IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

Verisign, Inc., Plaintiff, v. XYZ.com, LLC et al, XYZ.	Civil Action No. 1:14-cv-01749 CMH-MSN

DEFENDANTS' MOTION, AND MEMORANDUM IN SUPPORT OF THEIR MOTION, FOR JUDGMENT ON THE PLEADINGS UNDER FED. R. CIV. P. 12(c)

I. INTRODUCTION

Verisign, Inc. filed this lawsuit against its competitor XYZ.com LLC ("XYZ") and XYZ's CEO, Daniel Negari, alleging a single claim—false advertising under the Lanham Act, 15 U.S.C. § 1125(a)(1)(B). The Court should grant judgment on the pleadings under Fed. R. Civ. P. 12(c) for four independent reasons. First, Verisign does not (and could not) plausibly allege that it suffered commercial injury as a result of XYZ's statements[1]. Second, the statements do not qualify as advertising or promotion under the Lanham Act, so they are not actionable. Third, the statements are not statements of fact but rather mere puffery, hyperbole, predictive, or assertions of opinion—which are not actionable even if they are advertising. Fourth, most the statements are literally true and cannot cause injury to Verisign.

XYZ and Negari respectfully request the Court grant judgment on the pleadings, and dismiss this case without leave to amend because any amendment would be futile.

II. FACTUAL ALLEGATIONS

Verisign is a global leader in Internet domain names, having operated the .COM top-level domain for more than 15 years. (*See* Compl. ¶¶ 10–11, ECF No. 1.) Millions of businesses and

[1] Defendants refer to all the statements Verisign complains about as "XYZ's statements".

individuals register new .COM domain names every quarter. (*Id.* at ¶ 25.) In 2013 alone, Verisign sold over 30-million .COM domain names. (*Id.* at ¶ 3(a).) Other domain extensions that Verisign operates include .NET, .TV, .EDU, and .GOV. (*Id.* at ¶ 11.)

XYZ operates the newly launched .XYZ domain extension. (*Id.* at ¶ 13.) Negari is XYZ's founder and CEO. (*Id.* at ¶ 14.) Verisign alleges that "XYZ has launched a promotional campaign that is designed to suggest that it is superior to Verisign." (*Id.* at ¶ 16.) Verisign believes otherwise, and claims that "XYZ is in no way equivalent or superior to Verisign." (*Id.* at ¶ 3(d).)

Verisign complains that XYZ created a 35-second video entitled "Move over .com - .XYZ is for the next generation of the internet." (*Id.* at ¶ 17.) The video features a dirty old Honda with a license plate that says ".COM." (*Id.* at ¶ 19.) "The Honda is filmed in a grainy video, and is accompanied by unflattering and dated background music." (*Id.*) The video also "shows a shiny new Audi sports car pulling up next to the Honda with a Nevada license plate that says 'XYZ.'" (*Id.* at ¶ 21.) The narrator claims that "with over 120 million dot coms registered today, it's impossible to find the domain name that you want." (*Id.* at ¶ 20.) Then, the "Audi speeds away as the Honda remains stationary." (*Id.* at ¶ 22.)

Verisign is also concerned about National Public Radio (NPR)'s short segment about the launch of new domain extensions. (*Id.* at ¶ 27.) As part of that story, NPR interviewed Negari who stated: "[a]ll of the good real estate is taken. The only thing that is left is something with a dash, or maybe three dashes and a couple numbers in it." (*Id.*) Verisign does not, nor could it, allege that Negari or XYZ sought out the interview or asked to be featured in NPR's report.

After the NPR interview, Negari posted an entry on his personal website blog[2] entitled ".XYZ is the NEXT .COM – BELIEVE IT." Similarly, XYZ posted an entry on its website blog[3] promoting Negari's appearance on NPR and claiming that NPR described .XYZ as the next .COM. (*See Id*. at ¶ 32.) Separately, a different XYZ webpage[4] temporarily read: "Coined the

[2] http://ceo.xyz
[3] http://gen.xyz /blog
[4] http://gen.xyz/registrars

next .com by NPR and VentureBeat" (*See Id.* at ¶ 40.) Verisign complains that these statements were false because NPR did not say that XYZ would be the next .COM but rather XYZ could "try to become the next .COM." (*Id.* at ¶ 35.)

