Jeffrey A. LeVee (State Bar No. 125863)
Christina Coates (State Bar No. 206602)
Sean W. Jaquez (State Bar No. 223132)
JONES DAY
555 West Fifth Street, Suite 4600
Los Angeles, CA 90013
Telephone: (213) 489-3939
Facsimile: (213) 243-2539

Attorneys for Defendant
INTERNET CORPORATION FOR ASSIGNED NAMES AND NUMBERS

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF LOS ANGELES

REGISTERSITE.COM, et. al.,

Plaintiff,

v.

INTERNET CORPORATION FOR ASSIGNED NAMES AND NUMBERS, a California Corporation, et. al., and DOES 1-10, inclusive,

Defendants.

CASE NO. SC082479

Assigned for all purposes to Judge Gerald Rosenberg

Complaint Filed: August 4, 2004

DEFENDANT ICANN'S MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF DEMURRER TO PLAINTIFFS' FIRST, FIFTH, SEVENTH AND NINTH CAUSES OF ACTION AGAINST ICANN

[Filed concurrently with the Notice of Demurrers, Statement of Demurrers, Request for Judicial Notice, and [Proposed] Orders]

Date: November 16, 2004
Time: 8:30 a.m.
Place: Department F

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INTRODUCTION

This lawsuit concerns the proposal by defendant VeriSign to offer a "Wait Listing Service" or "WLS." That service will compete against products that plaintiffs offer and, thus, plaintiffs are eager to delay its introduction. Defendant Internet Corporation for Assigned Names and Numbers ("ICANN") will not be offering the service and should not have been named as a defendant in this case. Indeed, plaintiffs' causes of action against ICANN must be dismissed because they are not ripe, they do not adequately allege the necessary elements for a violation of section 17200 and they do not provide a basis for why ICANN should be responsible for the acts of other defendants. In addition, plaintiffs' breach of contract claim is barred by the doctrines of collateral estoppel and res judicata.

WLS would permit consumers to register a domain name on the Internet in the event the current domain-name registration is deleted, either because the current registrant elects not to renew the registration or because it is deleted before renewal. Plaintiffs offer products that are in some ways similar to WLS, but plaintiffs cannot offer a consumer a guarantee that he or she will in fact become the new registrant of a domain name if the name is deleted. Indeed, for domain names that are viewed as valuable, the odds are extremely low that any particular customer of the plaintiffs would obtain the name because each of the plaintiffs (and others) will be attempting to secure the name for its customers. By contrast, WLS would offer consumers a guarantee that they will obtain the domain name if the name is deleted, and so plaintiffs fear the loss of revenue that WLS might cause. Of course, plaintiffs do not know exactly what will happen when and if WLS is implemented because WLS has not been implemented and cannot be implemented unless and until the service is approved by the United States Department of Commerce. Hence, this lawsuit is based solely on plaintiffs' speculation about what will happen.

Even if plaintiffs' claims against ICANN were ripe, plaintiffs do not allege the elements required for a section 17200 violation. There is nothing unlawful or unfair about VeriSign's proposed WLS. Indeed, the service is intended to be an improvement (from the consumer's perspective) over the current method of obtaining expired domain names. Given the fundamental flaw in plaintiffs' Section 17200 claims, plaintiffs cannot plead that WLS is unfair or unlawful.

And certainly plaintiffs cannot plead that ICANN -- which has never sold and will never sell a WLS subscription (because ICANN is not (and can never be) in the business of selling domain names) -- aided and abetted any unlawful, unfair or fraudulent acts. Plaintiffs allege only that ICANN was a "but for" cause of the WLS, but this is not sufficient for secondary liability under section 17200.

Finally, plaintiffs' remaining cause of action against ICANN for breach of contract is barred by the doctrines of collateral estoppel and res judicata. In July 2003, three other registrars that had entered into Registrar Accreditation Agreements ("RAAs") with ICANN identical to those executed by plaintiffs, filed a lawsuit in federal court in California – known as the *Dotster* litigation – attacking the very same WLS proposal. The *Dotster* plaintiffs, a group of registrars identically situated to plaintiffs in this case, made the same "contract"-based arguments asserted here -- *i.e.* that ICANN's decision to permit the introduction of WLS violated the RAA. In an order denying the Dotster plaintiffs' motion for a preliminary injunction, the Court made clear that the arguments of the *Dotster* plaintiffs provided no basis for relief. In the wake of that order, the *Dotster* plaintiffs voluntarily dismissed their lawsuit *with prejudice*. These issues and claims should not be relitigated.

