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8  
9 UNITED STATES DISTRICT COURT  
10 CENTRAL DISTRICT OF CALIFORNIA

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

14 Plaintiffs,

15 v.

16 INTERNET CORPORATION FOR  
ASSIGNED NAMES AND  
17 NUMBERS, a California corporation;  
VERISIGN, INC., a Delaware  
18 Corporation; NETWORK  
SOLUTIONS, INC., a Delaware  
19 Corporation; ENOM, INC., a  
Washington Corporation; ENOM  
20 FOREIGN HOLDINGS  
CORPORATION, a Washington  
21 Corporation; and DOES 1-10,  
inclusive,

22 Defendants.  
23

Case No. CV 04-1368 ABC (CWx)

**MEMORANDUM OF POINTS  
AND AUTHORITIES IN  
SUPPORT OF MOTION BY  
DEFENDANT VERISIGN, INC.  
TO DISMISS PLAINTIFFS'  
ELEVENTH CLAIM FOR  
RELIEF FOR IMPROPER  
VENUE**

[Fed. R. Civ. P. 12(b)(3)]

Date: July 12, 2004

Time: 10:00 a.m.

Courtroom: Room 680 – Roybal Bldg.

Judge: Hon. Audrey B. Collins

[Notice of Motion and Motion and  
Declaration of Barbara Knight filed  
concurrently herewith]

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1 Defendant VeriSign, Inc. (“VeriSign”) submits this Memorandum of Points  
2 and Authorities in support of its Motion under Rule 12(b)(3) of the Federal Rules of  
3 Civil Procedure to Dismiss for improper venue the Eleventh “Cause of Action” in the  
4 First Amended Complaint (“Complaint” or “FAC”).

5 **I. INTRODUCTION**

6 Venue for Plaintiffs’ Eleventh “Cause of Action” is *improper* in this Court.  
7 Plaintiffs freely entered into and agreed to a fully disclosed, explicit forum selection  
8 clause as part of a Registry-Registrar Agreement (the “Agreement”) between  
9 VeriSign and each of the Plaintiffs.<sup>1</sup> The Agreement *mandates* that any legal action  
10 relating to the Agreement or its enforcement be brought in a court located in the  
11 Eastern District of Virginia. The Eleventh Cause of Action, which is for declaratory  
12 relief based upon an alleged breach of the Agreement, manifestly and expressly  
13 relates to the Agreement and thus is subject to the forum selection clause.

14 As demonstrated herein, forum selection clauses, such as the one contained in  
15 the Agreement, are *prima facie* valid and their enforcement is consistent with public  
16 policy. Indeed, courts routinely enforce these clauses, and place a *heavy burden on a*  
17 *party opposing enforcement*. The circumstances applicable here strongly support  
18 enforcement of the clause, and Plaintiffs cannot meet their resulting burden to resist  
19 enforcement. Accordingly, the Court should effectuate the clearly stated intent of the  
20 Registry-Registrar Agreement and the parties to that Agreement, and dismiss the  
21 Eleventh Cause of Action.<sup>2</sup>

22  
23 <sup>1</sup> The Complaint alleges claims for relief against VeriSign and Defendants Internet  
24 Corporation for Assigned Names and Numbers (“ICANN”), Network Solutions, Inc.,  
25 and eNom, Inc. This Motion, however, concerns a single claim for relief that  
Plaintiffs have directed *only* against VeriSign. Plaintiffs have denominated their  
claims as “causes of action” in the Complaint.

26 <sup>2</sup> In the event the Court is not inclined to dismiss Plaintiffs’ declaratory relief claim,  
27 VeriSign alternatively requests by this motion that the Court either dismiss this claim  
28 under Rule 12(b)(3) or sever and transfer it to the Eastern District of Virginia. See  
Fed. R. Civ. P. 21 (“Any claim against a party may be severed and proceeded with  
separately.”); *Toro Co. v. Alsop*, 565 F.2d 998, 1000–01 (8th Cir. 1977) (affirming  
the district court’s decision to sever, pursuant to Rule 21 of the Federal Rules of Civil

(Footnote Cont’d on Following Page)