Verisign alleges the statements "when viewed together and in context, reflect a strategy to create a deceptive message to the public that companies and individuals cannot get the .COM domain names they want from Verisign, and that XYZ is quickly becoming the preferred alternative." (*Id.* at ¶ 42.)

Finally, Verisign raises a fuss about statements made after a promotion under which third parties allegedly gave away free .XYZ domain names. (*Id.* at ¶ 3(b).) For example, Verisign objects to a video posted on Negari's blog in which he rides a skateboard through an office before addressing a group of employees, telling them that .XYZ is "now the number one new [domain extension] in the marketplace" before thanking them for their hard work. (*Id.* at ¶ 53(a), Ex. 6 (transcript of video); *see also* Compl. ¶ 53(b)–(e), Exs. 7–10 (remaining blog posts and PowerPoint slides at issue).) Verisign believes that XYZ should not promote its position as the number-one new domain because many of the .XYZ names were given away by third parties. But Verisign does not allege that the numbers or claims Negari published are literally false.

Verisign does not provide a single fact to establish it suffered harm. Rather, Verisign's attempt to plead harm consists entirely of the following naked conclusions:

> 4. XYZ and Negari's statements violate the Lanham Act, constitute unfair competition, and are proximately impairing Verisign's brand and goodwill.
>
> 74. Verisign is being injured as a result of XYZ and Negari's false and/or misleading statements of fact including because XYZ and Negari's statements undermine the equity and good will Verisign has developed in the .COM registry.
>
> 75. XYZ and Negari's false and misleading promotional statements, as described above, have irreparably harmed and, if not enjoined, will continue to irreparably harm Verisign.

(*See* Compl. ¶¶ 4, 74-45.)

Verisign does not allege a drop in sales, slowing of .COM registrations, or a single lost customer. The closest Verisign comes to describing how it was harmed is a rote recitation of the materiality element of every Lanham Act false advertising suit: the statements "have, or are likely to, influence domain name registration purchasing decisions." (*Id.* at ¶ 73.)

III. ARGUMENT

The Court considers a Fed. R. Civ. P. 12(c) motion for judgment on the pleadings under the same standard as a Rule 12(b)(6) motion to dismiss for failure to state a claim. *Burbach Broad. Co. of Del. v. Elkins Radio Corp.,* 278 F.3d 401, 405–06 (4th Cir. 2002). The Court should grant the motion if the plaintiff has failed to "state a plausible claim for relief". *Walters v. McMahen,* 684 F.3d 435, 439 (4th Cir. 2012) (internal quotation marks omitted) (quoting *Ashcroft v. Iqbal,* 556 U.S. 662, 679 (2009)). And to be plausible, a claim must contain "factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Clatterbuck v. City of Charlottesville,* 708 F.3d 549, 554 (4th Cir. 2013) (quoting *Iqbal,* 556 U.S. at 678).

To survive the motion, a complaint must contain sufficient factual allegations which, if taken as true, "raise a right to relief above the speculative level" and "nudg[e] [the] claims across the line from conceivable to plausible." *Vitol, S.A. v. Primerose Shipping Co.,* 708 F.3d 527, 543 (4th Cir. 2013) (quoting *Bell Atl. Corp. v. Twombly,* 550 U.S. 544, 555, 570 (2007)).

A complaint must contain more than "naked assertions" and "unadorned conclusory allegations" and requires "factual enhancement" to survive. *Francis v. Giacomelli,* 588 F.3d 186, 193 (4th Cir. 2009) (citing *Iqbal,* 556 U.S. at 679; *Twombly,* 550 U.S. at 557). In addition to the complaint, the court will also examine "documents incorporated into the complaint by reference," as well as those matters properly subject to judicial notice. *Matrix Capital Management Fund, LP v. BearingPoint, Inc.,* 576 F.3d 172, 176 (4th Cir. 2009) (quoting *Tellabs, Inc. v. Makor Issues & Rights, Ltd.,* 551 U.S. 308, 322 (2007)).

A. Verisign lacks standing because it failed to offer plausible factual allegations that XYZ's statements proximately caused Verisign economic or reputational harm.

