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UNITED STATES DISTRICT COURT

FOR THE CENTRAL DISTRICT OF CALIFORNIA

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

Plaintiffs,

v.

INTERNET CORPORATION FOR ASSIGNED NAMES AND NUMBERS, a California corporation, *et al.*,

Defendants.

Case No. CV 04-1368 ABC (CWx)

Hon. Audrey B. Collins

PLAINTIFFS' OPPOSITION TO MOTION BY DEFENDANTS VERISIGN, INC. AND NETWORK SOLUTIONS, INC. TO DISMISS 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: Room 680 – Roybal Bldg.

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I. INTRODUCTION

Defendants Verisign, Inc. and Network Solutions, Inc. (together "Defendants") are currently offering to consumers what they call the *Wait Listing Service* ("WLS"). Though they have not fully deployed the WLS, they are now accepting pre-orders, for which they are taking consumer credit card numbers pursuant to a binding contract. In marketing the WLS, Defendants are making false and deceptive representations to consumers and causing damages to Plaintiffs and consumers.

In their Motion to Dismiss First Amended Complaint For Failure to State a Claim (the "Motion"), Defendants contend Plaintiffs did not allege actual injury to themselves in the First Amended Complaint (the "FAC") and, as a result, lack Article III standing. However, Plaintiffs allege, among other things, that: (i) Plaintiffs' domain name registration businesses are likely to be harmed, if not destroyed, unless the WLS is enjoined (FAC ¶ 4.5.3); (ii) Defendants' unfair business practices are currently diverting customers from Plaintiffs' businesses to Defendants' businesses, and unless enjoined will prevent Plaintiffs from competing for certain domain registrations (FAC ¶ 13.6-13.13); and (iii) Defendants' misleading representations and/or omissions concerning the WLS have caused, and continue to cause, harm to Plaintiffs including loss of goodwill (FAC ¶ 13.6-13.13). Simply put, Defendants are now making unfair and deceptive representations to consumers, upon which the consumers are relying, and damaging Plaintiffs' lawful business interests. Additionally, Plaintiffs' harm will increase substantially upon the deployment of the WLS service.

Defendants also contend Plaintiffs have not alleged facts sufficient to plead any of their causes of action. Defendants arguments for failure to state a claim rely on disputed questions of fact under the pretense that they are questions of law. For example, Defendants rely on their theory that there is no evidence that consumers are misled and that all the material terms and conditions of the WLS can be

discovered by consumers. At this pleading stage, however, such factual arguments must be construed against Defendants. Plaintiffs need only allege facts sufficient to constitute a cause of action, which they have done in the FAC.

II. FACTS

A. ALLEGED FACTS RELEVANT TO DEFENDANTS' MOTION

Defendants have already launched the WLS and are accepting good and valuable consideration from consumers for the worthless WLS service. (FAC ¶¶ 1.1, 4.68.) The WLS purports to give consumers, for an annual fee, the right to be "first in line" on the "waiting list" for currently-registered <.com> and <.net> domain names. (FAC ¶ 1.1.) However, WLS consumers will receive no benefit from purchasing a WLS "subscription" *unless and until* the current domain name owner abandons it, which is unlikely. (FAC ¶ 1.1.)

By offering WLS subscriptions pre-orders, Defendants are now selling contingent future interests in property that Defendants do not own. (FAC ¶ 1.5.) Additionally, because the decision of the current domain name owner to abandon its property is beyond Defendants' control, the WLS is an illegal lottery. (FAC ¶ 1.1.) Specifically, Defendants require consideration (*i.e.*, payment of money), for the chance (*i.e.*, whether the current domain name owner abandons its property) to win the valuable domain name prize (currently owned by a party unrelated to Defendants). (FAC ¶¶ 5.11-5.13.)

