

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

~~Priority~~  
~~Send~~  
~~Clsd~~  
~~Enter~~  
NO JS-5/JS-6  
JS-2/JS-3

FILED  
CLERK, U.S. DISTRICT COURT  
JUL 12 2004  
CENTRAL DISTRICT OF CALIFORNIA  
BY DA DEPUTY

SCANNED

UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

REGISTERSITE.COM, an Assumed ) CASE NO.: CV 04-1368 ABC (CWx)  
Name of ABR PRODUCTS INC., a )  
New York corporation, et al., ) ORDER RE: DEFENDANTS' MOTIONS TO  
Plaintiff, ) DISMISS  
v. )  
INTERNET CORPORATION FOR )  
ASSIGNED NAMES AND NUMBERS, a )  
California corporation, et al. )  
Defendants. )

Pending before the Court are Defendants' motions to dismiss. The motions came on regularly for hearing on July 12, 2004. Upon consideration of the submissions of the parties, the case file, and oral argument of counsel, the motion to dismiss filed by Defendants Verisign, Inc. and Network Solutions, Inc. is hereby GRANTED IN PART and DENIED IN PART. The remaining motions are MOOT for reasons discussed below.

//

THIS CONSTITUTES NOTICE OF ENTRY  
AS REQUIRED BY FRCP, RULE 77(d).

ENTERED  
CLERK, U.S. DISTRICT COURT  
JUL 14 2004  
CENTRAL DISTRICT OF CALIFORNIA  
BY m/c DEPUTY

54

1 I. FACTUAL AND PROCEDURAL HISTORY

2 On April 8, 2004, Plaintiffs filed a First Amended Complaint  
3 ("FAC") asserting a federal antitrust claim under the Sherman Act,  
4 U.S.C. § 1, and eleven various state law claims. The Plaintiffs<sup>1</sup>  
5 consist of eight businesses that assist consumers in registering  
6 expired Internet domain names. (FAC ¶ 1.4.) Plaintiffs assert claims  
7 against four defendants: Verisign, Inc. ("Verisign"), Network  
8 Solutions, Inc. ("NSI"), Internet Corporation for Assigned Names and  
9 Numbers ("ICANN"), and eNom, Inc. ("eNom").

10 Verisign is a registry operator responsible for maintaining the  
11 database of domain registrations for the <.com> and <.net> domain  
12 names. (FAC ¶ 4.9.) Verisign plans to launch a new service, the Wait  
13 Listing Service ("WLS"). (FAC ¶ 1.1.) The WLS purports to give  
14 consumers, for an annual fee, the right to be "first in line" on the  
15 "waiting list" for currently-registered <.com> and <.net> domain  
16 names. (FAC ¶ 1.1.) According to Plaintiffs, Verisign requires that  
17 each consumer who purchases a WLS subscription also purchase any  
18 resulting domain name registration from the same registrar from whom  
19 he purchased the WLS subscription. (FAC ¶¶ 13.6, 13.7.) NSI and eNom  
20 are registrars who are currently advertising and taking "pre-orders"  
21 for the Verisign WLS service. (FAC ¶¶ 2.11-2.14, 7.6, 8.6.)  
22 Plaintiffs allege that a consumer will receive no benefit from  
23 purchasing a WLS subscription unless and until the current registrant  
24 decides to abandon its domain name, which is unlikely. (FAC ¶ 1.1.)  
25 As such, the WLS service will fail to provide any value to consumers.

26  
27 <sup>1</sup> Plaintiffs include: (1) Registersite.com, (2) Name.com, (3) R.  
28 Lee Chambers Company LLC, (4) Fiducia LLC, (5) Spot Domain, LLC, (6)  
!\$6.25 Domains! Network, Inc., (7) Ausregistry Group PTY LTD., and (8)  
!\$! Bid It Win It, Inc.

1 (FAC ¶ 4.55-4.58.).

2 In their ninth cause of action, Plaintiffs allege that the WLS  
3 service is an illegal tying arrangement in violation of the Sherman  
4 Act. Verisign allegedly exercises market power with respect to  
5 registry services, including WLS subscriptions. (FAC ¶ 13.9.) WLS  
6 subscriptions and domain name registrations are separate, distinct  
7 services. (FAC ¶ 13.8.) Consumers are free to transfer their  
8 registered domain names between registrars. (FAC ¶ 13.3.) However,  
9 consumers will be unable to purchase a WLS subscription without  
10 agreeing to purchase a domain name registration if the subscription is  
11 successful. (FAC ¶ 13.9.) Plaintiffs claim that "a not insubstantial  
12 volume of commerce in [domain name registrations] will be affected by  
13 Verisign's tying agreement." (FAC ¶ 13.16.)