Verisign's only claim is false advertising under the Lanham Act, 15 U.S.C. § 1125(a)(1)(B). The Supreme Court recently held that to state a claim for false advertising, a plaintiff "must show economic or reputational injury flowing directly from the deception wrought by the defendant's advertising; and that that occurs when deception of consumers causes them to withhold trade from the plaintiff." *Lexmark Int'l, Inc. v. Static Control Components, Inc.,* 134 S. Ct. 1377, 1391 (2014). In other words, "a plaintiff must plead (and ultimately prove) an injury to a commercial interest in sales or business reputation proximately caused by the defendant's misrepresentations." *Id.* at 1395. These allegations of commercial injury and proximate cause must be more than "naked assertions" and "unadorned conclusory allegations". *Giacomelli,* 588 F.3d at 193.

Verisign fails to meet the standard because its complaint is devoid of any facts necessary to show it suffered any economic or reputational injury "flowing directly" from Defendants' alleged misconduct. *Lexmark,* 134 S. Ct. at 1391. Instead, Verisign asserts conclusory allegations of commercial harm and proximate cause. (Compl. ¶¶ 4, 74–75.) Such bare legal conclusions are insufficient to establish standing under *Lexmark* and thus warrant dismissal under Rule 12(c). *See Belmora LLC v. Bayer Consumer Care AG*, No. 1:14-CV-00847-GBL-JFA, 2015 WL 518571 at *4, 5, 19–20 (E.D. Va. Feb. 6, 2015).

Earlier this year, the Eastern District of Virginia's Judge Lee granted a motion to dismiss and a motion for judgment on the pleadings for failure to establish *Lexmark* standing under the Lanham Act. *Id.* at *2, 5, 19–20. In *Belmora*, Bayer, a drug company that had been using the FLANAX mark in Mexico since the 1970s, brought claims for false designation and false advertising. Belmora was a drug company that obtained trademark rights to FLANAX in the United States in 2005. Bayer alleged that it had "lost sales in the United States as it was not able to convert immigrating Mexican FLANAX consumers to American consumers of ALEVE, Bayer's American counterpart to its Mexican FLANAX brand." *Id.* at *9. It pleaded that its reputation was harmed because Belmora's alleged deceptive marketing caused actual confusion

among consumers.

Judge Lee held that Bayer failed to establish proximate cause under *Lexmark* because it did not allege sufficient facts showing it suffered a cognizable injury under the Lanham Act. The court "expressly decline[d] to find that the loss of potential sales to immigrating consumers [was] the type of economic loss recognized by the Lanham Act" because such an injury was too speculative. *Id.* at *10 (discussing in context of trademark claim), *12–13 (adopting same analysis for false-advertising claim). Similarly, the court rejected Bayer's claims of reputational harm despite Bayer's allegations of confusion because Bayer did not plead sufficient facts showing any cognizable injury to its reputation resulting from Belmora's acts. *Id.* at *12.

The Court should apply the same analysis to this case. Verisign's allegations of proximate cause are even weaker than Bayer's. Unlike Bayer, Verisign did not allege specifically how it suffered economic or reputational harm. Rather, Verisign's only allegations about harm are rote statutory parroting and naked conclusions. (*See* Compl. ¶¶ 4, 74 ("XYZ and Negari's statements … proximately impairing Verisign's brand and goodwill; XYZ and Negari's statements undermine the equity and good will Verisign has developed in the .COM registry.").) Verisign has not and cannot plead facts to support any inference of economic and reputational harm.

Other district courts have reached similar conclusions to Judge Lee's. In *Avalos v. IAC/Interactivecorp.*, No. 13-CV-8351 (JMF), 2014 WL 5493242 (S.D.N.Y. Oct. 30, 2014), the court dismissed a false-advertising claim for lack of *Lexmark*-standing. In that case, the complaint alleged the defendant deceived consumers by using the plaintiff's intellectual property to create fake profiles on the defendant's dating websites, resulting in the devaluation of the intellectual property owned by the plaintiff. *Id.* at *5. As a result, the plaintiff asserted, it had lost millions of dollars in revenue. *Id.* The court found that the complaint failed to include the requisite factual support for the conclusory allegation of commercial harm. *Id.* Even if the plaintiff could show commercial harm, the court held that the complaint did not allege sufficient facts to establish a plausible connection between the consumer deception and economic harm to *the plaintiff* (as opposed to consumers). *Id.* The court emphasized that the Lanham Act only provides relief for

harm to the plaintiff—not harm to third parties, such as the potential users of defendant's websites who might be tricked by the fake profiles.