1 **II. FACTUAL BACKGROUND**

2 **A. The Parties.**

3 The Complaint asserts claims on behalf of eight businesses:

4 (1) Registersite.com; (2) Name.com, LLC; (3) R. Lee Chambers Company LLC;  
5 (4) Fiducia LLC; (5) Spot Domain, LLC; (6) !\$6.25 Domains! Network, Inc.;  
6 (7) AusRegistry Group Pty Ltd.; and (8) ! \$ ! Bid It Win It, Inc. (collectively,  
7 “Plaintiffs”). (FAC ¶¶ 2.1-2.8.) All of the Plaintiffs purport to offer services to assist  
8 customers who seek to register a domain name that previously was registered to  
9 someone else and recently was deleted. (*Id.* ¶ 1.4.)

10 As alleged in the Complaint, VeriSign is a Delaware corporation that, pursuant  
11 to an agreement with the Internet Corporation for Assigned Names and Numbers  
12 (“ICANN”), operates the exclusive “registry” for the .com and .net TLDs.<sup>3</sup> (*Id.*  
13 ¶¶ 2.10, 4.13, 4.44.) Plaintiffs allege a registry is an organization responsible for  
14 maintaining the authoritative list of second-level domains within a TLD.  
15 (*Id.* ¶ 4.9 & n.2.)

16 **B. The Registry-Registrar Agreement between VeriSign and Plaintiffs.**

17 Attached to the Complaint as Exhibit A, and expressly incorporated by  
18 reference into the Complaint, is a copy of the Registry-Registrar Agreement that each  
19 of the Plaintiffs admits it has entered into with VeriSign. (FAC ¶ 15.3, Ex. A.)  
20

21 \_\_\_\_\_  
(Footnote Cont'd From Previous Page)

22 Procedure, one of the counts in the plaintiffs’ complaint, as well as a counterclaim,  
23 and to transfer the severed claims to another district pursuant to 28 U.S.C. § 1404(a)).

24 <sup>3</sup> Every computer connected directly to the Internet has a unique numerical “address,”  
25 known as an Internet Protocol (“IP”) number. IP numbers are necessary for  
26 computers to “communicate” with each other over the Internet. Because IP numbers  
27 can be cumbersome, a corresponding system was developed which associates  
28 alphanumeric character strings, known as “domain names,” with certain IP numbers.  
Internet domain names consist of a string of “domains” separated by periods. “Top  
level” domains (“TLDs”) are found to the right of the last period and include the  
“.net” and “.com” TLDs. “Second level” domains (“SLDs”) are those appearing  
immediately to the left of the TLDs, such as “uscourts” in “uscourts.gov.” (FAC  
¶¶ 4.1-4.7.)

1 Among other things, the Registry-Registrar Agreement contains an exclusive forum  
2 selection clause in Section 6.7:

3 Any legal action or other legal proceeding relating to this  
4 Agreement or the enforcement of any provision of this  
5 Agreement *shall be* brought or otherwise commenced in  
6 any state or federal court located in the *eastern district of*  
7 *the Commonwealth of Virginia*. Each Party to this  
8 Agreement expressly and irrevocably consents and submits  
to the jurisdiction and venue of each state and federal court  
located in the eastern district of the Commonwealth of  
Virginia (and each appellate court located in the  
Commonwealth of Virginia) in connection with any such  
legal proceeding.

9 (FAC Ex. A § 6.7 (emphases added).)

10 VeriSign has entered into the same, or essentially the same, .com and .net  
11 Registry-Registrar Agreement with approximately 175 registrars. (*See* Declaration of  
12 Barbara Knight (“Knight Decl.”) ¶ 6.) These registrars are located both across the  
13 United States and in countries around the world. (*Id.*) VeriSign could not possibly  
14 appear in every state and in numerous countries throughout the world to defend itself  
15 on every claim that a registrar could bring relating to the Registry-Registrar  
16 Agreement. Accordingly, one of the purposes of the forum selection clause is to limit  
17 VeriSign’s exposure to litigation in multiple fora and to ensure uniform interpretation  
18 and enforcement of the Agreement by requiring that any legal action relating to the  
19 Agreement or its enforcement be brought in the Eastern District of Virginia. (*Id.*)