Consumers who sign-up for Defendants' WLS are unaware that they are unlikely to ever win the domain names they hope to register through the WLS. (FAC ¶ 8.13.) Rather, consumers are likely to pay Defendants money for several years for the WLS, but never receive anything in return for those payments. (FAC ¶¶ 8.11-8.14.) Consumers will fall for this scheme because Defendants do not disclose the likelihood of "winning" (*i.e.*, of obtaining the desired domain name). (FAC ¶¶ 1.2, 8.6.) Defendants likewise do not disclose that domain names registration terms are for up to 100 years, and therefore most domain names will not

be available through the WLS for several years and potentially not even in this Century. (FAC ¶¶ 4.25, 9.25.)

Defendants are also advertising WLS subscriptions to consumers as a form of "insurance" that will "protect" already registered domain names. (FAC ¶ 1.3.) Current domain name registrants are likely to purchase WLS subscriptions in the face of this "offer" because it lacks disclosure about how consumers can *already* redeem inadvertently lost domain names without this insurance. (FAC ¶ 4.32.)

Defendants have already begun selling WLS subscriptions (FAC ¶ 1.4), but have not yet finalized the WLS system. (FAC ¶¶ 4.66-4.67.) In the event Defendants complete deployment of WLS, which is expected soon, several of the Plaintiffs will literally be put out of business. (FAC ¶ 4.53.) Accordingly, Plaintiffs are suffering injury now as a result of Defendants' WLS offering (FAC ¶ 8.17), and Plaintiffs will suffer even greater injury when the WLS is fully deployed[1]. (FAC ¶ 4.53.)

Plaintiffs compete against Defendants in the retail domain name sales business. (FAC ¶ 13.17.) Plaintiffs each offer a service to assist consumers in registering expired domain names. (FAC ¶ 1.4.) None of the plaintiffs charges a fee for its service unless and until it actually registers a domain name on behalf of its customer. (FAC ¶ 1.4.)

Plaintiffs allege that a WLS subscription provides no value to consumers (FAC ¶ 4.54, 12.17, FAC § L) and effectively destroys Plaintiffs' legitimate

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[1]Taking Defendants' argument that consumers providing consideration (*i.e.*, entering into binding agreements) for the WLS does not constitute launch of the WLS to its logical conclusion would require that Defendants provide value before the WLS can be challenged. Under this theory, Defendants could maintain that the WLS is not ripe for judicial review until and unless a domain name is transferred to a consumer pursuant to the WLS. The problem with this argument, of course, is that Plaintiffs allege most consumers are unlikely to ever obtain domain name registrations as a result of the WLS. Accordingly, Defendants could avoid judicial review of the WLS service by never conferring value to consumers. Rather, Defendants could continue to require binding contracts of consumers, without ever providing anything of value to them. Under Defendants' theory, any consumer scam could avoid scrutiny by never offering any value to the consumers.

businesses (FAC ¶¶ 4.53, 16.20). A current registrant, having the option to renew a domain (and a grace period if the renewal is inadvertently abandoned), gains no advantage from the purchase of a WLS subscription. (FAC ¶ 4.31.) Similarly, most WLS subscribers gain no value from the WLS. (FAC ¶ 4.54.) The WLS consumer would unwittingly purchase "for a one-year period" the right to obtain a domain name if it expires in that year. (FAC ¶ 4.46.) However, the domain name may not become available for decades because it is registered to someone else for such a term. (FAC ¶ 4.25.) Accordingly, the prospective registrant is waiting in a line that may never end. (FAC ¶ 12.17.)

B. FACTUAL INACCURACIES ALLEGED IN DEFENDANTS' MOTION

Defendants motion includes a purported "Summary of the Complaint's Allegations" which includes several material inaccuracies and improper citations to the FAC. (Motion at 3-5.) Defendants state that "Plaintiffs allege that domain names can be registered for periods from one to ten years." (Motion at 3:16-17.) In truth, Plaintiffs allege that "[d]omain names are registered for fixed periods . . . up to 100 years". (FAC ¶ 4.25.) The difference between "one to ten" years and "up to 100 years" is significant because no reasonable consumer would purchase a "waiting list" position for a domain name not scheduled to expire for another century. (FAC ¶ 9.7.) For this reason, Plaintiffs allege in the FAC that Defendants should disclose this material registration term to consumers, and that failure to do so constitutes an unfair business practice. (FAC ¶ 9.9.)