LEGAL STANDARD

California Code of Civil Procedure section 430.10(e) permits a defendant to object by demurrer to a pleading on the ground that "[t]he pleading does not state facts sufficient to constitute a cause of action." Cal. Civ. Proc. Code § 430.10(e). A demurrer presents the question "whether the plaintiff has alleged sufficient facts in the complaint to justify relief on the legal theory" claimed. *Service by Medallion, Inc. v. Clorox Co.*, 44 Cal. App. 4th 1807, 1811-12 (1996). For purposes of testing the sufficiency of the causes of action within a complaint, the demurrer admits the truth of all material facts properly pleaded, but *not* contentions, deductions or conclusions of fact or law. *Serrano v. Priest*, 5 Cal. 3d 584, 591 (1971). Where, from the face of the complaint, there is no reasonable possibility that a cause of action can be amended to state a proper claim for relief, the claim should be dismissed without leave to amend. *Service by Medallion*, 44 Cal. App. 4th at 1819-20.

STATEMENT OF RELEVANT FACTS

ICANN is a not-for-profit California corporation that, in 1998, entered into a Memorandum of Understanding with the United States Department of Commerce ("DOC"), which charged ICANN with certain responsibilities for managing and administering the Domain Name System. Compl. ¶¶ 4.16-4.18; Bylaws, Art. 1, § 1.[1] ICANN pursues its mission by reaching agreements with companies (such as plaintiffs) that provide domain-name-registration-related services, under which the companies commit to ICANN to follow certain practices and ICANN "accredits" them to serve as Internet registrars.[2] When ICANN "accredits" a registrar, ICANN and the registrar enter into an RAA. Each of the plaintiffs signed an essentially identical RAA with ICANN. Compl. ¶ 13.2-13.4.

Defendant VeriSign operates the Internet "registry" for the ".com" and ".net" domains. Compl. ¶¶ 1.5, 4.40. If a consumer wishes to register a name in either of those domains, the consumer contacts an Internet "registrar" (such as one of the plaintiffs), which in turn contacts a registry operator (such as VeriSign) to see if the domain name is available. Compl. ¶¶ 4.9. Domain name registrations typically are for fixed periods, usually one or two years. Compl. ¶ 4.23. At the end of the registration period, some registrants elect not to renew their domain name registrations, in which case the registrar will request, after a grace period that the name be deleted. Compl. ¶¶ 4.25-4.32.

Some time ago, VeriSign proposed to offer the WLS. Via WLS, a consumer (through a registrar) could purchase the ability to stand in line for a domain name that might be deleted from the .com or .net registries. Compl. ¶¶ 1.1, 4.44. If the domain name is deleted (for example, because the current registrant of the domain name elected not to renew his or her registration), VeriSign would automatically register the domain name in the name of the person who had purchased the WLS subscription. Compl. ¶ 4.44. Internet registrars could elect to offer WLS to consumers if they wished but would be under no obligation to do so.

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[1] *See* http://www.icann.org/general/bylaws.htm for ICANN's Bylaws.

[2] ICANN conducts no commercial business, and its bylaws do not permit it to function as an Internet registrar or registry. Bylaws, Art. 2, § 2.

Plaintiffs are Internet registrars (Compl. ¶ 2.16) that "act[] as an interface between consumers and the registry operator [in this case, VeriSign]. A registrar causes registrations, renewals, transfers and deletions of domain names on behalf of consumers." Compl. ¶ 4.8. For various periods of time, plaintiffs have been offering similar types of "wait listing" services to consumers. The difference between plaintiffs' services and WLS is that plaintiffs cannot offer a guarantee that they can obtain a domain name for their customers if the name is deleted from the registry. Instead, under plaintiffs' version of "wait listing," if VeriSign deletes a domain name from the registry, multiple registrars attempt, on behalf of their different customers, to acquire the name in a "split-second" electronic race to be first-in-line when the domain name becomes available. Only one registrar will be successful in obtaining the deleted name for its customer; the other customers will be out of luck.

After VeriSign submitted its WLS proposal to ICANN, ICANN solicited comment on the proposal from the Internet community. Compl. ¶¶ 4.67-4.69. In August 2002, after receipt of those comments, ICANN's Board of Directors adopted a resolution authorizing ICANN's president and general counsel to negotiate amendments to its agreements with VeriSign to permit WLS to proceed. Compl. ¶ 4.70. After several procedures to review that decision – including reconsideration at the requests of registrars and VeriSign and the filing of a lawsuit in this Court by a group of registrars (the *Dotster* litigation) requesting an injunction to stop ICANN's negotiations with VeriSign – plaintiffs filed on March 1, 2004 a complaint in federal district court in Los Angeles, Case No. CV 04-1368, only five days before the ICANN Board was to evaluate the status of VeriSign's WLS proposal at its regularly-scheduled meeting.