14 On May 28, 2004, the Court received Defendant eNom's motion to  
15 dismiss the FAC, Defendant ICANN's motion to dismiss certain causes of  
16 action, Defendant Verisign's motion to dismiss the eleventh cause of  
17 action, and Defendants Verisign's and NSI's motion to dismiss the FAC.  
18 On June 17, 2004, Plaintiffs filed oppositions to each of the motions  
19 and a motion to strike certain portions of ICANN's motion. The  
20 Defendants filed replies on June 30, 2004.

21 **II. LEGAL STANDARD**

22 A Rule 12(b)(6) motion tests the legal sufficiency of the claims  
23 asserted in the complaint. See Fed. R. Civ. P. 12(b)(6). Rule  
24 12(b)(6) must be read in conjunction with Rule 8(a) which requires a  
25 "short and plain statement of the claim showing that the pleader is  
26 entitled to relief." 5A Charles A. Wright & Arthur R. Miller, Federal  
27 Practice and Procedure § 1356 (1990). "The Rule 8 standard contains  
28 'a powerful presumption against rejecting pleadings for failure to

1 | state a claim.'" Gilligan v. Jamco Dev. Corp., 108 F.3d 246, 249 (9th  
2 | Cir. 1997). A Rule 12(b)(6) dismissal is proper only where there  
3 | either a "lack of a cognizable legal theory" or "the absence of  
4 | sufficient facts alleged under a cognizable legal theory." Balistreri  
5 | v. Pacifica Police Dept., 901 F.2d 969, 699 (9th Cir. 1988); accord  
6 | Gilligan, 108 F.3d at 249 ("A complaint should not be dismissed  
7 | 'unless it appears beyond doubt that the plaintiff can prove no set of  
8 | facts in support of his claim which would entitle him to relief").

9 |       The Court must accept as true all material allegations in the  
10 | complaint, as well as reasonable inferences to be drawn from them.  
11 | See Pareto v. F.D.I.C., 139 F.3d 696, 699 (9th Cir. 1998). Moreover,  
12 | the complaint must be read in the light most favorable to plaintiff.  
13 | See id. However, the Court need not accept as true any unreasonable  
14 | inferences, unwarranted deductions of fact, and/or conclusory legal  
15 | allegations cast in the form of factual allegations. See, e.g.,  
16 | Western Mining Council v. Watt, 643 F.2d 618, 624 (9th Cir. 1981).

17 |       Moreover, in ruling on a 12(b)(6) motion, a court generally  
18 | cannot consider material outside of the complaint (e.g., those facts  
19 | presented in briefs, affidavits, or discovery materials). See Branch  
20 | v. Tunnell, 14 F.3d 449, 453 (9th Cir. 1994). A court may, however,  
21 | consider exhibits submitted with the complaint. See id. at 453-54.  
22 | Also, a court may consider documents which are not physically attached  
23 | to the complaint but "whose contents are alleged in [the] complaint  
24 | and whose authenticity no party questions." Id. at 454. Further, it  
25 | is proper for the court to consider matters subject to judicial notice  
26 | pursuant to Federal Rule of Evidence 201. Mir, M.D. v. Little Co. of  
27 | Mary Hospital, 844 F.2d 646, 649 (9th Cir. 1988).

28 |

1 III. DISCUSSION

2 A. Plaintiffs' Federal Antitrust Claim

3 Plaintiffs' ninth claim alleges that Verisign, eNom, and NSI have  
4 established an illegal per se tying arrangement in violation of the  
5 Sherman Act, 15 U.S.C. § 1. A tying arrangement involves a seller's  
6 refusal to sell one product (the tying product) unless the buyer also  
7 purchases a second product (the tied product) from the seller. Hamro  
8 v. Shell Oil Co., 674 F.2d 784, 786 (9th Cir. 1982). In this case,  
9 Plaintiffs allege that Verisign has established a tying arrangement  
10 because "[e]ach consumer who purchases a WLS subscription [the tying  
11 product] will be required to agree to purchase any resulting domain  
12 name registration [the tied product] from the same registrar from whom  
13 he purchased the WLS subscription." (FAC ¶ 13.6.)

