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UNITED STATES DISTRICT COURT

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; VERISIGN, INC., a Delaware Corporation; NETWORK SOLUTIONS, INC., a Delaware Corporation; ENOM, INC., a Washington Corporation; ENOM FOREIGN HOLDINGS CORPORATION, a Washington Corporation; and DOES 1-10, inclusive,

Defendants.

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

I. INTRODUCTION

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

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

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

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

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

II. ARGUMENT

A. Plaintiffs' Article III Standing Arguments Are Factually And Legally Meritless

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

[1] Plaintiffs strain to convince the Court that WLS has launched. (Opp'n at 1:2-4, 2:6, 3 n.1.) Even if the Complaint alleged this fact, rather than the opposite fact (FAC ¶ 4.67 ("VeriSign plans to launch the WLS")), and even if the opposition did not contradict this statement (Opp'n at 9 (Plaintiffs seek to prevent "formal[] launch" of WLS)), the 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.

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

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

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

Plaintiffs also cite general allegations, not within their UCL claims, that do not appear to have any connection with these claims. (Opp'n at 8-9 (citing FAC ¶¶ 4.53, 4.68, 14.7).) These similar allegations either contain no mention of harm to Plaintiffs (*see* FAC ¶ 4.68) or, again, are purely conclusory and unsupported by any specific factual allegations (*see id.* ¶¶ 4.53 (Plaintiffs will be "put out of business if the WLS is implemented" or "lose . . . goodwill associated with their businesses and business 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).

loss of income); *Regence Blueshield v. Philip Morris, Inc.*, 40 F. Supp. 2d 1179, 1184-85 (W.D. Wash. 1999) (plaintiffs' alleged injuries were "completely derivative" of injuries to third persons and were therefore too remote to confer standing). This is because Article III standing requires a plaintiff to have suffered injury that is not only actual and particularized, but *direct*. *See Rubin v. City of Santa Monica*, 308 F.3d 1008, 1019-20 (9th Cir. 2002) (affirming dismissal for lack of Article III standing where plaintiff failed to allege that he "*directly* suffered an injury in fact") (emphasis added), *cert. denied*, 124 S. Ct. 221, 157 L. Ed. 2d 136 (2003); *Scott v. Pasadena Unified Sch. Dist.*, 306 F.3d 646, 656 (9th Cir. 2002) (a plaintiff alleging future injury must be in immediate danger of sustaining "*direct*" injury as a result of the challenged conduct), *cert. denied*, 538 U.S. 1031, 123 S. Ct. 2071, 155 L. Ed. 2d 1059 (2003). The Court should therefore dismiss all seven of the UCL claims because Plaintiffs have not alleged that they have been, or imminently will be, *directly* injured by VeriSign's and NSI's alleged misconduct.[4]

B. Each Of The UCL Claims Also Fails For Independent Reasons

Wholly apart from Plaintiffs' lack of standing to pursue UCL claims, each of their purported UCL claims also fails under substantive state law.

1. The "Lottery" Claim Suffers from Fundamental Legal Defects

In their opposition, Plaintiffs try to show that WLS involves multiple "contestants," and is thus an illegal lottery, by comparing WLS with "scratch-and-win" lottery games, such as California State Lottery "Scratchers." (Opp'n at 11-12.) Their

[4] In what appears to be a feeble attempt to discredit VeriSign and NSI, Plaintiffs have submitted a brief filed by these parties in an unrelated state court action, *Smiley v. Internet Corp. for Assigned Names & Numbers*, Los Angeles County Superior Court, Case No. BC 254659 (2001). Nothing about VeriSign's and NSI's legal positions in *Smiley* is inconsistent with their positions here. In this action, VeriSign and NSI rely on longstanding, well-established federal law requiring a plaintiff to meet Article III standing requirements in order to sue in federal court. In *Smiley*, VeriSign and NSI relied on longstanding, well-established state law prohibiting, as a matter of equity, a party who participated in an allegedly illegal lottery from recovering its losses stemming from the lottery. Notably, Plaintiffs do not dispute that the law supports the positions advanced by VeriSign and NSI in both cases. Moreover, Plaintiffs' sideshow in no way addresses, much less cures, their Article III standing problem in this case.