On March 6, 2004, the ICANN Board passed a resolution approving the results of the negotiations and authorized ICANN staff to seek the approval of the United States Department of Commerce (as required by ICANN's agreement with that agency) to amend the VeriSign registry agreements to permit WLS to be offered. Compl. ¶¶ 4.70-4.74. However, the Department of Commerce has not approved WLS, and the complaint does not allege otherwise.

As noted earlier, plaintiffs are the second group of registrars that have filed suit against ICANN to try to stop the implementation of WLS. As explained by the court in *Dotster, Inc. v.*

Internet Corporation for Assigned Names and Numbers, 296 F. Supp. 2d 1159 (C.D. Cal. 2003), three registrars that offered "wait listing" services to assist consumers in registering expired domain names claimed that ICANN had breached sections 2 and 4 of the RAA in its decision to authorize negotiations with VeriSign about the proposed WLS. The *Dotster* plaintiffs unsuccessfully sought a preliminary injunction. In denying the motion for a preliminary injunction, the district court explained that plaintiffs had failed to demonstrate a likelihood of success on the merits of their claims because the RAA clearly did *not* require ICANN to follow the procedures set forth in sections 2 or 4 because WLS did not "affect a right or obligation" of the plaintiff-registrars. *Id.* at 1164-1166. Following this order, the *Dotster* plaintiffs stipulated to dismissal of their action with prejudice; the court entered that dismissal on December 5, 2003 (attached as Exhibit A to ICANN's concurrently-filed Request for Judicial Notice).

ARGUMENT

I. PLAINTIFFS' SECTION 17200 CLAIMS AGAINST ICANN ARE NOT RIPE FOR ADJUDICATION.

Plaintiffs contend that WLS violates California Business and Professions Code Section 17200 because it is an unlawful, deceptive, and unfair business practice (plaintiffs' First, Fifth, and Seventh Causes of action, respectively). But plaintiffs have not alleged and cannot allege *facts* to support these claims because the WLS has not yet been implemented. Compl. ¶ 4.74. Instead, their Section 17200 claims are premised on plaintiffs' "guesses" as to what will happen if WLS is deployed. For example, plaintiffs allege that consumers will purchase WLS subscriptions only for certain types of domain names and that registrations for those domain names are unlikely to expire or be deleted. Compl. ¶¶ 4.60-4.62. Plaintiffs further allege that, when a current domain name registrant learns that a WLS subscription has been purchased for the name, the registrant will "probably not" allow the registration to expire. Compl. ¶ 4.63. Based on these assumptions, plaintiffs conclude that WLS is an unfair business practice because "in all but tiny fraction of cases, no consumer will actually granted the right to register a domain name." Compl. ¶¶ 11.6-11.7.

Because WLS has not been implemented, it is not known which WLS subscriptions will be the most coveted; whether domain name registrants, once they learn that someone holds a WLS subscription for their name, will allow their names to be deleted; or what percentage of subscription holders will ultimately become registrants of their desired domain names. Hence, unless and until WLS is actually implemented, plaintiffs' Section 17200 claims are not ripe for adjudication.

"'A controversy is 'ripe' when it has reached, but has not passed, the point that the facts have sufficiently congealed to permit an intelligent and useful decision to be made.'" *Pacific Legal Found. v. California Coastal Comm'n*, 33 Cal. 3d 158, 171 (1982) (*quoting California Water & Tel. Co. v. County of Los Angeles,* 253 Cal. App. 2d 16, 22 (1967). Here, since WLS has not been implemented, it is not known how it will play out, and no "intelligent or useful" decision can be made. Thus, plaintiffs' Business and Professions Code claims must be dismissed. *Schell v. Southern Cal. Edison Co.*, 204 Cal. App. 3d 1039, 1047 (1988) ("A demurrer is [] appropriate if the causes of action are not yet ripe.").