14 In response to these allegations, Defendants argue that  
15 Plaintiffs lack standing because Defendants have yet to sell any WLS  
16 subscriptions. Plaintiffs counter that threatened injury confers  
17 standing. The Court agrees with Plaintiffs. "In order to establish  
18 standing, a plaintiff must first show that she has suffered an 'injury  
19 in fact - an invasion of a legally protected interest which is (a)  
20 concrete and particularized and (b) actual or imminent, not  
21 conjectural or hypothetical.'" Scott v. Pasadena Unified Sch. Dist.,  
22 306 F.3d 646, 654 (9th Cir. 2002) (citation omitted). Here,  
23 Plaintiffs allege that Verisign plans to launch the WLS no more than  
24 thirty days after it is approved, that approval is likely, and that  
25 eNom and NSI are currently advertising the WLS and are accepting pre-  
26 orders for WLS subscriptions on their Web sites. (FAC ¶¶ 4.66-4.68.)  
27 The Court finds that these allegations sufficiently state an imminent  
28 injury. Furthermore, Defendants' contention that the threatened

1 injury is not substantial enough is not relevant to a standing  
2 inquiry. Instead, the magnitude of the threatened injury is relevant  
3 to whether Plaintiffs have sufficiently pled each of the elements of a  
4 tying claim.

5 To establish that a tying arrangement is illegal *per se*,  
6 plaintiffs must prove: (1) a tie between two separate products or  
7 services sold in relevant markets, (2) sufficient economic power in  
8 the tying product market to affect the tied market, (3) an effect on a  
9 not-insubstantial volume of commerce in the tied product market, and  
10 (4) the defendant's economic interest in the tied product. County of  
11 Tuolumne v. Sonora Cmty. Hosp., 236 F.3d 1148, 1157-58 (9th Cir. 2001)  
12 (citation omitted).

13 Plaintiffs' allegations fail to satisfy the third and fourth  
14 requirements.<sup>2</sup> As Defendants point out, Plaintiffs must do more than  
15 state mere legal conclusions. While Plaintiffs do state that a "not  
16 insubstantial volume of commerce in the tied product will be affected  
17 by Verisign's tying agreement," Plaintiffs' FAC fails to include facts  
18 to support this legal conclusion. In fact, the FAC includes facts  
19 which suggest that WLS subscriptions will not have an effect on domain  
20 name registrations because "of WLS subscriptions on the most desirable  
21 domain names,<sup>3</sup> ninety five percent (95%) of consumers will never  
22 obtain the domain names to which they subscribe." (FAC ¶ 4.58)

23

24 \_\_\_\_\_  
25 <sup>2</sup> Plaintiffs' allegations also fail to satisfy the second  
26 requirement with respect to Defendants eNom and NSI. Plaintiffs have  
not alleged that eNom and NSI have market power in WLS subscriptions,  
the tying product.

27 <sup>3</sup> According to Plaintiffs, "WLS subscriptions are likely to be  
28 purchased on the most desirable domain names, and are unlikely to be  
purchased on the least desirable domain names." (FAC ¶ 4.56.)

1 (emphasis in original). As a result, Plaintiffs claim "VERISIGN WILL  
2 PROVIDE NO VALUE TO CONSUMERS PURCHASING WLS." (FAC at 20:4.) If  
3 Plaintiffs are correct, and the Court must assume they are, that  
4 consumers' WLS subscriptions will be overwhelmingly unsuccessful, and  
5 that only successful WLS subscriptions will result in domain name  
6 registrations, then the facts in Plaintiffs' FAC do not support the  
7 legal conclusion that the WLS will affect a not-insubstantial volume  
8 of commerce in domain name registrations. Instead, Plaintiffs' FAC  
9 suggests that the majority of WLS consumers will be free to register  
10 their domain names with either their current registrar or other  
11 registrars. In fact, Plaintiffs allege that "[c]onsumers are free to  
12 transfer their registered domain names between registrars." (FAC ¶  
13 13.3).

14 Plaintiffs have also failed to allege that Verisign has a  
15 sufficient economic interest in domain name registration. "In the  
16 typical tying scheme, the seller of the tying product also sells the  
17 tied product. The tying product seller's interest need not be so  
18 direct, however, as long as the seller has an economic interest in the  
19 sale of the tied product." Robert's Waikiki U-Drive, Inc., v. Budget  
20 Rent-A-Car Sys., Inc., 732 F.2d 1403, 1407-08 (9th Cir. 1984)  
21 (citation omitted). In this case, Plaintiffs' FAC makes clear that in  
22 the unlikely event that a WLS subscription is successful, domain name  
23 registrations will be sold by registrars, not Verisign. (FAC ¶ 13.6.)  
24 Plaintiffs further allege that "[d]omain registration fees are not  
25 included in the \$24 fee Verisign will charge registrars for each WLS  
26 subscription sold." (FAC ¶ 13.5.) Thus, according to Plaintiffs'  
27 allegations, Verisign's economic interest is in the sale of WLS  
28

1 | subscriptions, not domain name registrations.<sup>4</sup>

2 | For the reasons articulated, Plaintiffs have failed to  
3 | sufficiently allege an illegal tying arrangement. Therefore, the  
4 | Court dismisses this claim without prejudice.<sup>5</sup>

5 | **B. Plaintiffs' State Law Claims**

6 | Plaintiffs' remaining eleven claims arise out of state law.  
7 | Defendants argue for dismissal of these claims on the merits for  
8 | various reasons. However, the Court declines to exercise supplemental  
9 | jurisdiction over the state law claims for two reasons. First, where  
10 | federal claims are disposed of well before trial, it is appropriate  
11 | for pendent state claims to be dismissed as well. 28 U.S.C. §  
12 | 1367(c)(3). Because the Court has dismissed the sole federal claim,  
13 | judicial economy and comity weigh in favor of dismissing the state  
14 | claims.

