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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

half-heartedly ask the Court to ignore these facts, asserting falsely that Defendants merely "allege" them. (Opp'n at 19.) To the contrary, and as Plaintiffs do not deny, the facts appear in Plaintiffs' own exhibits and in judicially noticeable sources, both of which this Court may consider when deciding this motion and both of which take precedence over and supercede Plaintiffs' contrary, conclusory allegations. *See United States v. Ritchie*, 342 F.3d 903, 907-08 (9th Cir. 2003) (court may assume the truth of documents attached to a pleading). Nothing in the Complaint explains how a reasonable WLS subscriber could be deceived by Defendants' alleged failure to suggest that she check free, public sources of information.

Second, as stated in the motion, "Plaintiffs have not alleged that a reasonable WLS consumer *could not* or *would not* check this information before it purchased a WLS subscription." (Mot. at 15.) Plaintiffs do not disagree with, and point to nothing in the Complaint that contradicts, this true statement. Instead, they purport to describe what "the evidence will show" – namely, that expiration dates are "not always" public and that some WLS subscribers do not know about WHOIS databases. (Opp'n at 19.) Because neither these alleged "facts," nor anything resembling them, appears in the Complaint, they cannot be used to defeat this motion. *See Schneider v. Cal. Dep't of Corrections*, 151 F.3d 1194, 1197 n.1 (9th Cir. 1998) ("new" allegations contained in opposition "are irrelevant for Rule 12(b)(6) purposes"). The Complaint does allege, however, that "[m]ore than ninety percent (90%) of the domain name orders Plaintiffs receive from consumers relate to domain names that are scheduled to be deleted" (FAC ¶ 4.39), which, if true, strongly indicates that consumers *do* check expiration dates before attempting to register a domain name, contrary to this claim's basic premise.

Because domain name expiration dates are publicly available, and because there is every reason to expect that a reasonable person considering whether to buy a one-year WLS subscription would check public sources to ascertain if the underlying domain name is set to expire during the subscription period (and nothing in the Complaint suggests otherwise), Plaintiffs have not sufficiently alleged that reasonable

WLS subscribers are "likely to be deceived" if Defendants do not tell them to check expiration dates.[8]

5. Plaintiffs Have Not Responded to VeriSign and NSI's Showing that the "Protection" Claim Is Legally Defective

In the motion, VeriSign and NSI demonstrated that Plaintiffs' Sixth Claim – which asserts that Defendants have violated the UCL by marketing WLS to current domain name registrants as "protection" – fails for three independent reasons. (Mot. at 15-17.) Plaintiffs address *none* of these points. Instead, they attempt to invoke the contract-law doctrine of "preexisting duty" (Opp'n at 19-20), which is neither factually nor legally relevant to their UCL claim.

First, Plaintiffs ignore the fatal defects discussed in the opening memorandum. VeriSign and NSI showed that a fundamental legal principle – that a party may lawfully threaten to do that which it "has a legal right to do" – forecloses this claim, because the Complaint admits that VeriSign is legally entitled to delete a domain name registration after all grace periods have expired. (Mot. at 15 (citing *McKay v. Retail Auto. Salesmen's Local Union No. 1067*, 16 Cal. 2d 311, 321, 106 P.2d 373 (1940)); FAC ¶ 10.7.) Plaintiffs do not deny that VeriSign has this legal right; they do not challenge the validity of this legal principle; they do not dispute that it applies here to render Defendants' so-called "threats" non-actionable. Plaintiffs likewise ignore VeriSign and NSI's showings that they have failed to "allege with reasonable particularity" (i) the

[8] Although Plaintiffs may think it unwise to buy a WLS subscription for a domain name not set to expire within the year, the fact that the wisdom of such a purchase can be debated hardly establishes that it was induced by fraud. As discussed in the motion, a subscriber may rationally decide that the price of the subscription is justified by (i) the possibility that the current registrant will cancel its domain name registration before it expires or (ii) the right to renew the subscription for future periods, when the registration *is* scheduled to expire. (Mot. at 15 n.11.)

Reading only the opposition, moreover, one might be misled into concluding that domain name registrations generally last 100 years. (*E.g.*, Opp'n at 2-3 ("[D]omain 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.").) In the Complaint, however, Plaintiffs concede that "most registrars" limit registration terms "from a minimum of one year to a maximum of ten years." (FAC ¶ 4.25.)

marketing statements in which VeriSign and NSI supposedly sell "protection" and (ii) the facts indicating that such statements are "likely to deceive" a reasonable domain name registrant. (Mot. at 16-17.) As each of these arguments is unopposed, the Court should dismiss the Sixth Claim.