20 Plaintiffs’ Eleventh Cause of Action seeks declaratory relief based entirely on  
21 VeriSign’s purportedly threatened breach of the Registry-Registrar Agreement. (*See,*  
22 *e.g.*, FAC ¶ 15.3 (“Each Plaintiff is a party to the Registry-Registrar Agreement with  
23 VeriSign. . . .”); ¶ 15.2 (“VeriSign is contractually obligated to delete expired domain  
24 names . . . and *will breach* that obligation if the WLS is launched.”); ¶ 15.15 (“If the  
25 WLS is implemented, VeriSign *will materially breach* its obligations under the  
26 Registry-Registrar Agreement. . . .”) (emphases added).) Because this claim clearly  
27 relates to the Agreement and to its enforcement, the Court should effectuate  
28

1 Plaintiffs' agreement to submit their declaratory relief claim to the exclusive  
2 jurisdiction of the federal or state courts in Virginia.

3 **III. VIRGINIA IS THE ONLY PROPER VENUE FOR PLAINTIFFS'**  
4 **ELEVENTH CAUSE OF ACTION**

5 Plaintiffs' Eleventh Cause of Action should be dismissed because venue is  
6 improper. *See* Fed. R. Civ. Proc. 12(b)(3).<sup>4</sup> Plaintiffs bear the burden of establishing  
7 proper venue. *Nissan Motor Co. v. Nissan Computer Corp.*, 89 F. Supp. 2d 1154,  
8 1161 (C.D. Cal. 2000); *Mid Atl. Paper, LLC v. Scott County Tobacco Warehouses,*  
9 *Inc.*, 2004 WL 326710, at \*1 (W.D. Va. Feb. 23, 2004) ("Once improper venue is  
10 raised, the burden to establish that venue is proper in this court is on the plaintiff.");  
11 *see also Greater N.Y. Auto. Dealers Ass'n v. Env'tl. Sys. Testing, Inc.*, 211 F.R.D. 71,  
12 84 (E.D.N.Y. 2002) ("A plaintiff who brings suit in a forum other than the one  
13 designated by the forum selection clause carries the burden to make a 'strong  
14 showing' in order to overcome the presumption of enforceability."). Plaintiffs cannot  
15 meet this heavy burden here, because they each have entered into a binding  
16 agreement, with a fully-disclosed forum selection clause, vesting exclusive  
17 jurisdiction and venue in the federal and state courts of Virginia.

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19  
20  
21  
22  
23 <sup>4</sup> In the Ninth Circuit, a motion to enforce a forum selection clause is treated as a  
24 motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(3), and not  
25 Rule 12(b)(6). *R.A. Argueta v. Banco Mexicano, S.A.*, 87 F.3d 320, 324 (9th Cir.  
26 1996) (treating motion to dismiss on the basis of a forum selection clause as a Rule  
27 12(b)(3) motion to dismiss for improper venue); *Tokio Marine & Fire Ins. Co. v.*  
28 *Nippon Express U.S.A. (Illinois), Inc.*, 118 F. Supp. 2d 997, 998-99 (C.D. Cal. 2000);  
*Kelso Enter., Ltd. v. M/V Wisida Frost*, 8 F. Supp. 2d 1197, 1201 (C.D. Cal. 1998).  
Indeed, courts routinely dismiss, pursuant to Rule 12(b)(3) motions, claims that are  
brought in a forum other than the one specified in a forum selection clause. *See*  
*Spradlin v. Lear Siegler Mgmt. Servs. Co.*, 926 F.2d 865, 866, 869 (9th Cir. 1991);  
*Vogt-Nem, Inc. v. M/V Tramper*, 263 F. Supp. 2d 1226, 1229, 1233 (N.D. Cal. 2002).

