59-68, 16.5-16.28.

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[8] *See* Motion at 10:25-12:6 (Only allegation possibly directed against ICANN in first claim: "The Defendants and each of them have aided or assisted in setting up, managing, or drawing the lottery in the WLS lottery enterprise" (FAC ¶ 5.19); only allegation possibly directed against ICANN in fifth claim: "ICANN approved the WLS for a one-year trial without requiring Verisign to disclose (or to require registrars to disclose) that consumers may not have the opportunity to renew their WLS subscriptions after the one-year trial period" (FAC ¶ 9.6); only allegation possibly directed at ICANN in seventh claim: Plaintiffs' references to the Registry Agreement between VeriSign and ICANN and the Registry-Registrar Agreements between VeriSign and all ICANN-accredited registrars (FAC ¶¶ 11.6-11.7); and their assertion that "[n]either ICANN nor the Department of Commerce has authority to approve Verisign's attempt to leverage its *de facto* control into *de jure* rights" (FAC ¶ 11.10)).

Plaintiffs' opposition characterizes this claim as being based on ICANN's breach of the RAA "by denying [Plaintiffs] the right to delete domain names" (Opp. at 13:12-13), and that their claim is different than that of the *Dotster* plaintiffs, which was based on "their alleged inability to register domain names" (Opp. at 17:27-18:1).

Plaintiffs' mischaracterizations of the claims in this lawsuit and in the *Dotster* lawsuit cannot alter the fact that both cases challenge the appropriateness of ICANN's actions in addressing VeriSign's request to offer WLS, and both cases do so on the basis of the RAA executed by ICANN and the plaintiff-registrars. But the RAA gives Plaintiffs no right to interfere with ICANN's separate contractual relationships with any of the Internet's registries, including VeriSign. Instead, the provisions of the RAA on which Plaintiffs rely give Plaintiffs rights only if and when ICANN takes actions "that impact the *rights, obligations, or role* of Registrar." RAA § 2.3 (emphasis added). This is the *precise* issue that Judge Walter addressed, ruling in ICANN's favor. *Compare* FAC ¶ 16.14 ("[b]y approving the WLS without obtaining consensus, ICANN acted unjustifiably, arbitrarily, inequitably, and unfairly, and in so doing breached its contractual obligations to each Plaintiff."), *with* Ex. A (November 10, 2003 Order) at 6 (Judge Walter held that, because WLS did not affect the rights, obligations, or roles of the registrars under the RAA, the RAA's requirements concerning ICANN's adoption of "Consensus Policies" did not apply to WLS).

A. Collateral Estoppel Applies To Plaintiffs' Contract Claim Against ICANN.

The issue of whether ICANN needed to seek and achieve "consensus" before it approved WLS — which is the issue presented in Plaintiffs' FAC (¶ 16.14) — was fully and fairly litigated and disposed of as a result of a final judgment in *Dotster*. Plaintiffs in this action (or some of them) were parties in privity with the parties in *Dotster*. Thus, the elements of collateral estoppel have been established.

See In re Palmer, 207 F.3d 566, 568 (9th Cir. 2000) (citing *Pena v. Gardner*, 976 F.2d 469, 472 (9th Cir. 1992)).[9]

Plaintiffs argue that "the *Dotster* plaintiffs did not raise the issue of whether ICANN's conduct violated the UCL, or whether ICANN breached the RAA by denying them the right to delete domain names." Opp. at 13:11-13. The first point is irrelevant — ICANN did not argue that collateral estoppel (or res judicata) apply to Plaintiffs' UCL claims. Those claims fail for independent reasons, as explained above.

As to Plaintiffs' alleged "right to delete domain names" (FAC ¶ 16.7), the complaint itself describes the deletion process (FAC ¶¶ 4.25-4.34) and makes clear that WLS does not change registrars' ability to *delete* domain names (which only the registry can do); it only affects the right to *re-register* domain names once those names are deleted from the registry. This was *precisely* the basis for the contract claim asserted by the *Dotster* plaintiffs (Opp. at 17:27-18:1). Whether one characterizes WLS as affecting the ability to "delete domain names" or the ability to "register domain names," the point is that WLS is a voluntary service, all ICANN-accredited registrars will *not* be required to participate in WLS, WLS is *not* a "Consensus Policy" as defined by the RAA, and WLS will *not* affect the rights, obligations, or role of all registrars under the RAA. These are the issues that Judge Walter addressed, and they clearly dispose of the same contract claim here.[10]

[9] Plaintiffs argue that Judge Walter's decision not to accept the proposed transfer of this case is a basis to defeat collateral estoppel and res judicata (Opp. at 12:11-17), but Judge Walter's one-sentence order declining transfer obviously is not an adjudication of anything other than that he did not wish to accept reassignment of the case (for whatever reason).