The sole argument Plaintiffs urge in support of the Sixth Claim is the novel one that WLS subscription sales to current domain name registrants violate the UCL because they lack *consideration*. (Opp'n at 19-20 (citing Cal. Civ. Code § 1605).) According to their new theory (not pleaded in the Complaint), WLS subscriptions could never confer a benefit on current registrants, because current registrants already have the right to redeem an expired domain name during the "Redemption Grace Period." (*Id.*) This is disingenuous. The "Redemption Grace Period" lasts for a finite period of time. As Plaintiffs admit, WLS would enable a current registrant to obtain a registration for an expired domain name *after* the Redemption Grace Period has lapsed. (FAC ¶¶ 4.31-4.33, 4.48-4.49 (WLS activates after lapse of all grace periods).) Absent a WLS subscription, the registrant would, at that point in time, have no greater right or opportunity to register the name than any other hopeful contender. (*Id.* ¶ 4.49 (deleted names are available on a first-come, first-served basis).) Thus, Plaintiffs' own factual allegations negate their "no consideration" theory.[9]

6. <u>WLS Would Not Impair Any Person's Property Interests</u>

In the Seventh Claim, Plaintiffs allege that, by offering WLS, VeriSign and NSI, like a self-dealing bank, valet parking attendant, or coat check, are selling contingent future interests in property (domain names) that they do not own, and that this practice is "fraudulent" and "unfair" under the UCL. In the opening memorandum, VeriSign and NSI showed that unregistered (or "deleted") domain names "do[] not exist and . . .

[9] In any event, the doctrine of consideration is part of the law of contracts. Plaintiffs cite no case law, and Defendants are aware of none, in which a court applied Civil Code section 1605 to find or support a *UCL* violation. Fundamentally, it cannot be the law that any contract lacking in consideration gives rise to a UCL claim.

belong[] to *no one*," and that, accordingly, they have no legal duty to "hold" an unregistered domain name for the benefit of any person. (Mot. at 17.)

Plaintiffs' sole response is to deny the allegations of their own pleading. Casting their allegations aside, Plaintiffs assert that "Defendants *misrepresent* that Plaintiffs 'admit that a WLS subscription will only be activated if and when the current registrant "abandons" the domain name registration.'" (Opp'n at 20 (emphasis added).) However, there was no misrepresentation. In the Complaint's first substantive paragraph, Plaintiffs expressly and unambiguously allege:

> Inherent in the nature of the service is that a consumer will receive no benefit from purchasing a WLS "subscription" *unless and until* the current registrant of the domain name . . . *decides to abandon it*, which is unlikely.

(FAC ¶ 1.1 (emphasis added).) Plaintiffs repeat this alleged fact in the opposition. (Opp'n at 2.) The Complaint goes on to explain the connection between abandoning a domain name and activation of WLS. Plaintiffs concede, for example, that a WLS subscription would succeed only for domain names that have completed the deletion cycle. (FAC ¶ 4.55 ("only about 23%" of WLS subscriptions will succeed "because only 23% of domain names *are deleted* each year") (emphasis added), ¶ 4.58 (WLS operates only on domain names that "are allowed to expire"), ¶ 5.18 (success of WLS subscriptions "depend[s] upon the decision of the current registrant to renew the domain name"), ¶ 6.5 (WLS results in registration of a domain name only in "the unlikely event the current registrant abandons the subscribed domain name").) The Complaint further concedes that VeriSign has the right to delete a domain name registration after the registrant abandons it (*i.e.*, allows all renewal periods to lapse) (¶ 10.7), and that deleted domain names "do not exist" (¶ 4.24 n.6).

As these allegations demonstrate, WLS does not "seize" a domain name. It merely provides a WLS subscriber the right to register a domain name after a prior registration for the same domain name has been deleted and the former registrant has lost all rights in the deleted domain name.