15 | Second, a district court may decline to exercise supplemental  
16 | jurisdiction if the state law claims substantially predominate over  
17 | the federal law claim. 28 U.S.C. § 1367(c)(2). Here, Plaintiffs  
18 | allege several claims arising under California's Unfair Competition  
19 | Act, intentional interference with prospective economic advantage, and  
20 | breach of contract. These claims would substantially expand the scope

21 |

---

22 | <sup>4</sup> Plaintiffs do contend that "Verisign owns 15% of NSI and has an  
23 | economic interest in restricting registrars' ability to compete with  
24 | NSI for domain name registrations." (FAC ¶ 13.17.) However,  
25 | Plaintiffs have not contended that Verisign will limit WLS  
26 | subscriptions to NSI. Instead, Plaintiffs' allegations indicate that  
27 | Verisign intends to force other registrars to agree to offer WLS  
28 | subscriptions. (FAC ¶¶ 13.21, 13.22.)

27 | <sup>5</sup> Although the Court grants Plaintiffs leave to amend, the  
28 | amended complaint may only allege other facts consistent with the  
original complaint. See Reddy v. Litton Indus., Inc., 912 F.2d 291,  
297 (9th Cir. 1990).



1 of this case. To support these claims, Plaintiffs allege, inter alia,  
2 that Defendants are engaging in an illegal lottery, making false,  
3 misleading, and defamatory statements, and selling contingent future  
4 interests in property they do not own. Plaintiffs' submissions  
5 demonstrate that the state law claims predominate this action and the  
6 dispute between the parties. While the allegations necessary for the  
7 federal antitrust claim are contained on three brief pages, the  
8 allegations for the state law claims span the remaining 47 pages of  
9 Plaintiffs' 51-page FAC. In responding to Defendants' motion to  
10 dismiss, Plaintiffs dedicated only one page of their 25-page  
11 opposition to the federal antitrust claim. Not only are the various  
12 state law claims numerous, but, as discussed above, the facts alleged  
13 to support these state law claims are in some ways inconsistent with  
14 Plaintiffs' deficient antitrust claim, which is the sole basis for  
15 original jurisdiction.<sup>6</sup> For these reasons, the Court exercises its  
16 discretion to dismiss Plaintiffs' state law claims without prejudice.

SCANNED

#### 17 18 IV. CONCLUSION

19 For the foregoing reasons, Defendants Verisign, Inc.'s and  
20 Network Solutions, Inc.'s motion to dismiss the First Amended Complaint  
21 is hereby GRANTED IN PART and DENIED IN PART. Accordingly,  
22 Plaintiffs' First Amended Complaint is DISMISSED WITHOUT PREJUDICE as  
23 to the federal and state law claims. Plaintiffs may amend their  
24

---

25  
26 <sup>6</sup> In their FAC, Plaintiffs assert § 57b of the Federal Trade  
27 Commission Act ("FTCA") as an additional basis for jurisdiction. (FAC  
28 ¶ 3.1). However, § 57b of the FTCA authorizes suits by the Federal  
Trade Commission, not private individuals. See 15 U.S.C. § 57b. As  
such, Plaintiffs may not rely on § 57b as a basis for federal  
jurisdiction.

1 federal antitrust claim by filing a second amended complaint within 14  
2 days of entry of this Order. Failure to refile within 14 days will  
3 result in a dismissal of the antitrust claim with prejudice.<sup>7</sup>

SCANNED

4 The Court declines to exercise supplemental jurisdiction over  
5 Plaintiffs' state law claims. Accordingly, the Court finds that:

6 Defendant Verisign Inc.'s motion to dismiss the eleventh claim  
7 for relief for improper venue is MOOT;

8 Defendant Internet Corporation for Assigned Names and Numbers'  
9 motion to dismiss certain causes of action is MOOT;

10 Defendant eNom, Inc's motion to dismiss the First Amended  
11 Complaint is MOOT; and

12 Plaintiffs' motion to strike certain portions of Defendant  
13 ICANN's motion is MOOT.

14

15 SO ORDERED.

16 DATED:

July 12, 2004

17

18

Audrey B. Collins

19

AUDREY B. COLLINS  
UNITED STATES DISTRICT JUDGE

20

21

22

23

24

25

26 <sup>7</sup> The Court waives the requirement that the parties comply with  
27 the requirements of Local Rule 7-3, as the parties have already  
28 complied with its meet and confer requirements. However, Plaintiffs  
should be cognizant of their obligations under Federal Rule of Civil  
Procedure 11 in deciding whether to refile this claim.