analogy is fundamentally flawed, however, because Scratchers games, unlike WLS, involve multiple participants *competing against each other*, for a chance to win the *same* prize or set of prizes. *See Trinkle v. Cal. State Lottery*, 105 Cal. App. 4th 1401, 1404-05, 129 Cal. Rptr. 2d 904 (2003) (each Scratchers ticket "affords the purchaser an opportunity to win that is equal to that of every other ticket purchased in that particular game" and "may award the holder a fixed sum of money or a chance in the 'Big Spin' draw"). In contrast, even though there will be multiple WLS subscribers, each subscriber *alone* has the chance of "winning" the particular domain name registration (the "prize") covered by its WLS subscription. Indeed, WLS subscribers each seek *different*, *unique* domain names and "compete" against no other "player" for that prize. Thus, unlike Scratchers, WLS does not involve, as all illegal lotteries must, multiple participants vying against each other for a single prize or set of prizes. *See Gayer v. Whelan*, 59 Cal. App. 2d 255, 259, 138 P.2d 763 (1943); Cal. Penal Code § 319.

Plaintiffs' theory, taken to its logical conclusion, would have the absurd result of transforming common business practices into illegal lotteries. For example, investors can purchase a right of first refusal to acquire certain corporate stock. Multiple investors can hold identical rights of first refusal, but each investor's right corresponds to a unique set of shares. Similarly, with WLS, there may be multiple subscribers purchasing the right to be the first in line to register domain names, but each subscription corresponds to a unique domain name. Rights of first refusal hardly are illegal lotteries, because the investors holding the rights do not compete with each other to win the same "prize." WLS, therefore, could not be an illegal lottery.

Plaintiffs' "chance" allegations are similarly deficient. As VeriSign and NSI explained in the motion, the "chance" associated with illegal lotteries refers to the distribution of prizes on the basis of random mathematical probability. (Mot. at 8.) A domain name registrant's *decision* whether to renew his or her domain name is not the sort of chance associated with illegal lotteries. (*Id.*) Plaintiffs unsuccessfully attempt to overcome this defect by citing *People v. Hecht*, 119 Cal. App. Supp. 778, 3 P.2d 399

(1931) (Opp'n at 12-13), a superior court, appellate division case which held that distribution of prizes based on the *scheme operator's* decisions constituted a lottery. Even under *Hecht*, however, WLS still is not an illegal lottery.

In *Hecht*, the operators of the alleged lottery were the very clothing salesmen whose "decisions" determined which members of the suit club would be selected to receive a suit during a particular week. 119 Cal. App. Supp. at 784-87. Here, however, Plaintiffs admit that the alleged lottery operators, VeriSign and NSI (FAC ¶¶ 5.10-5.20), "do not control" whether a particular domain name becomes available for registration (*id.* ¶ 5.18); this is a matter solely within the control of the current registrant (*id.*). Thus, the element of "chance" in WLS, to the extent it exists at all, is entirely beyond the control of VeriSign and NSI. It is not a random mathematical probability, determined in advance by VeriSign and NSI, or an arbitrary decision made by them in their own discretion. *Hecht* therefore does not cure Plaintiffs' deficient "chance" allegations. Accordingly, Plaintiffs have failed to allege an "unlawful" business practice under the UCL based on Defendants' alleged operation of an illegal lottery, and the Court should dismiss the First Claim.