Plaintiffs' citation to *Kremen v. Cohen*, 337 F.3d 1024 (9th Cir. 2003), does not change this result. In *Kremen*, the plaintiff alleged that he was the *current* registrant of a domain name, "sex.com," and that the defendant, without authorization, transferred the registration to a third party in derogation of his *existing* property rights in the name. *Id.* at 1029-30. Plaintiffs, however, who admit that deleted domain names are registered to *no one* and "do not exist" (FAC ¶¶ 4.24 n.6, 4.33 (deleted domain names are "unregistered")), do not and cannot allege that WLS would infringe upon any person's property rights.[10]

Finally, Plaintiffs' argument that WLS would "preclude" them from competing to register some deleted domain names (Opp'n at 21) has no relevance to or bearing upon this claim, which advances the quite different theory that Defendants are selling property interests that do not belong to them. The Seventh Claim is incurably defective and should be dismissed.

7. Plaintiffs Have Not Stated a UCL Claim Based on Violations of the FTCA

a. California may not override Congress' decision to prohibit private enforcement of the FTCA

Plaintiffs may not privately enforce the Federal Trade Commission Act ("FTCA"), 15 U.S.C. §§ 41-58, by recasting a claim under that statute as one brought under the UCL. Plaintiffs do not dispute that Congress has unambiguously decided that no private party may bring an action to enforce the FTCA. (*See* Mot. at 18.) In these circumstances, state law, including the UCL, may not be used to undermine clear congressional intent to commit to a public agency the exclusive responsibility for enforcing a federal statute. Indeed, this Court applied precisely this principle in *Summit Technology Inc. v. High-Line Medical Instruments, Co.*, 933 F. Supp. 918, 943 n.21 (C.D. Cal. 1996).

[10] They could not allege, for example, that a registrant that has abandoned its domain name registration may "exclusive[ly] possess[] or control" the fully expired domain name, in which no one has any rights. *See Kremen*, 337 F.3d at 1030.

In that case, the Court rejected the plaintiff's attempt to maintain a UCL claim "that [was], in fact, an attempt to state a claim under the federal FDCA [*i.e.*, Food, Drug, and Cosmetic Act]." *Id.* The Court reasoned that, even if the UCL may be used to redress violations of other state laws providing no private right of action, this was *not* true if "federal law preempts such an action." *Id.* at 943 & n.21. The FDCA, like the FTCA, precludes private civil enforcement. *Id.* at 932-33. This Court held, therefore, that the plaintiff could not predicate a UCL claim on this particular federal statute. *Id.* at 943 n.21. For the same reason, Plaintiffs here cannot predicate their UCL claim on alleged violations of the FTCA.[11]

b. Plaintiffs have alleged no FTCA violation

Plaintiffs do not dispute, and therefore implicitly concede, that the meaning of "deceptive" under the FTCA is essentially the same as the meaning of "fraudulent" under the UCL. In fact, they cite only UCL cases, and not a single FTCA case, in support of their FTCA argument. (Opp'n at 22-23.) As VeriSign and NSI have shown, Plaintiffs' Eighth Claim is, at bottom, a repackaging of their defective Fourth Claim under the UCL. (Mot. at 18-19.) Consequently, for the same reasons that the Fourth Claim is legally flawed (*supra* pp. 10-12; Mot. at 11-13), the Court should dismiss Plaintiffs' Eighth Claim, which fails to state any violation of the FTCA.

C. The Complaint's Legal Conclusions Are Insufficient To State An Antitrust Tying Claim

Plaintiffs do not even attempt to respond to most of the reasons set forth in the motion for why they have not stated a tying claim under section 1 of the Sherman Act.

[11] Plaintiffs contend that "Defendants' violation of the FTC Act is no different than any other violation of law which private citizens cannot directly assert but can use as the basis for a UCL claim." (Opp'n at 22.) However, the cases they cite in support of this assertion (*id.* at 22 n.5) all involve violations of other state laws and, therefore, are inapposite. In those cases, the courts merely reconciled the UCL with other, potentially conflicting *state* laws, and had no occasion to decide whether the UCL can override a conflicting federal enactment, as was the issue in *Summit Technology* and is again the issue here. In fact, state laws sought to be applied in such a manner as to conflict with federal law are preempted under the Supremacy Clause of the U.S. Constitution.