Defendants misrepresent that "Plaintiffs have failed to allege, and cannot allege, that WLS involves the necessary element of chance." (Motion at 8:13-8:14.) In truth, Plaintiffs allege that "Defendants' WLS distribution of domain names is by chance." (FAC ¶ 5.11.)

Defendants prevaricate that "Plaintiffs reference a $60 price point for their services, compared with $24 for Verisign's." (Motion at 4:14.) In truth, Plaintiffs reference a one-time $60 (retail) charge for their services, compared with a $24 *per*

year wholesale charge for Verisign's services, which consumers are required to pay year-after-year indefinitely. (FAC ¶¶ 4.40; 4.46-4.47.) Plaintiffs also allege that consumers will always receive a domain name by paying the fee to Plaintiffs, but that Defendants' WLS is a scheme "in which most consumers will receive nothing for their money." (FAC ¶ 1.1.)

Defendants contend "[t]he Complaint admits that WLS has not been implemented and is not available for registrars to sell to their customers at this time." (Motion at 5:2-5:3.) In truth, Plaintiffs allege that "Defendants eNom and NSI are currently advertising the WLS and are accepting 'pre-orders' for WLS subscriptions on their Web sites." (FAC ¶ 4.68.)

Defendants misstate that "[f]or domain names with a WLS subscription, upon cancellation of the domain name registration and deletion of the domain name, the recently deleted domain name would automatically be registered through the registrar that sold the WLS subscription...". (Motion at 4:26-5:1.) In support of this allegation, Defendants cite paragraph FAC ¶ 4.48. (Motion at 5:1.) In truth, FAC ¶ 4.48 alleges the opposite: that Verisign will *not* delete domain names with a WLS subscription. (FAC ¶ 4.48.) That allegation is fundamental to Plaintiffs' Declaratory Relief and Breach of Contract claims (against Verisign and ICANN, respectively).

III. ARGUMENT

A court may not dismiss a complaint for failure to state a claim "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Conley v. Gibson, 355 U.S. 41, 45-46 (1957); *see also* Moore v. City of Costa Mesa, 886 F.2d 260, 262 (9th Cir. 1989); Haddock v. Bd. of Dental Exam'rs, 777 F.2d 462, 464 (9th Cir. 1985) (court should not dismiss a complaint if it states a claim under any legal theory, even if plaintiff erroneously relies on a different theory). Dismissal is proper under FED. R. CIV. P. 12(b)(6) only where there is either a "lack of a cognizable legal theory" or "the

absence of sufficient facts alleged under a cognizable legal theory." Balistreri v. Pacifica Police Dep't, 901 F.2d 696, 699 (9th Cir. 1988).

FED. R. CIV. P. 8(a) guides determination of whether a complaint states a claim. It provides that a complaint need only contain "a short and plain statement" of the pleader's claim showing that the pleader is entitled to relief. FED. R. CIV. P. 8(a). The facts upon which the claim is based need not be set out in detail. Conley, 355 U.S. at 47. "[A]ll the Rules require is 'a short and plain statement of the claim' that will give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests." Id.; *see* Swierkiewicz v. Sorema N.A., 534 U.S. 506 (2002); Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit, 507 U.S. 163, 168 (1993).