→ Tentative

cc Sims  
Elba

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

REGISTERSITE.COM, an Assumed )  
Name of ABR PRODUCTS INC., a )  
New York corporation, et al., )  
Plaintiff, )  
v. )  
INTERNET CORPORATION FOR )  
ASSIGNED NAMES AND NUMBERS, a )  
California corporation, et al. )  
' )  
Defendants. )

CASE NO.: CV 04-1368 ABC (CWx)  
ORDER RE: DEFENDANTS' MOTIONS TO  
DISMISS

Tentative Only

Pending before the Court are Defendants' motions to dismiss. The motions came on regularly for hearing on July 12, 2004. Upon consideration of the submissions of the parties, the case file, and oral argument of counsel, the motion to dismiss filed by Defendants Verisign, Inc. and Network Solutions, Inc. is hereby GRANTED IN PART and DENIED IN PART. The remaining motions are MOOT for reasons discussed below.

//

1 I. FACTUAL AND PROCEDURAL HISTORY

2 On April 8, 2004, Plaintiffs filed a First Amended Complaint  
3 ("FAC") asserting a federal antitrust claim under the Sherman Act, 15  
4 U.S.C. § 1, and eleven various state law claims. The Plaintiffs<sup>1</sup>  
5 consist of eight businesses that assist consumers in registering  
6 expired Internet domain names. (FAC ¶ 1.4.) Plaintiffs assert claims  
7 against four defendants: Verisign, Inc. ("Verisign"), Network  
8 Solutions, Inc. ("NSI"), Internet Corporation for Assigned Names and  
9 Numbers ("ICANN"), and eNom, Inc. ("eNom").

10 Verisign plans to launch a new service, the Wait Listing Service  
11 ("WLS"). (FAC ¶ 1.1.) The WLS purports to give consumers, for an  
12 annual fee, the right to be "first in line" on the "waiting list" for  
13 currently-registered <.com> and <.net> domain names. (FAC ¶ 1.1.)  
14 According to Plaintiffs, Verisign requires that each consumer who  
15 purchases a WLS subscription also purchase any resulting domain name  
16 registration from the same registrar from whom he purchased the WLS  
17 subscription. (FAC ¶¶ 13.6, 13.7.) NSI and eNom are registrars who  
18 are currently advertising and taking "pre-orders" for the Verisign WLS  
19 service. (FAC ¶¶ 2.11-2.14, 7.6, 8.6.) Plaintiffs allege that a  
20 consumer will receive no benefit from purchasing a WLS subscription  
21 unless and until the current registrant decides to abandon its domain  
22 name, which is unlikely. (FAC ¶ 1.1.) As such, the WLS service will  
23 fail to provide any value to consumers. (FAC ¶ 4.55-4.58.).

24 In their ninth cause of action, Plaintiffs allege that the WLS  
25 service is an illegal tying arrangement in violation of the Sherman

---

26 <sup>1</sup> Plaintiffs include: (1) Registersite.com, (2) Name.com, (3) R.  
27 Lee Chambers Company LLC, (4) Fiducia LLC, (5) Spot Domain, LLC, (6)  
28 !\$6.25 Domains! Network, Inc., (7) Ausregistry Group PTY LTD., and (8)  
!\$! Bid It Win It, Inc.

1 Act. Verisign allegedly exercises market power with respect to  
2 registry services, including WLS subscriptions. (FAC ¶ 13.9.) WLS  
3 subscriptions and domain name registrations are separate, distinct  
4 services. (FAC ¶ 13.8.) Consumers are free to transfer their  
5 registered domain names between registrars. (FAC ¶ 13.3.) However,  
6 consumers will be unable to purchase a WLS subscription without  
7 agreeing to purchase a domain name registration if the subscription is  
8 successful. (FAC ¶ 13.9.) Plaintiffs claim that "a not insubstantial  
9 volume of commerce in [domain name registrations] will be affected by  
10 Verisign's tying agreement." (FAC ¶ 13.16.)

11 On May 28, 2004, the Court received Defendant eNom's motion to  
12 dismiss the FAC, Defendant ICANN's motion to dismiss certain causes of  
13 action, Defendant Verisign's motion to dismiss the eleventh cause of  
14 action, and Defendants Verisign's and NSI's motion to dismiss the FAC.  
15 On June 17, 2004, Plaintiffs filed oppositions to each of the motions  
16 and a motion to strike certain portions of ICANN's motion. The  
17 Defendants filed replies on June 30, 2004.