Their opposition points to paragraphs of the Complaint that do no more than recite the bare legal elements of a tying claim. (Opp'n at 23-24.) To state a claim under section 1 of the Sherman Act, however, a plaintiff must plead the *facts* supporting the elements of the claim. *Les Shockley Racing, Inc. v. Nat'l Hot Rod Ass'n*, 884 F.2d 504, 507-08 (9th Cir. 1989); *Rutman Wine Co.*, 829 F.2d at 736 (plaintiffs may not "merely alleg[e] a bare legal conclusion; if the facts 'do not at least outline or adumbrate' a violation of the Sherman Act, the plaintiffs 'will get nowhere merely by dressing them up in the language of antitrust'") (quoting *Car Carriers v. Ford Motor Co.*, 745 F.2d 1101, 1106 (7th Cir. 1984)). Plaintiffs have not met this requirement for any of the elements of the claim.

First, the Complaint does not allege, and Plaintiffs have not explained, how a WLS subscription, which Plaintiffs regard as "a contingent future interest in a domain name," could be a service or product that is separate and distinct from the registration of the very same domain name. (Mot. at 20-21.) Plaintiffs do not dispute that they "do not plead any facts to show whether *consumers* of 'back order' services for currently-registered domain names" consider these to be separate products or services. (*Id.* at 21.) On the contrary, a WLS subscription is similar to an option to register a domain name. As set forth in the motion, the law recognizes that an option contract is *not* a product distinct from the underlying item to which the option applies. (*Id.* (discussing *Klamath-Lake Pharm. Ass'n v. Klamath Med. Serv. Bureau*, 701 F.2d 1276, 1290 (9th Cir. 1983)).)

Second, Plaintiffs do not dispute that the only *factual* allegations bearing on the element of "market impact" indicate that WLS would have a *de minimis* effect, if any, on the market for domain name registrations. (Mot. at 21-22.) They do not, and could not, allege that WLS would have any market effect on registrations of currently *un*registered domain names. And they allege that the vast bulk of WLS subscriptions would never result in the registration of a domain name. (FAC ¶¶ 4.55-4.58.) The opposition thus fails to identify any alleged *facts* supporting the conclusion necessary

for a viable tying claim – that WLS would affect a substantial volume of domain name registrations.

Third, the opposition, like the Complaint, wholly ignores the requirement that VeriSign receive a direct economic benefit from the sale of the allegedly *tied* product (domain name registrations). (Mot. at 20, 22-23.) Because VeriSign would receive the same six-dollar registry fee per domain name registration regardless of whether the registrant had purchased, and the registrar had sold, a WLS subscription on the domain name (FAC ¶¶ 4.48, 4.11), VeriSign lacks the required direct economic interest in tied product sales to support this claim.

Finally, Plaintiffs do not deny that they have failed to state a tying claim as to NSI because they have not alleged, and could not allege, that NSI has market power in the tying product market, *i.e.*, any alleged market for back-order services. (Mot. at 23.) Accordingly, the purported Sherman Act claim fails as to both VeriSign and NSI, and the Court should dismiss it.

D. Plaintiffs Have Not Stated A Tortious Interference Claim

Plaintiffs' failure to allege that VeriSign tortiously interfered with *specific, existing* relationships with third parties is a fatal defect requiring dismissal of their tortious interference claim. In arguing that the interference tort "does not require that the relationships interfered with be with current customers" and that they may base their claim on "relations with current and/or prospective customers" (Opp'n at 24), Plaintiffs misstate and conveniently gloss over the well-established case law cited by VeriSign demonstrating that, to state a claim for tortious interference, Plaintiffs must allege *specific, existing* third-party relationships with which VeriSign interfered. *See Brown v. Allstate Ins. Co.*, 17 F. Supp. 2d 1134, 1140 (S.D. Cal. 1998) (requiring the plaintiff to plead the "specific existing relationships with which [the defendant] tortiously interfered"); *Westside Ctr. Assocs. v. Safeway Stores 23, Inc.*, 42 Cal. App. 4th 507, 524, 49 Cal. Rptr. 2d 793 (1996) (must interfere with "*existing* noncontractual

relations which hold the promise of future economic advantage"); *see also Blank v. Kirwan*, 39 Cal. 3d 311, 330-31, 216 Cal. Rptr. 718 (1985).