In ruling on a FED. R. CIV. P. 12(b)(6) motion, the court must accept all factual allegations pleaded in the complaint as true, and must construe them and draw all reasonable inferences from them in favor of the nonmoving party. Cahill v. Liberty Mut. Ins. Co., 80 F.3d 336, 337-38 (9th Cir. 1996); Mier v. Owens, 57 F.3d 747, 750 (9th Cir. 1995). Moreover, and particularly relevant in the matter at bar, a court generally cannot consider material outside of the complaint (*e.g.*, facts presented in briefs, affidavits, or discovery materials). Branch v. Tunnell, 14 F.3d 449, 453 (9th Cir. 1994); Braco v. MCI Worldcom Communs., Inc., 138 F. Supp. 2d 1260, 1267 (C.D. Cal 2001). A court may, however, consider exhibits submitted with the complaint. Branch v. Tunnell, 14 F.3d 449, 454 (9th Cir. 1994). A court may also consider documents that are not physically attached to the complaint but "whose contents are alleged in [the] complaint and whose authenticity no party questions." Id.

In this matter, Plaintiffs have easily met the standards of FED. R. CIV. P. 8(a) by pleading at least a short and plain statement of each claim alleged in the FAC.

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A. PLAINTIFFS HAVE STANDING UNDER ARTICLE III

Article III of the Constitution limits the power of federal courts to deciding "cases" and "controversies". To meet the "cases and controversies" standard, a plaintiff seeking relief in federal court must show (1) he has suffered an "injury in fact" or is immediately in danger of sustaining such an injury, (2) that the injury is "fairly traceable" to the actions of the defendant, and (3) the injury will likely be redressed by a favorable decision. *See* Bennett v. Spear, 520 U.S. 154, 162 (1997); *see also* Vongrabe v. Sprint PCS, 2004 U.S. Dist. LEXIS 5438 (C.D. Cal. 2004); L.A. v. Lyons, 461 U.S. 95, 102 (1983). Defendants' Motion challenges only the first element of standing (*i.e.*, whether Plaintiffs alleged a particularized injury).

In Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992), the Supreme Court ruled that a plaintiff meets the injury-in-fact requirement by alleging an "invasion of a legally protected interest which is (a) concrete and particularized ... and (b) actual or imminent, not conjectural or hypothetical . . ." (internal quotation marks and citations omitted). "A plaintiff may survive a motion to dismiss for lack of injury in fact by merely alleging that a string of occurrences commencing with the challenged act has caused him injury; at that stage we presume that 'general allegations embrace those specific facts that are necessary to support the claim.'" Wyoming v. Oklahoma, 502 U.S. 437, 464 (1992) (citations omitted). Article III does *not* require a Plaintiff to prove the case on the merits in order to establish standing. "The purpose of the standing doctrine is to ensure that the plaintiff has a concrete dispute with the defendant, not that the plaintiff will ultimately prevail against the defendant." Hall v. Norton, 266 F.3d 969, 976-977 (9th Cir. 2001). Thus, a plaintiff "need not establish causation with the degree of certainty that would be required for him to succeed on the merits, say, of a tort claim." Churchill County v. Babbitt, 150 F.3d 1072, 1078 (9th Cir. 1998). Rather, he need only establish "the 'reasonable probability' of the challenged action's threat to [his] concrete interest." Id. A plaintiff satisfies the requirements of Article III if he can

"show that he personally has suffered some actual or threatened injury as a result of the putatively illegal conduct" of the other party. Gladstone, Realtors v. Village of Bellwood, 441 U.S. 91, 99 (1979); *see also* Warth v. Seldin, 422 U.S. 490, 501 (1975).

Defendants contend Plaintiffs failed to allege injury to themselves under California's Unfair Competition Law, CAL. BUS. & PROF. CODE §§ 17200 - 17210 (the "UCL"), and consequently lack standing to pursue their UCL claims[2]. (Motion at 5:18-5:21.) However, Plaintiffs allege Defendants "are currently advertising the WLS and are accepting 'pre-orders' for WLS subscriptions on their Web sites." (FAC ¶ 4.68.) Defendants' "pre-orders cannot be cancelled, and by placing an order the customer authorizes [Defendants] to charge its credit card if the WLS subscription sought is available." (FAC ¶ 8.7.) Plaintiffs allege due to this activity Defendants are now "caus[ing] harm to plaintiffs including loss of goodwill" (FAC ¶ 8.12), "Plaintiffs have suffered damages in an amount to be determined at trial" (FAC ¶ 14.7), and "consumers and Plaintiffs have been and will continue to be harmed as a result" of Defendants' conduct. (FAC ¶ 8.17.)

