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8 **UNITED STATES DISTRICT COURT**
9 **FOR THE CENTRAL DISTRICT OF CALIFORNIA**

10
11 **REGISTERSITE.COM**, an Assumed
Name of **ABR PRODUCTS INC.**, a
12 New York Corporation, *et al.*,

13 Plaintiffs,

14 v.

15 **INTERNET CORPORATION FOR**
ASSIGNED NAMES AND
16 **NUMBERS**, a California corporation,
et al.,

17 Defendants.
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Case No. CV 04-1368 ABC (CWx)
Hon. Audrey B. Collins

**PLAINTIFFS' OPPOSITION TO
MOTION TO DISMISS FIRST
AMENDED COMPLAINT BY
DEFENDANT ENOM, INC.**

DATE: July 12, 2004
TIME: 10:00 a.m.
COURTROOM: Room 680 –
Roybal Bldg.

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1 I. INTRODUCTION

2 Defendant eNom, Inc. (“eNom”)¹, in its Motion to Dismiss First Amended
3 Complaint (“Motion”), argues that Plaintiff’s Third Cause of Action against it
4 should be dismissed.² In support of this claim, eNom has submitted exhibits from its
5 own website that purport to allow a fair analysis of the representations eNom makes
6 to consumers. As the attached Exhibit A indicates, however, the most prominent
7 pages on eNom’s website – which eNom neglected to provide to this Court –
8 contain a number of misleading statements. Moreover, those misleading statements
9 are directed toward ordinary consumers rather than the “sophisticated purchasers”
10 eNom claims are its target audience.

11 Plaintiffs plead in their first amended complaint (“FAC”) a false advertising
12 claim that is sufficiently plain and straightforward. As Plaintiffs allege in their Third
13 Cause of Action, the statements on eNom’s website will lead subscribers to believe
14 that they have a much higher chance of obtaining a desired domain name registration
15 under eNom’s “First Dibs” service than they actually have. eNOM admits its
16 statements are so confusing that to clarify them “would, at best, be unhelpful and
17 would be misleading in most circumstances.” Plaintiffs’ recitation of statements on
18 eNom’s website are even more definite than other statements this court has held
19 “adequately stated the facts” to support an unfair competition claim.³ Accordingly,
20 this Court should deny eNom’s motion to dismiss Plaintiffs’ Third Cause of Action.

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23 ¹ eNom’s claim that Plaintiffs have agreed to substitute eNom, Inc., a Nevada corporation, for the
24 current eNom plaintiff in a Second Amended Complaint, is incorrect. Plaintiffs actually have agreed to
25 **add** the Nevada entity as a plaintiff. eNom’s statement that Plaintiffs have agreed to voluntarily dismiss it
26 from their Ninth Cause of Action, however, is accurate.

27 ² eNom has also joined in and incorporated by reference the arguments of defendants Verisign, Inc.
28 and Network Solutions, Inc. (collectively, “Verisign”) in Verisign’s motion to dismiss Plaintiffs’ claim
pursuant to FED. R. CIV. P. 12(b)(6). Accordingly, Plaintiffs have not re-argued those issues in this
memorandum, and incorporate their response to Verisign’s motion by reference herein.

³ See Perfect 10, Inc. v. Cybernet Ventures, Inc., 167 F.Supp.2d 1114, 1125 (C.D.Cal. 2001).

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II. FACTS

Plaintiffs are domain name registrars. (FAC ¶ 1.4.) This case involves several technical and contractual issues relating to defendants' Wait Listing Service ("WLS"), which "purports to give consumers, for an annual fee, the right to be 'first in line' on the 'waiting list' for currently-registered <.com> and <.net> domain names." (FAC ¶ 1.1.) Plaintiffs allege "Defendant eNom is currently advertising to consumers, and taking 'pre-orders' for 'First Dibs', eNom's branding of the Verisign WLS service. Nowhere in any part of eNom's advertising, or elsewhere in the sales process, does eNom disclose the likelihood that a subscriber will obtain the domain name to which it subscribes." (FAC ¶ 7.6.)

Plaintiffs further allege "[t]he truth that eNOM should disclose to consumers is that most subscriptions will not result in the actual registration of any domain name." (FAC ¶ 7.12.) Plaintiffs add that "[d]isclosing the likelihood that a WLS subscription will be successful would not suffice to make [eNOM's] advertising for WLS subscriptions fair". (FAC ¶ 1.3.) Indeed, in its Motion eNOM admits that such a disclosure would probably not cure the deception. (Motion at 6:20.) Rather, eNOM concedes that to warn consumers about the substantially low likelihood of ever actually registering a domain name "would, at best, be unhelpful and would be misleading in most circumstances." (*Id.*)

III. ARGUMENT

A. FED. R. CIV. P. 12(B)(6) MOTION STANDARD

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A court may not dismiss a complaint for failure to state a claim "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957); *see also Moore v. City of Costa Mesa*, 886 F.2d 260, 262 (9th Cir. 1989); *Haddock v. Bd. of Dental Exam'rs*, 777 F.2d 462, 464 (9th Cir. 1985) (court should not dismiss a complaint if it states a claim under any legal theory, even if plaintiff erroneously relies on a different theory). Dismissal is proper under FED. R. CIV. P.