[10] Remarkably, in their opposition to VeriSign's motion to dismiss the FAC, Plaintiffs rely on Judge Walter's Order as definitive law. *See* Opp. to VeriSign's Motion ("Indeed, one court has already made the factual finding that '[c]ontrary to the current system, domain names that are subject to a WLS subscription would never be deleted from the registry when the original registration expired.' *Dotster, Inc. v. Internet Corp.*, 296 F. Supp. 2d 1159, 1161 (C.D. Cal. 2003)."). Plaintiffs'

Plaintiffs then argue that the *Dotster* litigation cannot provide the basis for asserting either collateral estoppel or res judicata because "[m]ost significantly, the *Dotster* case was litigated before ICANN had actually approved the WLS, and the harm that the *Dotster* plaintiffs sought to enjoin was therefore speculative." Opp. at 13:14-16. But Plaintiffs filed this action on March 1, 2004 — before ICANN conditionally approved the WLS on March 6, 2004. Motion at 4:13-20. And whether or not WLS was "approved" before or after the filing of this action, the underlying issue of whether the RAA applies to WLS has already been decided. Judge Walter, in analyzing whether or not to grant a preliminary injunction, discussed at length the viability of the *Dotster* plaintiffs' claim in terms of their likelihood of succeeding on the merits. *See* Ex. A at 6-7. Judge Walter never ruled that the *Dotster* plaintiffs' claim was unripe, as Plaintiffs assert, and the *Dotster* plaintiffs made exactly the same "we are being injured by the imminent implantation of WLS" argument that Plaintiffs make here. Opp. at 13:14-21.

Plaintiffs devote more than three pages of their opposition to addressing the privity element of collateral estoppel (and res judicata). However, they do not acknowledge the one essential fact that destroys their argument: the "Domain Justice Coalition," which took responsibility for the *Dotster* litigation, included at least two of the plaintiffs in this action as members (R. Lee Chambers Co. LLC and Fiducia LLC). *See* http://www.stopwls.com/lawsuit.html.[11]

(continued...)

reliance on Judge Walter's Order as definitive law illustrates that Plaintiffs' twelfth claim is also precluded by the doctrine of *stare decisis*. *See* Black's Law Dictionary 1406 (6th ed. 1990) (when court has decided a principle of law applying to a certain set of facts, the principle will be followed where facts are substantially the same, regardless of whether parties are the same, and the same court or other courts of equal or lower rank will be bound).

[11] VeriSign included this fact in its Motion to Dismiss, but Plaintiffs do not address it in any of their opposition papers. *See* VeriSign's Motion at 1:25-28.

Thus, Plaintiffs' statements about the absence of any relationship between these Plaintiffs and the *Dotster* plaintiffs are simply false. There is privity, and that privity justifies the application of collateral estoppel.[12] *See, e.g.*, Opp. at 14:3-6 ("Privity 'contemplates an express or implied legal relationship by which parties to the first suit are accountable to non-parties who file a subsequent suit with identical issues.' *United States v. ITT Rayonier, Inc.*, 627 F.2d 996, 1003 (9th Cir. 1980)").

B. The Doctrine of Res Judicata Also Applies to Plaintiffs' Contract Claim.

Plaintiffs take issue with the test for the first element of res judicata (identity of claims) that is set forth in *Nordhorn v. Ladish Co.*, 9 F.3d 1402, 1405 (9th Cir. 1993). But the "*Nordhorn* test" does not require that all four parts of the "criteria" be met before res judicata will be applied. *See Nordhorn*, 9 F.3d at 1405 ("The Ninth Circuit determines whether or not two claims are the same for purposes of res judicata *with reference to the following criteria*") (emphasis added) (reversing the district court's application of res judicata on the grounds that the plaintiffs' second suit was against a different company than the first and involved a different contract).

The relevant inquiry for the first "criteria" is "whether rights or interests established in the prior judgment would be destroyed or impaired by prosecution of the second action." The inquiry does not end by looking at the effect of a judgment in this case on the plaintiffs in *Dotster*, as Plaintiffs suggest. Opp. at 17:17-19. The fact that the rights and interests of *ICANN* would be severely affected if this second action on the same issue was permitted to proceed is equally relevant.