Additionally, Plaintiffs allege impending harm, and specifically that "[s]everal of the Plaintiffs derive their entire revenue from services relating to expired domain names, and will be put out of business if the WLS is implemented." (FAC ¶ 4.53.)

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[2]Curiously, Defendants argue Plaintiffs lack Article III standing to bring a CAL. BUS. & PROF. CODE §17200 claim based on Defendants' creation and operation of an illegal lottery because Plaintiffs cannot be harmed by such a lottery if they have not participated in it. (Motion, 6:5-9.) The same Defendants (through the same legal counsel), however, argued in an earlier case against all defendants to this action that plaintiffs' participation in an illegal lottery *barred* them from making a §17200 claim for that lottery due to unclean hands from participating in it. (*See* Corrected Memorandum of Points and Authorities in Support of Defendants Network Solutions, Inc.'s and Verisign, Inc.'s Demurrer to the First Amended Complaint in Smiley v. Internet Corporation for Assigned Names and Numbers et al., Los Angeles Superior Court Case No. BC 254659 (2001), a true and correct copy of which is attached as Exhibit A to Plaintiffs' Request for Judicial Notice in Connection with Motion by Defendants Verisign, Inc. and Network Solutions, Inc. to Dismiss First Amended Complaint for Failure to State a Claim, filed herewith.) Defendants have taken inconsistent positions on this issue and, taken together, Defendants' arguments lead to the illogical conclusion that a party harmed by an illegal lottery may *never* sue the operators of that lottery under CAL. BUS. & PROF. CODE §17200.

"Other[] [Plaintiffs], if not put out of business, will lose their primary source of revenue and the entire goodwill associated with their businesses and business models." (Id.) This threatened injury is alleged as harm that will imminently result if the WLS is formally launched, which Plaintiffs seek to *avoid* by this lawsuit. As the United States Supreme Court has noted, "[one] does not have to await the consummation of threatened injury to obtain preventive relief. If the injury is certainly impending that is enough." (citations) Babbitt v. United Farm Workers Nat'l Union, 442 U.S. 289, 298 (1979).

This case is distinguished from those Defendants cite in which plaintiffs "suffered no individualized injury as a result of the defendant's challenged conduct", but rely solely upon third party harm. *See* Lee v. Am. Nat'l Ins. Co., 260 F.3d 997, 1001 (9th Cir., 2001). Here, Plaintiffs alleged in the FAC (i) both actual and threatened harm to themselves (ii) directly traceable to Defendants, (iii) which will be redressed by an injunction from this Court. The harm alleged is concrete and particularized, and a combination of both actual and imminent. Plaintiffs do not allege conjectural or hypothetical harm, but allege the injuries they are currently suffering and are sure to suffer after Defendants complete WLS deployment. Plaintiffs have suffered harm as a result of Defendants' unfair methods of competition. Therefore, Plaintiffs' allegations plead a "short and plain statement" sufficient to establish standing.

B. PLAINTIFFS ALLEGE FACTS SUFFICIENT TO STATE SEVEN UCL CLAIMS

California's unfair competition law defines "unfair competition" to mean and include "any unlawful, unfair or fraudulent business act or practice and unfair, deceptive, untrue or misleading advertising and any act prohibited by [the false advertising law]." BUS. & PROF. CODE § 17200. The UCL's purpose is to protect both consumers and competitors by promoting fair competition in commercial markets for goods and services. Barquis v. Merchants Collection Assn., 7 Cal. 3d 94, 110 (1972).