1 12(b)(6) only where there is either a "lack of a cognizable legal theory" or "the
2 absence of sufficient facts alleged under a cognizable legal theory." Balistreri v.
3 Pacifica Police Dep't, 901 F.2d 696, 699 (9th Cir. 1988).

4 FED. R. CIV. P. 8(a) guides determination of whether a complaint states a
5 claim. It provides that a complaint need only contain "a short and plain statement"
6 of the pleader's claim showing that the pleader is entitled to relief. FED. R. CIV. P.
7 8(a). The facts upon which the plaintiff bases his claim need not be set out in detail.
8 Conley, 355 U.S. at 47. "[A]ll the Rules require is 'a short and plain statement of
9 the claim' that will give the defendant fair notice of what the plaintiff's claim is and
10 the grounds upon which it rests." Id.; see Swierkiewicz v. Sorema N.A., 534 U.S.
11 506 (2002); Leatherman v. Tarrant County Narcotics Intelligence & Coordination
12 Unit, 507 U.S. 163, 168 (1993).

13 In ruling on a FED. R. CIV. P. 12(b)(6) Motion at the court must accept all
14 factual allegations pleaded in the complaint as true, and must construe them and
15 draw all reasonable inferences from them in favor of the nonmoving party. Cahill v.
16 Liberty Mut. Ins. Co., 80 F.3d 336, 337-38 (9th Cir. 1996); Mier v. Owens, 57 F.3d
17 747, 750 (9th Cir. 1995).

18 B. UNFAIR COMPETITION LAW STANDARD

19 California's unfair competition law defines "unfair competition" to mean and
20 include "any unlawful, unfair or fraudulent business act or practice and unfair,
21 deceptive, untrue or misleading advertising and any act prohibited by [the false
22 advertising law]." BUS. & PROF. CODE § 17200. The UCL's purpose is to protect
23 both consumers and competitors by promoting fair competition in commercial
24 markets for goods and services. Barquis v. Merchants Collection Assn., 7 Cal. 3d
25 94, 110 (1972).

26 The UCL's scope is broad. Kasky v. Nike, Inc., 27 Cal. 4th 939, 950 (2002).
27 By defining unfair competition to include any "*unlawful . . . business act or practice*"
28 (§ 17200 , italics added), the UCL permits violations of other laws to be treated as

1 unfair competition that is independently actionable. Id., citing Cel-Tech
2 Communications, Inc. v. Los Angeles Cellular Telephone Co., 20 Cal. 4th 163, 180
3 (1999). By defining unfair competition to include also any "*unfair or fraudulent*
4 business act or practice" (§ 17200, italics added), the UCL sweeps within its scope
5 acts and practices not specifically proscribed by any other law. Cel-Tech
6 Communications, Inc. v. Los Angeles Cellular Telephone Co., supra, at p. 180.) A
7 private plaintiff may bring a UCL action even when "the conduct alleged to
8 constitute unfair competition violates a statute for the direct enforcement of which
9 there is no private right of action." Stop Youth Addiction, Inc. v. Lucky Stores,
10 Inc., 17 Cal. 4th 553, 565 (1998). To state a claim under the UCL based on false
11 advertising or promotional practices, "it is necessary only to show that 'members of
12 the public are likely to be deceived.'" Committee on Children's Television, Inc. v.
13 General Foods Corp., 35 Cal. 3d at 197, 211 (1983); accord, Bank of the West v.
14 Superior Court, 2 Cal. 4th 1254, 1267 (1992).

15 **C. ENOM'S STATEMENTS ARE MISLEADING AND TARGETED TO ORDINARY**
16 **CONSUMERS**

17 eNom argues that the relevant question for this Court is whether its
18 statements could mislead "sophisticated purchaser[s]." (Motion at 2:25-27 (citing
19 Arizona Cartridge Remanufacturers Assoc., Inc. v. Lexmark Int'l, Inc., 290
20 F.Supp.2d 1034, 1041 (N.D.Cal. 2003).) However, it is clear that eNom's
21 statements are targeted to retail consumers, and that the appropriate inquiry is
22 whether those consumers are confused by eNom's representations.