II. PLAINTIFFS' HAVE NOT ADEQUATELY PLED A SECTION 17200 VIOLATION ON THE PART OF ICANN.

Plaintiffs do not allege any direct violation by ICANN of California's Business and Professions Code. Rather, plaintiffs Section 17200 claims against ICANN each is premised on a theory of secondary liability. Plaintiffs contend that ICANN aided and abetted VeriSign and the other defendants in: (1) operating an illegal lottery (First Cause of Action), (2) defrauding consumers (Fifth Cause of Action), and (3) engaging in an unlawful business practice (Seventh Cause of Action). However, plaintiffs have failed to allege sufficient facts to support these claims. Accordingly, plaintiffs First, Fifth, and Seventh causes of action against ICANN should be dismissed.

A. The First Cause of Action Against ICANN Must Fail Because Plaintiffs Have Not Adequately Pled That The WLS Is An Illegal Lottery.

Plaintiffs contend that WLS is an "illegal lottery" under California Penal Code section 319. Compl. ¶¶ 5.10, 5.20-5.21. But plaintiffs have failed to plead facts supporting a violation of

the underlying statute. *Aguilar v. Atlantic Richfield Co.*, 25 Cal. 4th 826 (2001), 856-57 (where there is no violation of the underlying law, there can be no 17200 claim based on the alleged violation).

To state a violation of California Penal Code section 319, a plaintiff must allege facts establishing three elements: (1) the disposition of property; (2) determined by chance; (3) among persons who have paid or promised to pay a valuable consideration for the chance of winning the prize. Cal. Pen. Code § 319; *Finster v. Keller*, 18 Cal. App. 3d 836, 843 (1971). Moreover, the alleged lottery must involve two or more persons vying for the same prize at the same time. *See Gayer v. Whelan*, 59 Cal. App. 2d 255, 259 (1943) ("[I]n order to constitute a lottery two or more persons must have paid or promised to pay a consideration for the chance of obtaining the prize. . . ."); Cal. Pen. Code § 319 ("persons" who have paid consideration).

Plaintiffs concede that "only *one* WLS subscription will be accepted for *each* domain name." Compl. ¶ 4.42 (emphasis added). Thus, the WLS cannot constitute a lottery because only one consumer will be able to purchase a WLS subscription. *Gayer*, 59 Cal. App. 2d at 259.

Likewise, the WLS lacks the characteristics of a lottery because it is not dominated by chance. "Chance," the California Supreme Court has explained, "means that winning and losing depend on luck and fortune rather than, or at least more than, judgment and skill." *Hotel Employees & Restaurant Employees Int'l Union v. Davis*, 21 Cal. 4th 585, 592 (1999). In other words, "[t]he test is not whether the game contains an element of chance or an element of skill but which of them is the dominating factor in determining the result of the game." *In re Allen*, 59 Cal. 2d 5, 6 (1962).

Plaintiffs' allegations demonstrate that the WLS is *not* dominated by chance. According to plaintiffs, under WLS, "registrars who choose to offer the WLS will be able to subscribe (on behalf of customers) to currently registered <.com> and <.net> domain names" and "[o]nly one WLS subscription will be accepted for each domain name" on a "first-come/first-served basis." Compl. ¶ 4.42. Then, if a registrar requests deletion of a reserved domain name, "VeriSign would not delete the name, but instead would assign the name to the registrar who placed the reservation." Compl. ¶ 4.44.

This process of obtaining a deleted domain name is based entirely on a series of decisions made by domain name subscribers and would-be subscribers, not chance. *See Partanian v. Flodine*, 95 Cal. App. 2d Supp. 931, 933-34 (1950) (holding where a plaintiff "voluntarily" makes the decision to give valuable consideration for an option to purchase a car "'if, as and when' defendant ever has one to deliver," the "chance being taken [is] not in the nature of a lottery."). First, a potential registrant must make the decision to reserve a domain name through the WLS. Presumably, this decision is based on a review of the likelihood that the domain name will be deleted and that the domain name will promote the WLS subscriber's personal or business interests. This is a *decision,* not *chance*. *See Partanian*, 95 Cal. App. 2d Supp. at 933-34.

Second, the WLS subscriber must have the business acumen to make these decisions on an expedited basis in order to ensure that she is the first to reserve the domain name: WLS reservations are accepted on a "first-come/first-served basis," and "[o]nly one WLS subscription [will] be accepted for each domain name." Compl. ¶ 4.42. Again, this is *execution of a decision,* not *chance*. *Partanian*, 95 Cal. App. 2d Supp. at 933-34.