The UCL's scope is broad. Kasky v. Nike, Inc., 27 Cal. 4th 939, 950 (2002). By defining unfair competition to include any "*unlawful* . . . business act or practice", the UCL permits violations of other laws to be treated as unfair competition that is independently actionable. Id., *citing* Cel-Tech Communications, Inc. v. Los Angeles Cellular Telephone Co., 20 Cal. 4th 163, 180 (1999). By defining unfair competition to include also any "*unfair* or *fraudulent* business act or practice", the UCL sweeps within its scope acts and practices not specifically proscribed by any other law. Id. A private plaintiff may bring a UCL action even when "the conduct alleged to constitute unfair competition violates a statute for the direct enforcement of which there is no private right of action." Stop Youth Addiction, Inc. v. Lucky Stores, Inc., 17 Cal. 4th 553, 565 (1998). To state a claim under the UCL based on false advertising or promotional practices, "it is necessary only to show that 'members of the public are likely to be deceived.'" Committee on Children's Television, Inc. v. General Foods Corp., 35 Cal. 3d 197, 211 (1983); *accord*, Bank of the West v. Superior Court, 2 Cal. 4th 1254, 1267 (1992).

1. Plaintiffs State a Claim for Violation of B&P 17200 predicated on Illegal Lottery

Plaintiffs allege Defendants committed unfair competition by violating CAL. PENAL CODE § 319, *et seq.* proscribing lotteries. Specifically, Defendants require consideration (*i.e.* payment of money) for the chance (*i.e.*, whether a current domain name owner abandons its property) to win the valuable domain name prize. Under California law, a lottery has three essential elements: (1) a prize; (2) chance; and (3) consideration. California Gasoline Retailers v. Regal Petroleum Corporation, 50 Cal.2d 844, 851 (1950). The California Supreme Court held the Penal Code definition of a "lottery" is materially indistinguishable from the definition of a "lottery game" under the California State Lottery Act of 1984 (CAL. GOV. CODE §§ 8880-8880.68). Western Telcon, Inc. v. California State Lottery, 13 Cal.4th 475, 484 (1996).

Defendants seek to dismiss Plaintiffs' First Cause of Action under two theories: 1) the WLS does not distribute prizes among multiple competing participants, and 2) Plaintiffs fail to allege that WLS involves the necessary element of chance. (Motion at 8:10-8:14.)

a. There Are Multiple Participants in the WLS Lottery

Defendants claim their lottery is not unlawful because only one person may enter to win each particular domain name price. (Motion at 8:8-8:11.) To the contrary, the chance of one participant winning a single prize within the context of a larger scheme effecting multiple participants can constitute an illegal lottery. *See e.g.,* Western Telcon, Inc., 13 Cal.4th at 484.

The Lottery Act defines a "lottery game" as "any procedure authorized by the Commission whereby *prizes* are distributed among persons who have paid, or unconditionally agreed to pay, for tickets or shares which provide the opportunity to win such prizes." CAL. GOV. CODE § 8880.12 (emphasis added). There is no requirement that the prize come from a particular source such as the consideration paid by the participants. *See* 71 Op.Atty.Gen.Cal. 139 (1988). Schemes ranging from "Scratchers" (a variety of off-line "instant ticket games" in which players win prizes ranging from a free ticket to several thousand dollars) to a raffle in which winners won haircuts have been held to constitute lottery games. *See* Western Telcon, Inc., 13 Cal.4th at 484; *see also* 72 Op.Atty.Gen.Cal. 143 (1989).