2. Plaintiffs Fail To State a Claim for "Unlawful" Business Practices Based on Alleged Violations of the CLRA

a. Plaintiffs have not alleged the most basic elements of a CLRA violation

Plaintiffs incorrectly contend it is of no consequence that they are not consumers and have suffered no damage, as required by the Consumers Legal Remedies Act ("CLRA"), Cal. Civ. Code §§ 1750-1784, because they supposedly need not plead the elements of a CLRA violation to state their Second Claim under the UCL. (Opp'n at 14-15.) To the contrary, where, as here, a plaintiff bases its UCL claim for "unlawful" business practices on violations of another law (here, the CLRA), the plaintiff must plead and prove the elements of the predicate offense. *See People v. Duz-Mor Diagnostic Lab., Inc.*, 68 Cal. App. 4th 654, 673, 80 Cal. Rptr. 2d 419 (1998) (affirming judgment for defendant under the "unlawful" prong because plaintiff did not

establish a violation of the predicate statute). Plaintiffs have not alleged, and cannot allege, the elements of a CLRA violation. Indeed, they tacitly admit by their argument that they have not done so.[5]

First, a plaintiff's status as a "consumer" is a substantive element of a CLRA claim. Plaintiffs are not "consumers," as defined by the CLRA, of WLS. Plaintiffs only allege that they each "own[] at least one *domain name* . . . and [are] a consumer of *domain names* to that extent." (FAC ¶ 2.15 (cited Opp'n at 14).) As VeriSign and NSI pointed out in the motion (and Plaintiffs ignored), however, the purported "goods and services" that are the subject of the alleged CLRA violation are *WLS subscriptions*, not domain names. Plaintiffs have not alleged that they sought or acquired any WLS subscriptions. Moreover, Plaintiffs conveniently gloss over the fact that a "consumer" under the CLRA is one who purchases or leases goods or services "*for personal, family, or household purposes*." Cal. Civ. Code § 1761(d) (emphasis added) (cited Mot. at 9). Plaintiffs cannot meet this requirement because, as they freely admit, they are *businesses* that purportedly assist consumers seeking to register recently deleted domain names. (FAC ¶¶ 1.4, 2.1-2.8.)

Second, as VeriSign and NSI demonstrated in their moving papers (Mot. at 9), Plaintiffs have not alleged, as they must, that they suffered damage from VeriSign's and NSI's alleged wrongdoing. *See* Cal. Civ. Code § 1780(a). Indeed, Plaintiffs could not have suffered any cognizable damage under the CLRA because they do not allege that they sought or acquired any WLS subscriptions. Given Plaintiffs' allegations to date, the best Plaintiffs could allege is that they have been harmed by WLS as competitors of VeriSign and NSI. The CLRA, however, is not designed to redress "competitive injuries" (Opp'n at 14-15 & n.4). *See Von Grabe v. Sprint PCS*, 312 F. Supp. 2d 1285, 1302-03 (S.D. Cal. 2003) ("consumers" who may sue under CLRA

[5] Plaintiffs' reliance on cases that did not involve the UCL's "unlawful" prong, such as *Freeman v. Time, Inc.*, 68 F.3d 285, 289 (9th Cir. 1995) (cited Opp'n at 14), is misplaced, because different legal elements apply to claims for "fraudulent" and "unfair" business practices than to claims for "unlawful" conduct. (*See* Mot. at 7.)

cannot allege "competitive injury"). Thus, even if Plaintiffs had alleged "competitive injury," which they have not, this allegation would not save their Second Claim.

b. Plaintiffs have not alleged a representation by VeriSign

Plaintiffs' CLRA claim also fails because Plaintiffs have not sufficiently alleged a representation by VeriSign. Plaintiffs contend that they have provided "fair notice" to VeriSign and NSI of VeriSign's alleged representation by alleging that VeriSign, "both by itself and acting by and through the Participating Registrars, is representing to consumers that they will receive an economic benefit . . . the earning of which is contingent on an event to occur subsequent to the consummation of the transaction. . . ." (Opp'n at 15 (quoting FAC ¶ 6.5).) In fact, Plaintiffs have done no more than parrot the statutory language of the CLRA, Cal. Civ. Code § 1770(a)(17), while providing *no* facts supporting the element of a deceptive "representation."