Finally, the current registrant of the domain name must then decide whether to renew the domain name or let it expire (so that the registrar will request VeriSign to delete it); this, too, is a *decision,* not *chance*. *Id.* If the current registrant allows the registrar to request deletion of the domain name, the WLS registrant then secures the expiring domain name for her own benefit.[3]

Moreover, the fact that the WLS subscriber pays valuable consideration up front for this option does not convert the WLS into a lottery. *Id.* Were this the case, this country's well-established options markets would constitute illegal lotteries.[4]

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[3] The fact that some decisions are made by persons other than the WLS registrant does not convert those decisions into chance. The case law does not define "chance" with regard to whether a third party selects a winner, but whether a winner is selected arbitrarily. 76 Op. Atty. Gen. Cal. 266 at *3 (1993) ("When the person conducting the promotion *arbitrarily* selects the winner, the chance element is present . . . .") (emphasis added); *People v. Hecht*, 119 Cal. App. Supp. 778, 787 (1931) (finding "chance" present where winner selected through blind drawing).

[4] In an options market, purchasers pay valuable consideration up front for the option to purchase or sell a given stock, at a predetermined price, by a certain date. Because the value of a share of stock is determined by the market, and is thus out of the control of the purchaser, the predetermined price may prove unfavorable to the purchaser and the purchaser will not exercise her option.

Plaintiffs' complaint fails to allege that the WLS is dominated by anything but personal, economic, and business decisions. Numbers are not drawn, dice are not thrown and luck is not present. Compl. ¶¶ 4.42, 4.44. Indeed, the WLS provides dramatically more certainty than the "system" *plaintiffs* offer, in which dozens of registrars are competing for the opportunity to obtain a deleted domain name on behalf of their customers.

B. The Seventh Cause of Action Against ICANN Must Fail Because Plaintiffs Have Not Adequately Pled That The WLS Is Unfair.

Plaintiffs contend that the WLS is an unfair business practice because "VeriSign, Enom, NSI, and Does 1-10 are charging consumers valuable consideration for WLS subscriptions, but the consumers do not receive any consideration in return." Compl. ¶ 11.7. But this allegation is not adequate to support a section 17200 claim.

First, the allegation that consumers do not receive any consideration is false. A WLS subscriber does receive consideration in exchange for the subscription fee. He or she is given the right to register a particular domain name if and when the name is deleted. That plainly is good consideration. *See* Cal. Civ. Code § 1605 ("*Any* benefit conferred…is a good consideration for a promise.") (emphasis added). The consumer enters into the transaction with full knowledge that the domain name may not expire during the term of their subscription and that he or she may never get the opportunity to register the name. A guarantee that the subscription holder will in fact become the registrant of the domain name is not part of the bargain. Indeed, this is why subscriptions will be relatively inexpensive. Compl. ¶ 4.43 ("The registrar's fee to its customer…is estimated to be around $40.00.")

Second the fact that a consumer may receive little or no ultimate value from a particular transaction, does not, in and of itself, make that transaction unfair. *Chrisman v. Southern California Edison Co.*, 83 Cal. App. 249, 254 (1927) ("The benefit may be trifling, but if the promisor is not otherwise lawfully entitled to it, it is sufficient to sustain the contract as a matter of law. The law does not weigh the *quantum* of the consideration.") A business practice is unfair only if "it offends an established public policy or when the practice is immoral, unethical, oppressive, unscrupulous or substantially injurious to consumers." *See People v. Casa Blanca*

Convalescent Homes, Inc., 159 Cal. App. 3d 509, 530 (1984). For a transaction to be unfair under the statute, it must confer no benefit whatsoever (*i.e.*, the transaction is based on a promise to perform a pre-existing duty) or it must involve deception or fraud. *See e.g. Podolsky v. First Healthcare Corp.*, 50 Cal. App. 4th 632, 649-656 (1996).

C. The First, Fifth And Seventh Claims Against ICANN Must Fail Because Plaintiffs Have Not Adequately Pled That ICANN Aided And Abetted.