Similarly, here, Verisign fails to allege facts showing a plausible connection between XYZ's statements and Verisign's alleged commercial injury. Even if XYZ's statements might trick consumers into thinking XYZ is the market leader among "new" domains, Verisign would not suffer any economic or reputational harm because no consumer thinks .COM is a "new" domain. Likewise, XYZ's claim to be "the *next* .com" could not plausibly harm Verisign's commercial interest because the claim reinforces that Verisign's .COM is the most-popular, most-successful domain. Perhaps consumers think that since .XYZ is the next .COM, they should not buy other *new* domains. Perhaps consumers buy more .COM domains because XYZ has promoted Verisign as the market leader. But Verisign suffering any injury as a result of XYZ's statements is implausible. Any injury from those statements is too speculative.

In short, Verisign cannot plausibly show what *Lexmark* requires—that Defendants' actions caused consumers to "withhold trade" from the Verisign. 134 S. Ct. at 1391. Thus, the Court should dismiss Verisign's claim for lack of standing.

B. Verisign's claim fails because XYZ's statements are not commercial advertisement or promotions as a matter of law.

The Lanham Act only applies to "commercial advertising or promotion" placed into interstate commerce. 15 U.S.C. § 1125(a)(1)(B). The Fourth Circuit Court of Appeals has not defined commercial advertising or promotion, so courts in the Eastern District of Virginia follow the Second Circuit's standard from *Fashion Boutique of Short Hills, Inc. v. Fendi USA, Inc.,* 314 F.3d 48 (2d Cir. 2002). *See Reynolds Consumer Products, Inc. v. Handi-Foil Corp.*, No. 13-CV-214, 2014 WL 794277, at *5 (E.D. Va. Feb. 27, 2014) (collecting cases relying on the *Fashion Boutique* test). To qualify as a "commercial advertisement or promotion" a statement must be both commercial speech, and disseminated sufficiently to the relevant purchasing public to constitute advertising or promotion. *See Reynolds,* 2014 WL 794277, at *5. Whether an advertisement is sufficiently disseminated depends on the specific market in question. *Id.*

XYZ's statements were not commercial advertisements or promotions because they were not widely disseminated—and Verisign does not allege any facts to the contrary. For that reason, Verisign's claim cannot survive.

1. Since XYZ's statements were not widely disseminated, they cannot qualify as advertising or promotion under the Lanham Act.

The *Fashion Boutique* test requires the alleged falsehood be "disseminated sufficiently to the relevant purchasing public." 314 F.3d at 56. "Proof of widespread dissemination within the relevant industry is a normal concomitant of meeting this requirement. Thus, businesses harmed by isolated disparaging statements do not have redress under the Lanham Act." *Id*. at 57 (citing *Am. Needle & Novelty, Inc. v. Drew Pearson Mktg., Inc.*, 820 F. Supp. 1072, 1078 n.2 (N.D. Ill. 1993)). Whether statements qualify as advertising or promotion depends on the number of alleged contacts made in relation to the total market. *Cavalier Tel., LLC v. Verizon Va. Inc.,* 208 F. Supp. 2d 608, 617–18 (E.D. Va. 2002).

And "where it is clear . . . that the relevant market is large and that the alleged contacts are comparatively trivial, dismissal for failure to state a claim is appropriate." *Tao of Sys. Integration, Inc. v. Analytical Servs. & Materials, Inc.*, 299 F. Supp. 2d 565, 573 (E.D. Va. 2004). In *Cavalier Tel.*, the court dismissed for failure to state a claim because the market included several-million customers and the plaintiff failed to specify the number of contacts reached by the defendant's misrepresentation. 208 F. Supp. 2d at 617–18. This case is similar. The market for domain-name consumers is several million. Indeed, Verisign sells "***millions of .COM domain names…each quarter***." (Compl. ¶ 3(a) (emphasis in original).) Verisign "added over 30 million [.COM] domain names" in 2013 alone. *Id.*

When put in the context of such a voluminous, global market, statements made on lightly trafficked personal and corporate blogs and websites can hardly be "widely disseminated"—especially absent specific factual allegations. Again, Verisign makes no factual allegations about the number of consumers exposed to the statements. Nor can Verisign amend to allege facts to support the "widely disseminated" conclusion because, in truth, the market is tens of millions

and most of XYZ's statements reached a couple-thousand people at most. Those statements cannot qualify as advertising or promotion under the Lanham Act. For that reason, the Court should dismiss the Lanham Act claim.