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[12] Thus, Plaintiffs have no basis to distinguish *In re Schimmels*, 127 F.3d 875 (9th Cir. 1987), by arguing that the court "found that '[t]he government was aware of, and even tacitly participated in, the adjudication of the [private parties'] adversary proceeding, but never sought to intervene therein.'" Opp. at 14:28-15:3.

The second criteria — whether the same evidence is presented in the two actions — cannot be ascertained on a motion to dismiss, although we do know that the contract that forms the basis for both actions is the same. And the other three "criteria" for an identity of claims to be established are clearly present. *See Nordhorn*, 9 F.3d at 1405.[13]

As for the third and fourth "criteria," Plaintiffs in both suits are ICANN-accredited registrars that claim that ICANN breached the RAA by not following the procedures referenced in the RAA with respect to WLS. Thus, the "rights" and issues in the two cases are *identical*. Plaintiffs cannot deny that the "same transactional nucleus of facts" form the basis of their breach of contract claim; simply saying the facts are different does not make them so. *Anderson v. Clow (In re Stac Electronics Sec. Litig.)*, 89 F.3d 1399, 1403 (9th Cir. 1996) ("[c]onclusory allegations of law and unwarranted inferences are insufficient to defeat a motion to dismiss for failure to state a claim.")(internal quotation omitted); *Scheid v. Fanny Farmer Candy Shops, Inc.*, 859 F.2d 434, 436 (6th Cir. 1988) (to withstand scrutiny under Rule 12(b)(6), the complaint "must contain either direct or inferential allegations respecting all the material elements to sustain a recovery under some viable legal theory.") (internal quotations omitted).

As the more recent *Tahoe-Sierra* decision explains, "[t]he fact that res judicata depends on an 'identity of claims' does not mean that an imaginative attorney may avoid preclusion by attaching a different legal label to an issue that has . . . been litigated." *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg. Planning Agency*, 322 F.3d 1064, 1077-78 (9th Cir. 2003). Plaintiffs cannot evade application of the res judicata doctrine by asserting that "Plaintiffs' claims center on their inability to delete domain names, while the *Dotster* plaintiffs' claims were

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[13] Contrary to Plaintiffs' suggestion, Judge Walter did not "determin[e] that the *Dotster* plaintiffs did a poor job of presenting their own evidence." Opp. at 17:21-23.

based on their alleged inability to register domain names" (Opp. at 17:27-18:1), or by asserting that "Defendants are selling 'pre-orders' for WLS subscriptions, and Plaintiffs therefore suffer immediate harm in a way that the *Dotster* plaintiffs did not" (Opp. at 18:2-4). In both cases, plaintiffs claim that when ICANN considered WLS, it breached the RAA by not following the procedures referenced in the RAA and that implementation of WLS would injure Plaintiffs' businesses. The essence of the claims is truly identical.

CONCLUSION

Each of Plaintiffs' claims for relief against ICANN — the first, fifth, seventh, and twelfth claims — are deficient as a matter of law and cannot be cured by amendment. ICANN urges the Court to dismiss these claims for relief with prejudice.

Dated: June 30, 2004

JONES DAY

By: Jeffrey A. LeVee

Jeffrey A. LeVee

Attorneys for Defendant INTERNET CORPORATION FOR ASSIGNED NAMES AND NUMBERS

PROOF OF SERVICE BY OVERNIGHT DELIVERY

I am a citizen of the United States and employed in Los Angeles County, California. I am over the age of eighteen years and not a party to the within-entitled action. My business address is 555 West Fifth Street, Suite 4600, Los Angeles, California 90013-1025. On June 30, 2004, I deposited with Federal Express, a true and correct copy of the within documents:

DEFENDANT ICANN'S REPLY IN SUPPORT OF ITS MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM UNDER FRCP 12(B)(6)

in a sealed envelope, addressed as follows:

Derek A. Newman, Esq.
NEWMAN & NEWMAN,
Attorneys at Law
505 Fifth Avenue, South, Suite 610
Seattle, WA 98104

Laurence Hutt, Esq.
ARNOLD & PORTER
777 S. Figueroa, 44th Fl.,
Los Angeles, CA 90017

Frederick F. Mumm, Esq.
DAVIS WRIGHT TREMAINE LLP
865 S. Figueroa Street, Suite 2400
Los Angeles, CA 900017

Following ordinary business practices, the envelope was sealed and placed for collection by Federal Express on this date, and would, in the ordinary course of business, be retrieved by Federal Express for overnight delivery on this date.

I declare that I am employed in the office of a member of the bar of this court at whose direction the service was made.

Executed on June 30, 2004, at Los Angeles, California.

Elba B. Alonso de Ortega