Even if there were something unlawful, unfair or deceptive about WLS -- which there is not -- plaintiffs have not adequately pled that ICANN aided and abetted any improper acts. Plaintiffs allege that defendants NSI and Enom have agreed to sell subscriptions on behalf of VeriSign (Compl. ¶ 2.15); that Enom and NSI are currently accepting "pre-orders" for WLS subscriptions (Compl. ¶¶ 4.72, 5.16); and that VeriSign, NSI and Enom are currently making representations to consumers about WLS (Compl. ¶ 4.73). But there are no allegations about *ICANN's* participation in any unfair, unlawful or fraudulent acts. Rather, plaintiffs seek to base their section 17200 claims against ICANN on the grounds that ICANN was a "but for" cause of the WLS. Compl. ¶ 2.9, 9.6, 11.12-11.13. But secondary liability under Section 17200 cannot be premised on "but for" causation. Rather, "[a] defendant's liability must be based on his personal 'participation in the unlawful practices' and 'unbridled control' over the practices that are found to violate section 17200 or 17500." *Emery v. Visa Int'l Serv. Ass'n.*, 95 Cal. App. 4th 952, 960 (2002). ICANN has never sold and will never sell a WLS subscription because ICANN is not and can never be in the business of selling domain names. ICANN's only role with regard to WLS, was to approve its implementation on a trial basis. Compl. 4.71. Indeed, ICANN does not even have the final say on whether WLS is implemented. Compl. 4.74 ("To complete WLS deployment, VeriSign must secure approval from the United States Department of Commerce").

Further, the allegation in plaintiffs Fifth Cause of Action that ICANN's decision to permit VeriSign to proceed with WLS gave rise to some sort of duty on ICANN's part to ensure that VeriSign and others would comply with the law (Compl. ¶¶ 9.6-9.8) is absurd. Laws of general application such as Section 17200 are enforced by courts and the executive branch; plaintiffs have

not shown why ICANN is obliged (much less equipped) to use its agreements with VeriSign and others to monitor and enforce their compliance with the myriad of laws that may apply to them.

Finally, with respect to the claim that ICANN aided and abetted an illegal lottery, plaintiffs' allegations fall short because they have not pled -- and cannot plead -- that ICANN "'knowingly aided' a lottery venture with 'guilty knowledge' of the scheme to set up the lottery." *See Emery*, 95 Cal. App. 4th at 962. Plaintiffs do not allege, because it is not true, that ICANN approved WLS with knowledge that the service is illegal and/or with the intent to aid and encourage criminal conduct.

III. PLAINTIFFS DO NOT HAVE STANDING TO BRING A SECTION 17200 CLAIM ON BEHALF OF THE GENERAL PUBLIC.

Although cast as an action brought in part on behalf of the general public (Compl. ¶¶ 5.2, 9.2, 11.2), the only party that truly is looking for any relief is the plaintiffs. This lawsuit is not about vindicating or protecting the rights of consumers; not a single consumer has been harmed in any way by WLS. Rather, plaintiffs' purported "representative" action is merely a pretext intended to disguise their only true motive of preserving plaintiffs' existing share of the market for expired domain names.[5]

Given this motive and the absence of any harm to consumers, plaintiffs are not "competent" to prosecute a Section 17200 claim on behalf of the general public. Cal. Bus. & Prof. Code § 17204; *Kraus v. Trinity Mgmt. Serv., Inc.*, 23 Cal. 4th 116, 138 (2000). To make a showing of competency, a plaintiff must demonstrate that the claim truly is brought on behalf of the "general public." *Rosenbluth Int'l, Inc. v. Superior Court.*, 101 Cal. App. 4th 1073, 1075 (2002). Actions, such as plaintiffs', brought to vindicate commercial business interests are not representative actions. *Prata v. Superior Court*, 91 Cal. App. 4th 1128, 1143 (2001) (recognizing a distinction between "actions brought to vindicate the rights of individual consumers" and actions involving "sophisticated business finance issues").

[5] *See e.g.* Compl. ¶ 4.57 ("If the WLS is implemented, Plaintiffs will be prevented from offering the services they currently provide"); Compl. ¶ 4.78 ("Plaintiffs are now suffering damages as a result of the WLS 'pre-sales'"); Compl. ¶ 4.79 ("Many of the Plaintiffs will be put out of business by the unlawful WLS scheme.").

IV. PLAINTIFFS' NINTH CAUSE OF ACTION FOR BREACH OF THE REGISTRAR ACCREDITATION AGREEMENT MUST FAIL.

In their ninth cause of action, plaintiffs allege that ICANN has breached the RAA by authorizing VeriSign to proceed with WLS without following procedures set forth in the RAA. Compl. ¶¶ 4.65-4.75, 13.1-13.26. Plaintiffs argue that, as registrars, they have certain rights when ICANN seeks to enter into amendments to agreements with registry operators such as VeriSign, if ICANN's conduct might have some effect on the registrars.