2. NPR's unsolicited interview of Negari is not commercial advertisement or promotion.

Courts applying *Fashion Boutique* uniformly hold that a response to an unsolicited inquiry by a legitimate news organization is not commercial advertising under the Lanham Act. *Boule v. Hutton*, 70 F. Supp. 2d 378, 390 (S.D.N.Y. 1999), *aff'd on other grounds*, 328 F.3d 84 (2d Cir. 2003); *accord Gmurzynska v. Hutton*, 355 F.3d 206, (2d Cir. 2004); line of cases recognized by 5 McCarthy on Trademarks at §27:71, n.30.

As the *Boule* court stated:

> While [the Lanham Act false-advertising prohibition] applies to commercial advertising or promotion beyond the traditional advertising campaign, it does not cover a response to an unsolicited inquiry by a magazine reporter seeking comment on a topic of public concern.
> …
> The fact that the [defendants] had an economic interest in making their statements to the [media outlet] does not alone transform their comments into "commercial advertising or promotion."

Boule, 70 F. Supp. 2d at 390.

Since Verisign does not allege that Negari or XYZ solicited NPR's attention, Negari's statements to NPR cannot form the basis of Verisign's false advertising claim.

C. Verisign's claim fails because XYZ's statements are not statements of fact but rather mere puffery, hyperbole, predictive, or assertions of opinion.

Even assuming XYZ's statements were commercial advertisements or promotions, they are not "representations of fact" but rather mere opinion or puffery—which are not actionable. To be actionable under the Lanham Act, a statement must be a representation of fact. 15 U.S.C. § 1125(a)(1)(B). Statements of fact are capable of being shown true or false in a way that admits of empirical verification. *EndoSurg Med., Inc. v. EndoMaster Med., Inc.*, No. GJH-14-2827, 2014 WL 7336691, at *20 (D. Md. Dec. 19, 2014) (citing *Presidio Enter., Inc. v. Warner Bros. Distrib. Corp.*,

784 F.2d 674, 679 (5th Cir. 1986). By contrast, statements of opinion convey a subjective (rather than empirical) viewpoint. *See Pizza Hut, Inc. v. Papa John's Int'l, Inc.*, 227 F.3d 489, 498–99 (5th Cir. 2000), *cert. denied*, 532 U.S. 920. Similarly, "puffery" is an exaggerated and boasting statement that no reasonable buyer would be justified in relying on or a general claim of superiority over comparable products that is so vague that it can be understood as nothing more than a mere expression of opinion. *Id.* at 496.

"Bald assertions of **superiority** or general statements of opinion" do not violate the Lanham Act's false-advertising statute. *Id.* at 496 (emphasis added); *accord Time Warner Cable, Inc. v. DIRECTV, Inc.*, 497 F.3d 144, 160 (2d Cir. 2007). Whether or not a statement is a fact, opinion, or puffery can generally be decided as a matter of law. *See Imagine Medispa, LLC v. Transformations, Inc.*, 999 F. Supp. 2d 873, 881–82 (S.D. W. Va. 2014) (dismissing lawsuit because claims at issue were non-actionable puffery).

Verisign's primary gripe appears to be that "XYZ has launched a promotional campaign that is designed to suggest that it is **superior** to Verisign." (Compl. ¶ 16 (emphasis added).) But courts have held that such vague statements of exaggerated praise are puffery and thus do not violate the Lanham Act. Verisign does not allege that XYZ claimed superiority as to specific attributes. Rather, Verisign alleges that XYZ's video "visually communicates a comparative superiority claim." (*Id.* at ¶ 24.) Visual communication is in the eye of the beholder, and thus subjective rather than factual. Some might view the old Honda in the video with the "COM" license plate as trusty and reliable, and the Audi sports car with "XYZ" as high maintenance, impracticable, and too trendy. XYZ likely wants viewers to see it as the fast new kid in the market, and .COM as the stodgy old guard. In either event, a video that "visually communicates a comparative superiority claim" is not a factual statement.