Moreover, Plaintiffs' opposition simply underscores the fact that Plaintiffs have not identified any statement *made by* VeriSign or expressly at its direction. As set forth in the motion, the UCL expressly prohibits vicarious liability. Plaintiffs do not, because they cannot, cite to *any* allegation in the Complaint to support their contention that VeriSign made any misstatements or is the "moving force" behind individual registrars' advertising of WLS. Plaintiffs simply have not alleged facts indicating that VeriSign *personally participated* in the allegedly unlawful practices and exercised *unbridled control* over them. *See Emery v. Visa Int'l Serv. Ass'n*, 95 Cal. App. 4th 952, 960, 116 Cal. Rptr. 2d 25 (2002). (Mot. at 10.)

c. NSI's sole alleged representation is not "likely to deceive" a reasonable consumer

NSI's alleged representation is not "fraudulent" because it discloses, on its face, the contingent nature of the benefit to be derived from a WLS subscription. (Mot. at 10-11.) *See Freeman*, 68 F.3d at 289-90 (dismissing UCL claim where promotions, considered in their entirety, disclosed conditions on their face). Plaintiffs' irrelevant observations about the differences between LoJack and WLS (Opp'n at 16-17) do not

address, much less overcome, this fatal flaw in their allegations. The full NSI ad is now before the Court. Plaintiffs do not deny that the Court may consider it. They do not explain what about the ad, viewed as a whole, is likely to deceive a reasonable consumer. They could not do so because, as discussed in the motion, the ad discloses on its face the very contingency Plaintiffs contend is hidden. (Mot. at 10-11.) Consequently, for each of these reasons, the Court should dismiss the Second Claim.[6]

3. The Complaint's Unsupported Legal Conclusions Are Insufficient To Sustain the "Likelihood of Success" Claim

In their Fourth Claim, Plaintiffs allege that VeriSign and NSI have committed a "fraudulent" business practice by running ads for WLS that deceive consumers about "the likelihood that a subscriber will obtain the domain name to which it subscribes." (FAC ¶¶ 8.6, 8.8.) As noted above, to allege such a claim, Plaintiffs "must state with reasonable particularity the facts supporting the statutory elements" of the alleged UCL violation. *GlobeSpan, Inc.*, 151 F. Supp. 2d at 1236. In the case of an allegedly "fraudulent" business practice, the statutory elements include (1) a business practice (2) that is likely to deceive a reasonable member of the audience at which it is aimed. *Freeman*, 68 F.3d at 289-90. As shown in the motion, and unrebutted by Plaintiffs, the Complaint fails to state with reasonable particularity any facts supporting either of these elements.

With regard to the element of "deception," Plaintiffs conclusorily allege that Defendants' ads "are likely to deceive consumers" because they fail to disclose that most currently registered domain names will be renewed and, consequently, that "most WLS subscriptions will not result in the registration of any domain name." (FAC

[6] Contrary to Plaintiffs' mischaracterizations, VeriSign and NSI never argued that WLS and LoJack are identical in all respects. They do share a common feature that is significant for this claim, however: Each provides a contingent economic benefit. Like earthquake insurance and smoke detectors, they deliver no benefit at all (other than peace of mind) unless an uncertain future event occurs. *If Plaintiffs were right that NSI's ad for WLS violates the CLRA despite its express disclosure of the contingent nature of the benefit provided by WLS, no manufacturer could lawfully advertise the benefits of any of these products.*

¶¶ 8.12-8.14.) As pointedly stated in the motion, however, "*Nowhere have Plaintiffs alleged that this fact* [*i.e.*, that most registrations will be renewed] *is unknown to the reasonable WLS subscriber.*" (Mot. at 12.) Plaintiffs do not address this defect at all in their opposition. They point to no allegation in the Complaint that consumers are ignorant of this fact, because none exists. Instead, Plaintiffs fall back on their unsupported incantation of the bare legal standard – that consumers are "likely to be deceived." (Opp'n at 17-18.) This allegation obviously does not "state with reasonable particularity the *facts*" supporting the element of deception.