Plaintiffs are wrong. The provisions of the RAA upon which plaintiffs rely give plaintiffs rights only if and when ICANN takes actions "that impact the *rights, obligations, or role* of Registrar." RAA § 2.3 (emphasis added). The provisions do not give plaintiffs any right to interfere in the contracts that ICANN has with any registry, including VeriSign.

A. Plaintiffs' Claim Is Wrong As A Matter Of Law.

Plaintiffs' legal assertion was specifically at issue in *Dotster v. Internet Corporation for Assigned Names and Numbers*, 296 F. Supp. 2d 1159 (C.D. Cal. 2003). Although the *Dotster* opinion was issued at the preliminary injunction stage, there can be no mistake that the court categorically rejected the very contract theories that plaintiffs allege in their ninth cause of action.[6] This Court should reject those theories as well.

In analyzing the *Dotster* plaintiffs' claim that "ICANN will be in breach of various provisions of the RAA if it approves an amendment to the Registry Agreement between ICANN and Verisign" the *Dotster* court:

> reject[ed] Plaintiffs suggestion that ICANN is required to obtain registrar consensus before it can enter into any agreement with a third party that might affect domain name allocation. If the Court adopted this interpretation, the registrars would effectively have the power to veto any contract that affected their economic interests.

Dotster, 296 F. Supp. 2d at 1165 n.5. Likewise, plaintiffs here allege that "[b]y approving the WLS without obtaining consensus, ICANN acted unjustifiably, arbitrarily, inequitably, and unfairly, and in so doing breached its contractual obligations to each Plaintiff." Compl. ¶ 13.15.

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[6] *See Thomas v. Gilliland,* 95 Cal. App. 4th 427, 429-30 (2002) (a court may take notice of the proceedings and determinations of prior related litigation on demurrer).

Plaintiffs are making the same allegation as the *Dotster* plaintiffs, and that allegation is just as wrong in this case as it was in the *Dotster* case.

Plaintiffs' position that Section 2.3 of the RAA prohibits ICANN from permitting VeriSign's offering of WLS (Compl. ¶¶ 13.7-13.13.23) also was rejected in *Dotster*:

> The plain language of Subsection 2.3 makes it clear that the obligations imposed on ICANN under that section do not apply to matters falling outside the *RAA*. Because the implementation of WLS does not affect a right or obligation of Plaintiffs under the RAA or otherwise require an amendment to the RAA, its implementation falls outside the scope of the RAA.

Dotster, 296 F. Supp. 2d at 1165-66 (italics in original).[7] Shortly after the *Doster* decision, the parties stipulated to dismiss the *Dotster* case with prejudice.

B. Plaintiffs' Claim Is Barred By The Doctrines Of Collateral Estoppel And Res Judicata.

Collateral estoppel, also known as "issue preclusion," is appropriate when the following elements are met: (1) the issue is identical to that decided in a former proceeding; (2) the issue was actually litigated; (3) the issue was necessarily decided; (4) the doctrine is asserted against a party to the former action or one who was in privity with such a party; and (5) the former decision is final and was made on the merits. *Silver v. Los Angeles County Metro. Transp. Authority*, 79 Cal. App. 4th 338, 357 (2000). Similarly, res judicata, or "claim preclusion," is appropriate when: (1) a claim raised in the present action is identical to a claim litigated in a prior

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[7] In the Ninth Cause of Action, plaintiffs make the confusing allegation that WLS would have an impact on a right under the RAA involves a claimed "right to delete domain names according to [the Registry-Registrar Protocol ("RPP")]." Compl. ¶ 13.8. But earlier in their complaint plaintiffs make more specific allegations describing the deletion process (Compl. ¶¶ 4.23-4.34), which allegations make clear that WLS does not change a registrars' ability to *delete* domain names (which only a registry operator can do); instead, WLS affects the right to *re-register* names once they are deleted. Further, WLS, which is a voluntary service that no registrar will be required to offer, is *not* a "Consensus Policy" and will *not* affect the rights, obligations, or role of registrars under the RAA. Registrars are responsible, both now and after WLS is implemented, for sending deletion commands to the registry under the RRP concerning those domains that their customers do not wish to renew. Compl. ¶ 4.29. It is only when VeriSign runs its batch deletion process – entirely a registry function in which registrars have no role (Compl. ¶ 4.33) – that WLS makes any change. Specifically, names with a WLS subscription in effect are not returned to the pool of available names but instead are registered to the WLS subscriber in fulfillment of the subscription. Compl. ¶ 4.44. If there is no subscription, the registry operator includes the name and the batch deletion occurs. Compl. ¶ 4.45.

proceeding; (2) the prior proceeding resulted in a final judgment on the merits; and (3) the party against whom the doctrine is being asserted was a party or in privity with a party to the prior proceeding. *People v. Barragan*, 32 Cal. 4th 236, 253 (2004).