The narrator's assertion in the two-cars video that it is "impossible to find the .com domain name you want" is not a statement of fact. What "you want" is an inherently subjective, unverifiable element. How could anyone measure what a generic, unknown consumer wants? And the word "impossible" is so hyperbolic that no reasonable buyer would be justified in relying

on it. People once claimed it was "impossible" to swim the English Channel, build the Panama Canal, or run a four-minute mile. It was thought to be "impossible" for a boy raised in poverty to become a billionaire. Whether it's "impossible" to find a name "you want" is XYZ's exaggerated opinion. The claim is similar to being the "fastest" or that "nothing's faster, nothing's easier"—which courts in this district found were puffery as a matter of law and not actionable under the Lanham Act.

Similarly, Negari's statement to NPR that "all the good real estate is taken" reflects his opinion. (*Id.* at ¶ 27.) "Good" virtual real estate to one person may or may not be good to another. Because the statement is inherently subjective and thus not capable of empirical verification, it is not actionable under the Lanham Act.

The same holds true for XYZ's *belief* and *prediction* that .XYZ is the next .COM. Whether the statement is true is not capable of empirical verification, as underscored by Negari's blog-post headline imploring readers to "BELIEVE IT!" Indeed, nearly all future-looking statements are, by their very nature, not statements of fact. *See* 5 McCarthy on Trademarks § 27:96 (citing *Coastal Abstract Serv., Inc. v. First Am. Title Ins. Co.*, 173 F.3d 725, 731–32 (9th Cir. 1999) (statements on matters that are unknowable at the time they are made are non-actionable opinions under the Lanham Act).

In *American Italian Pasta Co.*, for example, the court found that "America's Favorite Pasta" is not actionable under the Lanham Act. *Am. Italian Pasta Co. v. New World Pasta Co.*, 371 F.3d 387, 391 (8th Cir. 2004). "Favorite" means popular, well-liked, or admired. *Id.* Whether something is popular or admired is subjective and vague and not capable of empirical evaluation. *Id.* For that reason, the court dismissed the plaintiff's Lanham Act claim.

Courts in this district have reached similar conclusions. In one case, the court concluded that "'Fastest Refund Loans' language is puffery, not false advertising." *JTH Tax, Inc. v. H & R Block E. Tax Servs., Inc.*, 128 F. Supp. 2d 926, 950 (E.D. Va. 2001) *aff'd in part, vacated in part*, 28 F. App'x 207 (4th Cir. 2002). The court relied on an earlier decision from this district that "Nothing's Faster, Nothing's Easier" is puffery. *Id.*; *see Jackson Hewitt, Inc. v. H & R Block, Inc.,*

No. 94–106 (E.D. Va. Jan. 31, 1994) (hearing and order denying plaintiff's motions for temporary restraining order and preliminary injunction re: "Nothing's Faster, Nothing's Easier").

Likewise, XYZ's statement to NPR that the "only thing that is left is something with a dash, or maybe three dashes and a couple of numbers in it" is patent hyperbole. (Compl. ¶ 27.) No consumer would reasonably rely on such an extreme statement in deciding whether to register a .COM—especially when the statement comes from a .COM competitor.

Verisign's claim rests on its contention that XYZ's statements "when viewed together and in context, reflect a strategy to create a deceptive message to the public that companies and individuals cannot get the .COM domain names they want from Verisign, and that XYZ is quickly becoming the preferred alternative." (*Id.* at ¶ 42.) But whether individuals can get the .COM they want is inherently subjective and thus a mere expression of opinion. Neither XYZ nor Verisign can predict what any given consumer wants. And whether XYZ is a preferred alternative is similarly subjective—surely any consumer who buys a .XYZ domain thinks XYZ is a preferred alternative, while people who buy a .COM may think it is not.

Since nearly all XYZ's statements are opinion, puffery, hyperbole, or future looking, they cannot form the basis for a Lanham Act claim.

D. Verisign's claim fails because the number of .XYZ registrations that XYZ touted are literally true, and XYZ's truthful statement could not cause harm to Verisign.

Verisign thinks XYZ's factual statements about the number of .XYZ domain names sold, and XYZ's position as a market leader among new domains, are deceptive. Putting aside the fact that these statements were not widely disseminated enough to be considered "commercial advertisements or promotions," Verisign's claim fails because the numbers quoted are literally true. XYZ's blog posts accurately stated the number of .XYZ registrations. Verisign offers no allegation to the contrary.