## 18 II. LEGAL STANDARD

19 A Rule 12(b)(6) motion tests the legal sufficiency of the claims  
20 asserted in the complaint. See Fed. R. Civ. P. 12(b)(6). Rule  
21 12(b)(6) must be read in conjunction with Rule 8(a) which requires a  
22 "short and plain statement of the claim showing that the pleader is  
23 entitled to relief." 5A Charles A. Wright & Arthur R. Miller, Federal  
24 Practice and Procedure § 1356 (1990). "The Rule 8 standard contains  
25 'a powerful presumption against rejecting pleadings for failure to  
26 state a claim.'" Gilligan v. Jamco Dev. Corp., 108 F.3d 246, 249 (9th  
27 Cir. 1997). A Rule 12(b)(6) dismissal is proper only where there is  
28 either a "lack of a cognizable legal theory" or "the absence of

1 sufficient facts alleged under a cognizable legal theory." Balistreri  
2 v. Pacifica Police Dept., 901 F.2d 969, 699 (9th Cir. 1988); accord  
3 Gilligan, 108 F.3d at 249 ("A complaint should not be dismissed  
4 'unless it appears beyond doubt that the plaintiff can prove no set of  
5 facts in support of his claim which would entitle him to relief").

6 The Court must accept as true all material allegations in the  
7 complaint, as well as reasonable inferences to be drawn from them.  
8 See Pareto v. F.D.I.C., 139 F.3d 696, 699 (9th Cir. 1998). Moreover,  
9 the complaint must be read in the light most favorable to plaintiff.  
10 See id. However, the Court need not accept as true any unreasonable  
11 inferences, unwarranted deductions of fact, and/or conclusory legal  
12 allegations cast in the form of factual allegations. See, e.g.,  
13 Western Mining Council v. Watt, 643 F.2d 618, 624 (9th Cir. 1981).

14 Moreover, in ruling on a 12(b)(6) motion, a court generally  
15 cannot consider material outside of the complaint (e.g., those facts  
16 presented in briefs, affidavits, or discovery materials). See Branch  
17 v. Tunnell, 14 F.3d 449, 453 (9th Cir. 1994). A court may, however,  
18 consider exhibits submitted with the complaint. See id. at 453-54.  
19 Also, a court may consider documents which are not physically attached  
20 to the complaint but "whose contents are alleged in [the] complaint  
21 and whose authenticity no party questions." Id. at 454. Further, it  
22 is proper for the court to consider matters subject to judicial notice  
23 pursuant to Federal Rule of Evidence 201. Mir, M.D. v. Little Co. of  
24 Mary Hospital, 844 F.2d 646, 649 (9th Cir. 1988).

### 25 III. DISCUSSION

#### 26 A. Plaintiffs' Federal Antitrust Claim

27 Plaintiffs' ninth claim alleges that Verisign, eNom, and NSI have  
28 established an illegal *per se* tying arrangement in violation of the

1 Sherman Act, 15 U.S.C. § 1. A tying arrangement involves a seller's  
2 refusal to sell one product (the tying product) unless the buyer also  
3 purchases a second product (the tied product) from the seller. Hamro  
4 v. Shell Oil Co., 674 F.2d 784, 786 (9th Cir. 1982). In this case,  
5 Plaintiffs allege that Verisign has established a tying arrangement  
6 because "[e]ach consumer who purchases a WLS subscription [the tying  
7 product] will be required to agree to purchase any resulting domain  
8 name registration [the tied product] from the same registrar from whom  
9 he purchased the WLS subscription." (FAC ¶ 13.6.)

10 In response to these allegations, Defendants argue that  
11 Plaintiffs lack standing because Defendants have yet to sell any WLS  
12 subscriptions. Plaintiffs counter that threatened injury confers  
13 standing. The Court agrees with Plaintiffs. "In order to establish  
14 standing, a plaintiff must first show that she has suffered an 'injury  
15 in fact - an invasion of a legally protected interest which is (a)  
16 concrete and particularized and (b) actual or imminent, not  
17 conjectural or hypothetical.'" Scott v. Pasadena Unified Sch. Dist.,  
18 306 F.3d 646, 654 (9th Cir. 2002) (citation omitted). Here,  
19 Plaintiffs allege that Verisign plans to launch the WLS no more than  
20 thirty days after it is approved, that approval is likely, and that  
21 eNom and NSI are currently advertising the WLS and are accepting pre-  
22 orders for WLS subscriptions on their Web sites. (FAC ¶¶ 4.66-4.68.)  
23 The Court finds that these allegations sufficiently state an imminent  
24 injury. Furthermore, Defendants' contention that the threatened  
25 injury is not substantial enough is not relevant to a standing  
26 inquiry. Instead, the magnitude of the threatened injury is relevant  
27 to whether Plaintiffs have sufficiently pled each of the elements of a  
28 tying claim.