There was a full opportunity in *Dotster* to litigate these same issues concerning the applicability of the RAA to WLS, and in that case they were in fact vigorously contested and decided contrary to plaintiffs' position here. For example, plaintiffs invoke Section 2.3 of the RAA, but the application of that section to WLS was specifically litigated in the *Dotster* litigation. After fully reviewing the extensive briefing, submission of evidence, and oral argument that was presented, the court determined the meaning of that section and its effect on WLS. *See Dotster*, 296 F. Supp. 2d at 1165-66. Similarly, plaintiffs' contention that approving WLS without obtaining registrar consensus breached the RAA was also specifically litigated and decided. *See id.* at 1165 n.5. In view of the *Dotster* court's adjudication of these very same issues presented here, the plaintiffs elected to stipulate that the *Dotster* action be dismissed with prejudice and that voluntary dismissal with prejudice in *Dotster* operates as a final adjudication on the merits. *Adler v. Vaicius*, 21 Cal. App. 4th 1770, 1776 (1993) ("A voluntary dismissal with prejudice is a final determination on the merits."); *see also McMahon v. Pier 39 Ltd. P'ship*, 2003 U.S. Dist LEXIS 22178, *10 (N.D. Cal. 2003) (citing *Semtek Int'l Inc. v. Lockheed Martin Corp.*, 531 U.S. 497, 505 (2001)) ("[a] *voluntary* dismissal with prejudice, even one based on an agreed or stipulated judgment, operates as an adjudication on the merits.") (emphasis added).

The *Dotster* plaintiffs are in privity with plaintiffs here. "The concept of privity for the purposes of res judicata or collateral estoppel refers 'to a mutual or successive relationship to the same rights of property, or to such an identification in interest of one person with another as to represent the same legal rights [citations] and, more recently, to a relationship between the party to be estopped and the unsuccessful party in the prior litigation which is 'sufficiently close' so as to justify application of the doctrine of collateral estoppel. [Citations].'" *Citizens for Open Access etc. Tide, Inc. v. Seadrift Ass'n.*, 60 Cal. App. 4th 1053, 1069-1070 (1998) (citing *Clemmer v. Hartford Insurance Co.*, 22 Cal. 3d 865, 875 (1978)). "'This requirement of identity of parties or privity is a requirement of due process of law.'" *Id.* (citing *Clemmer*, 22 Cal. 3d at 874).

As the California Supreme Court has recognized, "[p]rivity is not susceptible of a neat definition, and determination of whether it exists is not a cut-and-dried exercise." *Aranow v. LaCroix, 219 Cal. App. 3d 1039, 1048 (1990) (citing Clemmer*, 22 Cal. 3d at 875). "In the final analysis, the determination of privity depends upon the fairness of binding [a litigant] with the result obtained in earlier proceedings in which it did not participate." *Citizens for Open Access etc. Tide, Inc.*, 60 Cal. App. 4th at 1070.

These factors clearly warrant a finding of privity here. The *Dotster* litigation was a well-publicized case where all pleadings were posted on ICANN's website, and elsewhere, and the issues were fully discussed within the Internet community. The registrars that challenged ICANN's agreement to WLS in *Dotster* had identical interests -- financially, legally, and otherwise -- to those of plaintiffs here. At the time of the *Dotster* litigation, the *Doster* plaintiffs also offered their own form of wait listing service, an activity they asserted would be made unprofitable by the introduction of WLS. And they made the same argument as plaintiffs make here: ICANN did not follow the procedures and other requirements under the RAA in approving WLS. The *Dotster* plaintiffs were represented by a competent team of attorneys. Permitting serial relitigation of these issues by potentially hundreds of ICANN-accredited registrars would impose severe and inappropriate burdens on the court system and ICANN. These considerations mandate a conclusion of privity between the *Dotster* plaintiffs and the plaintiffs here.

CONCLUSION

Each of plaintiffs' four causes of action against ICANN is deficient as a matter of law. Because these deficiencies cannot be cured by amendment, ICANN urges the Court to dismiss these causes of action with prejudice.

DATED: October 4, 2004 JONES DAY

By: _____
Jeffrey A. LeVee
Attorneys for Defendant
INTERNET CORPORATION FOR
ASSIGNED NAMES AND NUMBERS