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CENTRAL DISTRICT OF CALIFORNIA
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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.

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

ENTERED
CLERK, U.S. DISTRICT COURT
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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 Plaintiffs¹
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 ¹ 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.² 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,³ ninety five percent (95%) of consumers will never
22 obtain the domain names to which they subscribe." (FAC ¶ 4.58)

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24 _____
25 ² 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 ³ 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.⁴

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.⁵

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 | ⁴ 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.)

29 | ⁵ Although the Court grants Plaintiffs leave to amend, the
30 | amended complaint may only allege other facts consistent with the
31 | original complaint. See Reddy v. Litton Indus., Inc., 912 F.2d 291,
32 | 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.⁶ For these reasons, the Court exercises its
16 discretion to dismiss Plaintiffs' state law claims without prejudice.

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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 ⁶ In their FAC, Plaintiffs assert § 57b of the Federal Trade
26 Commission Act ("FTCA") as an additional basis for jurisdiction. (FAC
27 ¶ 3.1). However, § 57b of the FTCA authorizes suits by the Federal
28 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.⁷

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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

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Audrey B. Collins

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AUDREY B. COLLINS
UNITED STATES DISTRICT JUDGE

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26 ⁷ 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

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UNITED STATES DISTRICT COURT
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