Westside Center does not support Plaintiffs' erroneous position that it is sufficient for them to allege relationships with "prospective customers." (Opp'n at 24.) The case correctly notes that, although a tortious interference claim does not require "an existing, legally binding agreement," 42 Cal. App. 4th at 520-21, it *does* require *specific*, *existing* relationships with third parties, which Plaintiffs have failed to allege here. *Id.* at 522, 524; *see also Brown*, 17 F. Supp. 2d at 1140 (dismissing claim).[12]

Moreover, Plaintiffs' failure to identify any relationships with which VeriSign allegedly interfered dooms their claim under *federal* pleading standards. As *Brown* demonstrates, a plaintiff proceeding under California tort law must allege the specific, existing relationships with which the defendant purportedly interfered, regardless of whether the complaint is filed in state or federal court. Plaintiffs have not done so. For these reasons, the tortious interference claim should be dismissed.

E. Plaintiffs' Sleight-Of-Hand Cannot Salvage Their Claim For Declaratory Relief

Through the Eleventh Claim, Plaintiffs seek a declaration that VeriSign, by offering WLS, would breach a provision of the Registry-Registrar Agreement (the "RRA") that entitles a registrar to "cancel the registration of a domain name it has registered." (FAC ¶¶ 15.8-15.9, Ex. A § 3.1.) In the motion, VeriSign showed that specific facts alleged in the Complaint belie this theory. Specifically, Plaintiffs allege that if all renewal grace periods expire for a currently registered domain name that is covered by a WLS subscription, the registration will be deleted and the domain name

[12] Thus, contrary to their assertion otherwise (Opp'n at 24), Plaintiffs made a legally significant – and factually irreconcilable – change in their alleged facts when, by altering three letters, they transformed what were merely "prospective" customers into "respective customers." *See Reddy v. Litton Indus., Inc.*, 912 F.2d 291, 296-97 (9th Cir. 1990) ("the amended complaint may only allege 'other facts *consistent* with the challenged pleading'") (emphasis added).

will then be registered to the WLS subscriber. (*Id.* ¶¶ 1.1, 4.30-4.32, 4.48, 4.55, 4.58, 6.5.) Plaintiffs now attempt to dodge these allegations in two ways, neither convincing.

First, Plaintiffs obscure the issues by mischaracterizing the "delete" function. The RRA authorizes Plaintiffs to "cancel *the registration* of a domain name [they have] registered." (*Id.* ¶ 15.8, Ex. A § 3.1 (emphasis added).) In a non sequitur, Plaintiffs point to their allegation that WLS would alter what happens *after* the deletion process by preventing domain names that are covered by WLS subscriptions from "becoming available for registration by any registrar." (Opp'n at 25 (citing FAC ¶ 15.12).) That the *domain name* exists anew, now under registration to the WLS subscriber, however, in no way supports Plaintiffs' theory that WLS would prevent the deletion of *registrations* of domain names.[13] The RRA only entitles Plaintiffs to "cancel *the registration* of a domain name," a function WLS does not affect. Plaintiffs have identified no provision of the RRA that gives them any broader right.

Second, although Plaintiffs argue "the Court must accept all factual allegations in the FAC" (Opp'n at 25), they may not evade their specific allegations about how WLS would operate, which undermine their claim, by relying on pure legal conclusions in their pleading. *See Foster & Kleiser Co. v. Special Site Sign Co.*, 85 F.2d 742, 753 (9th Cir. 1936) (disregarding allegations that were "mere conclusion[s] of the pleader" in favor of contradictory "specific allegations"). Accordingly, Plaintiffs have failed to state a claim for declaratory relief, and the Court should dismiss the Eleventh Claim.[14]

III. CONCLUSION

For all of the foregoing reasons and the reasons stated in the opening memorandum, VeriSign and NSI respectfully submit that the Complaint fails to state

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[13] In fact, because a domain name may only be registered to one person at a time (FAC ¶ 4.8), it would not be possible for a WLS subscriber to register a domain name if the prior *registration* were not deleted. Thus, WLS *requires* the deletion of expired domain name registrations.

[14] Nothing in *Dotster, Inc. v. Internet Corp. for Assigned Names & Numbers*, 296 F. Supp. 2d 1159 (C.D. Cal. 2003), suggests that WLS would prevent a registrar from "cancel[ing] the registration of a domain name it has registered."

any claim for relief as to them. Plaintiffs have already amended once in an attempt to cure these defects, and have not explained how further amendment could salvage their flawed claims. Accordingly, the Court should grant this motion and dismiss all claims against VeriSign and NSI without further leave to amend.

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