If reasonable consumers already know that most domain name registrations will be renewed, then Defendants' alleged nondisclosure of this fact is *un*likely to deceive anyone. Moreover, as shown in the motion, the Complaint's only factual allegations that touch on the issue of what consumers know tend to *contradict* Plaintiffs' theory. (Mot. at 11-12.) In particular, Plaintiffs acknowledge that they developed their pay-if-successful business models (under which they purportedly do not charge customers until they register a domain name for them) in response to the market's recognition of the very facts they claim are hidden – *i.e.*, that "most currently registered domains *will be renewed*, and that backorders on currently-registered names are therefore of *inherently uncertain value*." (FAC ¶¶ 1.4, 4.54 (emphasis added).) Plaintiffs correctly note that a Rule 12(b)(6) motion "tests only the sufficiency of [their] allegations" (Opp'n at 18), but here it is the Plaintiffs' allegations themselves that negate the Fourth Claim.[7]

[7] Neither *Podolsky v. First Healthcare Corp.*, 50 Cal. App. 4th 632, 259 Cal. Rptr. 191 (1996), nor *People v. Dollar Rent-A-Car Systems, Inc.*, 211 Cal. App. 3d 119, 58 Cal. Rptr. 2d 89 (1989) (cited Opp'n at 18), has any relevance to whether Plaintiffs have alleged sufficient facts to support the Fourth Claim. Both cases were decided on the evidence – *Dollar* after a trial, and *Podolsky* after summary judgment. In both cases, consumers testified that they were actually misled by the defendants' practices, and had been unaware of the facts that were concealed from them. *Podolsky*, 50 Cal. App. 4th at 638-41; *Dollar*, 211 Cal. App. 3d at 123-25. Here, by contrast, Plaintiffs have not *alleged* any facts supporting their theory that consumers are unaware that domain names are usually renewed, and the allegations they have made imply that consumers are well aware of this circumstance.

Furthermore, Plaintiffs totally ignore the other fatal defect plaguing this claim – that they have not alleged with reasonable particularity any advertisement of VeriSign or NSI that could support the claim (*i.e.*, the offending "business practice"). (*See* Mot. at 13.) Indeed, Plaintiffs have identified *no* specific statement by VeriSign that they contend is misleading. (*Id.*) And the only statement by NSI alleged in support of this claim is nonactionable "puffery." (*Id.*) The opposition does not dispute this, and thereby concedes the issue. Accordingly, the Court should dismiss the Fourth Claim.

4. Plaintiffs Have Not Identified Any Allegations Supporting the Deception Element of Their "Expiration Dates" Claim

Plaintiffs' Fifth Claim alleges that VeriSign and NSI have committed another "fraudulent" business practice by proposing to offer WLS subscriptions without advising consumers to "check the expiration date of any domain for which they are purchasing a WLS subscription." (FAC ¶¶ 9.4-9.7.) As with the preceding claim, and as shown in the moving papers (Mot. at 13-15), Plaintiffs fail to "state with reasonable particularity the facts supporting" their contention that this practice is "likely to deceive" a reasonable WLS subscriber. *Supra* pp. 10-11. As to this claim, moreover, Plaintiffs must plead the facts supporting the element of deception with the specificity required by Federal Rule 9(b), because they expressly aver that Defendants are knowingly "defrauding consumers" (FAC ¶¶ 9.7-9.8). *See Vess v. Ciba-Geigy Corp. USA*, 317 F.3d 1097, 1104-05 (9th Cir. 2003). Far from identifying any facts in support of the necessary element of "deception," the opposition seeks to avoid the impact of the allegations that do appear in their Complaint, which negate deception, and then relies on "facts" that Plaintiffs have not alleged anywhere. (Opp'n at 19.)

First, Plaintiffs ignore the Complaint's exhibits and other judicially noticeable sources, which demonstrate that, far from concealing the expiration dates of domain names, VeriSign and all registrars that do business in the .com or .net TLDs (previously including NSI) are actively publishing those dates to the world, free of charge, through instant-response, Internet-accessible WHOIS databases. (Mot. at 14-15.) Plaintiffs