Verisign's claim that XYZ's statements about the number of .XYZ registrations would lead to commercial injury to Verisign is implausible. Indeed, Verisign's .COM is the undisputed largest domain registry in the world. If a consumer wants a domain name in a highly-trafficked

registry, and the .COM name is available, the consumer would certainly pick .COM. The only reason a consumer would choose .XYZ is because the consumer wants a *new* domain, and not the incumbent .COM. Thus, even assuming consumers were materially deceived, the result would be that those consumers might choose .XYZ over another *new* domain extension—but not over .COM. And Verisign cannot state a claim if its competitor, and not Verisign, suffers the harm. *Lexmark*, 134 S. Ct. at 1386, 1391. So none of Verisign's allegations regarding the number of .XYZ registrations can form the basis of a Lanham Act claim.

IV. AMENDMENT WOULD BE FUTILE

While leave to amend defective pleadings should generally be freely given, courts need not do so when it is clear that any attempted amendment would be futile or offered in bad faith. *Glaser v. Enzo Biochem, Inc.*, 126 F. App'x 593, 601–02 (4th Cir. 2005). An amendment would be futile if the amended claim would fail to survive a motion to dismiss for failure to state a claim under Fed. R. Civ. P. 12(b)(6). *Syngenta Crop Prot., Inc. v. U.S.E.P.A.*, 222 F.R.D. 271, 278 (M.D.N.C. 2004).

There is no reasonable basis upon which Verisign could amend its pleadings to claim that XYZ or Negari solicited NPR's coverage. Nor could Verisign allege in good faith that the blog posts were "widely disseminated" in the context of the millions of potential domain-name registrants. Any amendment would either be futile—because Verisign's claim would still fail—or would require factual allegations that could not meet Rule 11's requirement that factual contentions have evidentiary support.

Attached as Exhibit A is a chart containing every statement that Verisign complains about, and a summary of reasons why each statement is not actionable. No amendment could cure these deficiencies. The Court should not grant leave to amend.

V. CONCLUSION

Since the dawn of a competitive market, the incumbent industry leader has always felt threatened by the scrappy startup. Every new company enters the market believing it is superior to the competition, and its statements reflect that. In the end, when companies compete fairly, the market decides who deserves consumer attention.

Rather than compete on the merits, Verisign is attempting to litigate XYZ out of business complaining about a vanity video, website blog posts, and opinions stated to a reporter. But Verisign's complaint does not allege harm, the statements it complains about do not qualify as advertising and promotion under the Lanham Act, the statements are opinion or puffery which would not be actionable in any event, and most of them are true. The Court should grant judgment on the pleadings and dismiss Verisign's complaint without leave to amend.

Dated April 20, 2015.

/s/ Derek A. Newman
Derek A. Newman, admitted *pro hac vice*
Jason B. Sykes, *pro hac vice* application forthcoming
Newman Du Wors LLP
100 Wilshire Blvd., Suite 940
Santa Monica, CA 90401
(310) 359-8200 Tel
(310) 359-8190 Fax
dn@nemanlaw.com
Counsel for XYZ.com LLC and Daniel Negari

/s/ Timothy J. Battle
Timothy J. Battle
Timothy J. Battle Law Offices
VSB# 18538
524 King Street
Alexandria, VA 22320-4593
(703) 836-1216 Tel
(703) 549-3335 Fax
tjbattle@verizon.net
Counsel for XYZ.com LLC and Daniel Negari