1 To establish that a tying arrangement is illegal *per se*,  
2 plaintiffs must prove: (1) a tie between two separate products or  
3 services sold in relevant markets, (2) sufficient economic power in  
4 the tying product market to affect the tied market, (3) an effect on a  
5 not-insubstantial volume of commerce in the tied product market, and  
6 (4) the defendant's economic interest in the tied product. County of  
7 Tuolumne v. Sonora Cmty. Hosp., 236 F.3d 1148, 1157-58 (9th Cir. 2001)  
8 (citation omitted).

9 Plaintiffs' allegations fail to satisfy the third and fourth  
10 requirements.<sup>2</sup> As Defendants point out, Plaintiffs must do more than  
11 state mere legal conclusions. While Plaintiffs do state that a "not  
12 insubstantial volume of commerce in the tied product will be affected  
13 by Verisign's tying agreement," Plaintiffs' FAC fails to include facts  
14 to support this legal conclusion. In fact, the FAC includes facts  
15 which suggest that WLS subscriptions will not have an effect on domain  
16 name registrations because "of WLS subscriptions on the most desirable  
17 domain names,<sup>3</sup> ninety five percent (95%) of consumers will never  
18 obtain the domain names to which they subscribe." (FAC ¶ 4.58)  
19 (emphasis in original). As a result, Plaintiffs claim "VERISIGN WILL  
20 PROVIDE NO VALUE TO CONSUMERS PURCHASING WLS." (FAC at 20:4.) If  
21 Plaintiffs are correct, and the Court must assume they are, that  
22 consumers' WLS subscriptions will be overwhelmingly unsuccessful, and  
23

---

24 <sup>2</sup> Plaintiffs' allegations also fail to satisfy the second  
25 requirement with respect to Defendants eNom and NSI. Plaintiffs have  
26 not alleged that eNom and NSI have market power in WLS subscriptions,  
the tying product.

27 <sup>3</sup> According to Plaintiffs, "WLS subscriptions are likely to be  
28 purchased on the most desirable domain names, and are unlikely to be  
purchased on the least desirable domain names." (FAC ¶ 4.56.)



1 that only successful WLS subscriptions will result in domain name  
2 registrations, then the facts in Plaintiffs' FAC do not support the  
3 legal conclusion that the WLS will affect a not insubstantial volume  
4 of commerce in domain name registrations. Instead, Plaintiffs' FAC  
5 suggests that the majority of WLS consumers will be free to register  
6 their domain names with either their current registrar or other  
7 registrars. In fact, Plaintiffs allege that "[c]onsumers are free to  
8 transfer their registered domain names between registrars." (FAC ¶  
9 13.3).

10 Plaintiffs have also failed to allege that Verisign has a  
11 sufficient economic interest in domain name registration. "In the  
12 typical tying scheme, the seller of the tying product also sells the  
13 tied product. The tying product seller's interest need not be so  
14 direct, however, as long as the seller has an economic interest in the  
15 sale of the tied product." Robert's Waikiki U-Drive, Inc., v. Budget  
16 Rent-A-Car Sys., Inc., 732 F.2d 1403, 1407-08 (9th Cir. 1984)  
17 (citation omitted). In this case, Plaintiffs' FAC makes clear that in  
18 the unlikely event that a WLS subscription is successful, domain name  
19 registrations will be sold by registrars, not Verisign. (FAC ¶ 13.6.)  
20 Plaintiffs further allege that "[d]omain registration fees are not  
21 included in the \$24 fee Verisign will charge registrars for each WLS  
22 subscription sold." (FAC ¶ 13.5.) Thus, according to Plaintiffs'  
23 allegations, Verisign's economic interest is in the sale of WLS  
24 subscriptions, not domain name registrations.<sup>4</sup>

---

26 <sup>4</sup> Plaintiffs do contend that "Verisign owns 15% of NSI and has an  
27 economic interest in restricting registrars' ability to compete with  
28 NSI for domain name registrations." (FAC ¶ 13.17.) However,  
Plaintiffs have not contended that Verisign will limit WLS

(continued...)