23 eNom has omitted critical information from the website screenshots attached
24 as Exhibit A to its Motion (the "eNom Exhibit"). Accordingly, Plaintiffs have
25 completed the job by attaching **other** relevant portions of eNom's website to this
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1 memorandum as Exhibit A (“Plaintiffs’ Exhibit”).⁴

2 The first page of Plaintiffs’ Exhibit (the “Home Page”) indicates what
3 consumers see when they first enter eNom’s website. A button marked “First Dibs”
4 is prominent on the right side of that page. When a viewer clicks on it, she is taken
5 to page three of Plaintiffs’ Exhibit (the “First Dibs Page”), with the heading “Get
6 First Dibs on ANY .com or .net domain name!” The phrase “Get the domain name
7 you want” appears in bold text beneath this heading, along with the slogan “If you
8 were given the opportunity to have ANY domain name, which name would you
9 choose?” (Plaintiffs’ Ex., pp. 3-5.) Nowhere on the First Dibs Page does eNom
10 state that pre-orders are available only to eNom Technology Partners (“ETPs”). In
11 fact, the First Dibs Page apparently allows anyone to pre-order First Dibs
12 subscriptions, and invites them to do so by clicking on either of two bold headings
13 titled “Enter the First Dibs Pre-Order Queue”. The First Dibs Page states that the
14 queue is “now open”, and that subscribers may “add as many First Dibs for as many
15 names as [they] wish.”

16 When the viewer clicks on the heading “Enter the First Dibs Pre-Order
17 Queue,” she is taken to page six of Plaintiffs’ Exhibit (the “Bidding Details Page”).
18 That page reiterates that “[t]he queue is open to retail customers”. (Plaintiffs’ Ex.,
19 p. 6.) Again, the Bidding Details Page specifically informs ordinary consumers that
20 they may purchase First Dibs subscriptions, and does not reserve that privilege for
21 ETPs, or even mention ETPs.⁵

22 eNom’s Terms and Conditions for the First Dibs Service include the
23 following statement: “During the pre-order period, only, [ETPs] may sign up to
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25 ⁴ Exhibit A is comprised of true and correct copies of screenshots from eNom’s website. eNom
26 has already cited authority for referring to such materials in a 12(b)(6) Motion at *i.e.*, Shwarz v. United
27 States, 234 F.3d 428, 435 (9th Cir. 2000)(the court “may consider documents that are referred to in the
28 complaint whose authenticity no party questions”).

29 ⁵ Moreover, since eNom’s First Dibs web pages fail to specify what an “eNom Technology
30 Partner” is, an ordinary consumer might be forgiven for assuming that she is one.

1 participate in the First Dibs pre-order process.” (eNom Ex., p. 1.) The placement
2 of the first comma implies that ETPs may sign up only during the pre-order period,
3 not that only ETPs may sign up during the pre-order period. Regardless, this is
4 irrelevant since the Bidding Details Page states that the queue is now open to
5 everyone.

6 Viewed in the clear light of its own website, eNom’s claim that it offers the
7 First Dibs service to “an audience of sophisticated consumers” (Motion at 2:8-10) is
8 disingenuous. Its citation of Arizona Cartridge, *supra* is deceptive, as well as
9 inapplicable (“[w]here the practice is targeted to a sophisticated purchaser, ‘the
10 question of whether [a representation] is misleading to the public will be viewed
11 from the vantage point of members of the targeted group”). And its claim that
12 “[p]laintiffs disingenuously rely on selectively edited statements...” is ironic.⁶
13 (Motion at 3:24-26) It is clear that eNom’s statements regarding the First Dibs
14 service are targeted at ordinary consumers.⁷

15 **D. PLAINTIFFS PROPERLY ALLEGED THAT ENOM’S STATEMENTS ARE**
16 **MISLEADING TO CONSUMERS**

17 Plaintiffs are not required to prove their claims at this point – they need only
18 plead them in a manner that gives eNom fair notice of what they are. Conley,
19 *supra*, 355 U.S. at 47. Plaintiffs have done this. In the FAC, they allege that eNom
20 is currently taking “pre-orders” for First Dibs, “without disclosing the likelihood
21 that a subscriber will obtain the domain name to which it subscribes.” (FAC, ¶ 7.6)

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23 ⁶ eNom misstates the facts again when it claims that Plaintiffs mischaracterize its First Dibs Terms
24 and Conditions (Motion at 3:17-18) by alleging that eNom will charge customers’ credit cards even if it
25 does not obtain a WLS subscription for them (Motion at 3:11-13). In reality, the FAC provides that “by
26 placing an order the customer authorizes eNom to charge his credit card if the subscription sought is
27 available” (FAC, ¶ 7.8) (emphasis added).