Exhibit A

STATEMENT VERISIGN COMPLAINS ABOUT	WHY STATEMENT IS NOT ACTIONABLE UNDER THE LANHAM ACT
"with over 120 million dot coms registered today, it's impossible to find the domain name that you want." (*See* Compl. ¶ 20, Ex. 1.)	• Not commercial advertisement because statement was **not widely disseminated.** • Not a statement of fact, rather an expression of **opinion/puffery**: (i) what "you want" is inherently subjective, and (ii) "impossible" is so hyperbolic that no reasonable buyer would be justified to rely on it.
"All the good real estate is taken. The only thing that's left is something with a dash or maybe three dashes and a couple numbers in it." (*See* Compl. ¶ 27, Ex. 2.)	• Not commercial advertisement because statement was a **response to an unsolicited inquiry by a news organization.** • Not a statement of fact rather an expression of **opinion**: "good" is inherently subjective and not capable of empirical verification.
"NPR's David Kestenbaum described .xyz as the next .com". (*See* Compl. ¶¶ 32-33, Ex. 3.)	• Not commercial advertisement because statement was **not widely disseminated.** • Statement **did not and is not likely to injure Verisign** because it reinforces that Verisign's .COM is the most-popular, most-successful domain registry.
".xyz is the Next .com—NPR interview with Daniel Negari." (*See* Compl. ¶¶ 32-33, Ex. 3.)	• Not commercial advertisement because statement was **not widely disseminated.** • Statement **did not and is not likely to injure Verisign** because it reinforces that Verisign's .COM is the most-popular, most-successful domain registry.
".XYZ is the Next .COM—BELIEVE IT". (*See* Compl. ¶¶ 32-33, Ex. 3.)	• Not commercial advertisement because statement was **not widely disseminated.** • Not a statement of fact because it is a **future-looking** statement. • Statement **did not and is not likely to injure Verisign** because it reinforces that Verisign's .COM is the most-popular, most-successful domain registry.
"Coined the next.com by NPR and VentureBeat". (*See* Compl. ¶ 40.)	• Not commercial advertisement because statement was **not widely disseminated.** • Statement **did not and is not likely to injure Verisign** because it reinforces that Verisign's .COM is the most-popular, most-successful domain registry.
"We are now the number one new TLD in the marketplace." (*See* Compl. ¶ 53(a), Ex. 6.)	• Not commercial advertisement because statement was **not widely disseminated.** • Not a statement of fact, rather an expression of **opinion/puffery** re: superiority. "#1" is subjective. If not subjective, literally **true**. • Statement **did not and is not likely to injure Verisign** as .COM is not a new TLD.

STATEMENT VERISIGN COMPLAINS ABOUT	WHY STATEMENT IS NOT ACTIONABLE UNDER THE LANHAM ACT
".xyz has received the most registrations of all new gTLDs with 447,544 domains registered." (*See* Compl. 53(b), Ex. 7.)	• Not commercial advertisement because statement was **not widely disseminated.** • Literally **true** statement. • Statement **did not and is not likely to injure Verisign** as .COM is not a new TLD.
"It seems I aimed too low in my ambitions of .com, .net, .xyz, as it has not become .com, .xyz, .org!" (*See* Compl. ¶ 53(c), Ex. 8.)	• Not commercial advertisement because statement was **not widely disseminated.** • Not a statement of fact, rather an expression of **opinion/puffery**: vague statement of exaggerated praise. • Statement **did not and is not likely to injure Verisign** as .COM appears first in the list.
"In nearly every relevant metric for success including registration numbers … .xyz leads the pack." (*See* Compl. ¶ 53(d), Ex. 9.)	• Not commercial advertisement because statement was **not widely disseminated.** • Not a statement of fact, rather an expression of **opinion/puffery** re: superiority. • Statement **did not and is not likely to injure Verisign** as .COM is not a new TLD.
"Awareness and traffic lead to registrations. Notable accomplishments since general availability launch: 550k – xyz domains registered since launch". (*See* Compl. ¶ 53(e), Ex. 10.)	• Not commercial advertisement because statement was **not widely disseminated.** • Literally **true** statement. • Statement **did not and is not likely to injure Verisign** as it is undisputed that .COM is the largest and highest-trafficked registry.

CERTIFICATE OF SERVICE

I certify that on April 20, 2015, I electrically filed the foregoing with the Clerk of Court using the CM/ECF system, which will send a notification of such filing (NED) to the following:

Nicholas Martin DePalma <nicholas.depalma@venable.com>
Randall Karl Miller < rkmiller@venable.com>
Kevin W. Weigand <kweigand@venable.com>
VENABLE LLP
8010 Towers Crescent Drive, Suite 300
Tysons Corner, VA 22182

/s/ Timothy J. Battle
Timothy J. Battle
VSB# 18538
524 King Street
Alexandria, VA 22320-4593
(703) 836-1216 Tel
(703) 549-3335 Fax
tjbattle@verizon.net
Counsel for XYZ.com LLC and Daniel Negari