1 For the reasons articulated, Plaintiffs have failed to  
2 sufficiently allege an illegal tying arrangement. Therefore, the  
3 Court dismisses this claim without prejudice.<sup>5</sup>

4 **B. Plaintiffs' State Law Claims**

5 Plaintiffs' remaining eleven claims arise out of state law.  
6 Defendants argue for dismissal of these claims on the merits for  
7 various reasons. However, the Court declines to exercise supplemental  
8 jurisdiction over the state law claims for two reasons. First, where  
9 federal claims are disposed of well before trial, it is appropriate  
10 for pendent state claims to be dismissed as well. 28 U.S.C. §  
11 1367(c)(3). Because the Court has dismissed the sole federal claim,  
12 judicial economy and comity weigh in favor of dismissing the state  
13 claims.

14 Second, a district court may decline to exercise supplemental  
15 jurisdiction if the state law claims substantially predominate over  
16 the federal law claim. 28 U.S.C. § 1367(c)(2). Here, Plaintiffs  
17 allege several claims arising under California's Unfair Competition  
18 Act, intentional interference with prospective economic advantage, and  
19 breach of contract. These claims would substantially expand the scope  
20 of this case. To support these claims, Plaintiffs allege, inter alia,  
21 that Defendants are engaging in an illegal lottery, making false,  
22 misleading, and defamatory statements, and selling contingent future  
23

---

24 <sup>4</sup>(...continued)  
25 subscriptions to NSI. Instead, Plaintiffs' allegations indicate that  
26 Verisign intends to force other registrars to agree to offer WLS  
subscriptions. (FAC ¶¶ 13.21, 13.22.)

27 <sup>5</sup> Although the Court grants Plaintiffs leave to amend, the  
28 amended complaint may only allege other facts consistent with the  
original complaint. See Reddy v. Litton Indus., Inc., 912 F.2d 291,  
297 (9th Cir. 1990).

1 interests in property they do not own. Plaintiffs' submissions  
2 demonstrate that the state law claims predominate this action and the  
3 dispute between the parties. While the allegations necessary for the  
4 federal antitrust claim are contained on three brief pages, the  
5 allegations for the state law claims span the remaining 47 pages of  
6 Plaintiffs' 51-page FAC. In responding to Defendants' motion to  
7 dismiss, Plaintiffs dedicated only one page of their 25-page  
8 opposition to the federal antitrust claim. Not only are the various  
9 state law claims numerous, but, as discussed above, the facts alleged  
10 to support these state law claims are in some ways inconsistent with  
11 Plaintiffs' deficient antitrust claim, which is the sole basis for  
12 original jurisdiction.<sup>6</sup> For these reasons, the Court exercises its  
13 discretion to dismiss Plaintiffs' state law claims without prejudice.  
14

#### 15 IV. CONCLUSION

16 For the foregoing reasons, Defendants Verisign, Inc.'s and  
17 Network Solutions, Inc.'s motion to dismiss the First Amended Complaint  
18 is hereby GRANTED IN PART and DENIED IN PART. Accordingly,  
19 Plaintiffs' First Amended Complaint is DISMISSED WITHOUT PREJUDICE as  
20 to the federal and state law claims. Plaintiffs may amend their  
21 federal antitrust claim by filing a second amended complaint within 14  
22 days of entry of this Order. Failure to refile within 14 days will  
23  
24

---

25  
26 <sup>6</sup> In their FAC, Plaintiffs assert § 57b of the Federal Trade  
27 Commission Act ("FTCA") as an additional basis for jurisdiction. (FAC  
28 ¶ 3.1). However, § 57b of the FTCA authorizes suits by the Federal  
Trade Commission, not private individuals. See 15 U.S.C. § 57b. As  
such, Plaintiffs may not rely on § 57b as a basis for federal  
jurisdiction.

1 result in a dismissal of the claim with prejudice.<sup>7</sup>

2 The Court declines to exercise supplemental jurisdiction over  
3 Plaintiffs' state law claims. Accordingly, the Court finds that:

4 Defendant Verisign Inc.'s motion to dismiss the eleventh claim  
5 for relief for improper venue is MOOT;

6 Defendant Internet Corporation for Assigned Names and Numbers'  
7 motion to dismiss certain causes of action is MOOT;

8 Defendant eNom, Inc's motion to dismiss the First Amended  
9 Complaint is MOOT; and

10 Plaintiffs' motion to strike certain portions of Defendant  
11 ICANN's motion is MOOT.

12  
13 **SO ORDERED.**

14 **DATED:** \_\_\_\_\_

15  
16  
17 \_\_\_\_\_  
18 **AUDREY B. COLLINS**  
19 **UNITED STATES DISTRICT JUDGE**

20  
21  
22  
23  
24  
25 \_\_\_\_\_  
26 <sup>7</sup> The Court waives the requirement that the parties comply with  
27 the requirements of Local Rule 7-3, as the parties have already  
28 complied with its meet and confer requirements. However, Plaintiffs  
should be cognizant of their obligations under Federal Rule of Civil  
Procedure 11 in deciding whether to refile this claim.