28 ⁷ eNom’s statements concerning the alleged “sophistication” of ETPs are unsupported by the
record and should be stricken pursuant to Fed. R. Evid. 802. (Motion at 4:3-6 and 4:26-28) Moreover,
those statements are irrelevant since, as mentioned, the First Dibs program is targeted to average
consumers.

1 Phrases on eNom’s website such as “Get the domain name you want” and “If you
2 were given the opportunity to have ANY domain name, which name would you
3 choose?” encourage ordinary consumers to believe that they are purchasing
4 property. (FAC, ¶ 7.9) This is misleading and a violation of CAL. BUS. & PROF.
5 CODE §17200 *et seq.*

6 In Consumer Advocates v. Echostar Satellite Corp., 113 Cal.App.4th 1351
7 (Cal.Ct.App. 2003), the defendants represented to consumers that their television
8 service would allow viewing of a program schedule “up to 7 days in advance,” and
9 that they would provide fifty (50) channels. *Id.* at 1353. The court held that there
10 was a “triable issue of fact” as to whether these representations were “likely to
11 deceive a reasonable consumer”. *Id.* at 1361-62.

12 Similarly, eNom’s statements such as “Get the domain name you want” and
13 suggestions that consumers may “have ANY domain name”, are misleading and
14 create a triable issue of fact for this Court. Like the defendants in Consumer
15 Advocates, eNom argues that its statements are not meant to be taken literally, but
16 Plaintiffs have made a credible argument that consumers might be misled.
17 Accordingly, this Court should follow the Consumer Advocate court’s reasoning
18 and hold that:

19 ...we cannot say that there is no triable issue on whether
20 they were untrue or misleading. Under the False
21 Advertising Act and the UCL, “A perfectly true statement
22 couched in such a manner that it is likely to mislead or
deceive the consumer, such as by failure to disclose other
relevant information, is actionable.”

23 *Id.* at 1362 (citing Day v. AT&T Corp., 63 Cal.App.4th 325, 332-33 (Cal.Ct.App.
24 1998)).

25 This court issued a similar holding in Perfect 10, Inc. v. Cybernet Ventures,
26 Inc., 167 F.Supp.2d 1114, 1125 (C.D.Cal. 2001) (“Nor are the examples mere
27 ‘puffery’ . . . It is not a ‘vague, highly subjective claim’ when one attaches ‘You
28 Gotta Love Jennifer Hewitt Nudes’ to a web link . . . Rather, one could reasonably

1 expect to find Jennifer Love Hewitt nude images on a site with that label”). The
2 Perfect 10 court held that the plaintiff had “adequately stated the facts” supporting
3 its unfair competition claim. Id.

4 In the present case, “Get the domain name you want” is even more definite
5 than the statement the Perfect 10 court held was not puffery. Such a statement
6 might easily mislead consumers, and in any event creates a triable issue for this
7 court.

8 The force of eNom’s misleading statements is compounded by its refusal to
9 provide any clear and accurate information regarding the likelihood that a WLS
10 subscription will be successful. Shockingly, eNom argues that providing such
11 information to its customers “would be unhelpful at best, and, in many
12 circumstances, it would be grossly misleading”. (Motion at 3:20-23) Although it
13 would not be difficult for eNom to disclose the fact that “most subscriptions will not
14 result in the actual registration of any domain name,” as Plaintiffs urge (FAC, ¶
15 7.12), eNom views this as a “complex calculus” (Motion at 7:1).

16 eNom has asked this Court to hold that its representations to consumers are
17 not misleading under any conceivable set of circumstances. As indicated, however,
18 eNom’s statements are at least as misleading as the representations in Consumer
19 Advocates and Perfect 10, *supra*. What “reasonable consumers” understand
20 eNom’s statements to mean, is a question of fact. Accordingly, this Court should
21 deny eNom’s Motion and allow Plaintiffs’ Third Cause of Action to remain before
22 this Court.

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1 **IV. CONCLUSION**

2 Even eNom is confused about what its own website actually says, as
3 indicated by its assertion that its site clearly distinguishes between what eNom
4 offers to retail consumers and “ETPs”. As indicated by Plaintiff’s Exhibit A, there
5 is no clear distinction. Moreover, eNom’s relentlessly upbeat statements about the
6 possibility of acquiring desired domain names, coupled with its ongoing refusal to
7 provide any clear information about the actual likelihood of acquiring those names,
8 is misleading to consumers and actionable under California’s unfair competition
9 law. Plaintiffs have adequately pleaded an unfair competition law claim against
10 eNom on behalf of themselves and the general public, and respectfully request that
11 this Court deny eNom’s motion to dismiss that claim.

12 Dated this 17th day of June, 2004.

13
14 Respectfully Submitted,

15 **NEWMAN & NEWMAN,**
16 **ATTORNEYS AT LAW, LLP**

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18 By: 

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EXHIBIT A