In the present matter, Defendants plan to sell multiple WLS subscriptions and award multiple domain name prizes. The WLS is akin to a scratch-and-win where the participant must scratch the card to see if it has won a prize. Like the Defendants' WLS scheme, there is only one participant for each scratch card. Some participants in the scratch game will be successful and win a cash prize. The fact that each scratch game has only one participant does not constitute a defense to an illegal lottery charge. Similarly, some WLS subscribers will be successful and win a domain name prize. In both the scratch game and WLS, the vast majority of players

will pay for the chance but win nothing. The scratch-and-win game is the same as Defendants' WLS for purposes of California's lottery law. Both have many participants, but just one participant per prize.

b. The WLS Lottery Relies on Chance from the Perspective of the Consumer

Defendants' claim that the WLS is not a lottery because domain names are not awarded by "mathematical" chance is similarly unfounded.[3] Defendants assert "uncertainty over whether a person will allow his domain name registration to lapse...does not constitute chance". (Motion at 8:21-8:24.) In support of that proposition, Defendants cite only a century-old opinion from a Massachusetts state court. However, California law is to the contrary: "whether a prize is distributed by chance is determined from the perspective of the players." 76 Op.Atty.Gen.Cal. 266 (1993). The fact that the success or failure of a WLS subscription may turn on a third party domain name owner's decision to allow a registration to lapse is irrelevant because it is *not within the control of the WLS subscriber*. The "chance" element is present because "as to the purchaser it is uncertain, it is chance that luck and good fortune will give a large return for a small outlay." People v. Hecht, 119 Cal. App. Supp. 778, 787 (1931).

In People v. Hecht, a defendant clothing store owner sold memberships in a "suit club" at a price of two dollars per week. The suit club membership contract was ostensibly a standard agreement for the purchase of a tailor-made suit for the sum of $60. The contract obligated the seller to deliver a tailored garment upon payment of the difference between the amount paid in membership fees and $60 at any time during the life of the contract. In contrast to a standard purchase agreement, however, the contract provided that each week, one member of the club

[3]As noted above, Plaintiffs expressly allege that the WLS involves the distribution of prizes by chance (FAC ¶ 5.11), which is sufficient to defeat Defendants' Motion under Rule 12(b)(6).

would be selected by defendant to receive a free suit.

The Hecht Defendant was convicted of setting up and proposing a lottery. The court rejected defendant's argument that the choice of persons to receive the suit was not by lot or chance noting that:

> With the purchaser, what prize he might obtain was a mere matter of lot and chance. The scheme involved substantially the same sort of gambling upon chances as in any other kind of lottery. It appealed to the same disposition for engaging in hazards and chances with the hope that luck and good fortune may give a great return for a small outlay, and as we think within the general meaning of the word "lottery", and clearly within the mischief against which the statute is aimed.

Id. The Court recognized that "[t]he vice of the whole scheme . . .is found in the 'chance' which the customer takes when he pays his money under the terms of the contract . . . if he fails once or twice, or more times, to win the prize, and discontinues paying, he loses all that he has paid." Id.

The WLS is similar to the Hecht scheme. Just as whether the Hecht defendant distributed suits was based upon a decision by someone other than the suit club member, whether Defendants distribute the domain name is based upon a decision by someone other than the WLS subscriber. Both schemes involve a decision rather than a random drawing. But, both are lotteries because they involve "chance" – that is, the subscriber is not responsible for whether she wins the prize. The WLS subscriber's likelihood of actually registering the domain name is "entirely upon others over whom and whose actions the beneficiary has no control." 23 Op.Atty.Gen.Cal. 260 (1900); *see also* Public Clearing House v. Coyne, 194 U.S. 497 (1904); Wolf v. F.T.C., 135 F.2d 564 (7th Cir. 1943). Also, like the Hecht scheme, if the WLS customer "fails once or twice, or more times, to win the prize, and discontinues paying, he loses all that he has paid" and consequently will pay the WLS fee year-after-year. *See* Hecht, 119 Cal. App. Supp. at 787. Therefore, Defendants' WLS scheme is an illegal lottery pursuant to CAL. PENAL CODE § 319 and a commensurate violation of the UCL.

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