1           **A. The Forum Selection Clause Is Presumptively Valid And Applies To**  
2           **The Claim At Issue.**

3           Federal common law governs the enforceability of forum selection clauses in  
4 federal court.<sup>5</sup> *Argueta*, 87 F.3d at 324 (In federal court, “[f]ederal law governs the  
5 validity of a forum selection clause.”); *Manetti-Farrow, Inc. v. Gucci Am., Inc.*, 858  
6 F.2d 509, 513 (9th Cir. 1988); *Kelso Enter.*, 8 F. Supp. 2d at 1201. Under federal  
7 law, the forum selection clause in the Registry-Registrar Agreement is “prima facie  
8 valid” and should be enforced unless the resisting party clearly can show that  
9 “enforcement would be unreasonable and unjust, or that the clause was invalid for  
10 such reasons as fraud or overreaching.” *M/S Bremen v. Zapata Off-Shore Co.*, 407  
11 U.S. 1, 10, 15, 92 S. Ct. 1907, 32 L. Ed. 2d 513 (1972); *see also Spradlin*, 926 F.2d at  
12 867. This mandate has been widely recognized and routinely followed by the courts.  
13 *See, e.g., Manetti-Farrow*, 858 F.2d at 514–15; *Pelleport Investors, Inc. v. Budco*  
14 *Quality Theatres, Inc.*, 741 F.2d 273, 279 (9th Cir. 1984); *Tokio Marine*, 118  
15 F. Supp. 2d at 1000 (“strong policy favoring enforcement of forum selection  
16 clauses”); *Brinderson-Newberg Joint Venture v. Pac. Erectors, Inc.*, 690 F. Supp.  
17 891, 894–96 (C.D. Cal. 1988).

18           Enforcement of forum selection clauses is particularly warranted where, as  
19 here, the clause contains mandatory language: “Any legal action . . . *shall be* brought  
20 . . . in the eastern district of the Commonwealth of Virginia.” (*See* FAC Ex. A § 6.7  
21 (emphasis added).) *See Vogt-Nem*, 263 F. Supp. 2d at 1231 (clause stating that “[a]ny  
22 dispute . . . will be submitted to the competent court in Rotterdam” is mandatory);  
23 *Talatala v. Nippon Yusen Kaisha Corp.*, 974 F. Supp. 1321, 1325 (D. Haw. 1997)  
24 (“[T]he instant language ‘any action thereunder shall be brought before the Tokyo  
25 District Court in Japan’ is clearly mandatory.”).

26  
27  
28           <sup>5</sup> The Court may examine facts outside the complaint because the pleadings are not  
accepted as true under Rule 12(b)(3). *Argueta*, 87 F.3d at 324.

1 Plaintiffs resisting enforcement of a forum selection clause bear a “heavy  
2 burden of proof” and must “clearly show that enforcement [of the forum selection  
3 clause] would be unreasonable and unjust, or that the clause was invalid for such  
4 reasons as fraud or overreaching.” *Bremen*, 407 U.S. at 15. Applying *Bremen*, the  
5 Ninth Circuit has held that a forum selection clause is unenforceable only where  
6 “(1) its incorporation into the contract was the result of fraud, undue influence, or  
7 overweening bargaining power; (2) the selected forum is so ‘gravely difficult and  
8 inconvenient’ that the complaining party will ‘for all practical purposes be deprived  
9 of its day in court’; or (3) enforcement of the clause would contravene a strong public  
10 policy of the forum in which the suit is brought.” *Argueta*, 87 F.3d at 325 (internal  
11 citations omitted).

12 Here, Plaintiffs and VeriSign agreed in advance that any disputes relating to  
13 the Registry-Registrar Agreement or its enforcement would be adjudicated in the  
14 Eastern District of Virginia. The Eleventh Cause of Action alleging a threatened  
15 breach of the Agreement necessarily “relates” to the Agreement or to the  
16 “enforcement” of the Agreement and, as such, is plainly subject to the forum  
17 selection clause. Further, as discussed below, none of the *Bremen* factors necessary  
18 to demonstrate unenforceability is present in this action. Thus, Plaintiffs are  
19 contractually bound by the clause and cannot avoid its enforcement by commencing  
20 their claim for alleged breach of the Agreement in California, instead of Virginia.

21 **1. The forum selection clause is not the result of fraud or undue**  
22 **influence.**

23 A party may escape a forum selection clause on the basis of fraud if “the  
24 inclusion of that clause in the contract was the product of fraud or coercion.”  
25 *Batchelder v. Kawamoto*, 147 F.3d 915, 919 (9th Cir. 1998) (internal quotation marks  
26 and citations omitted). Plaintiffs’ Complaint contains no allegation that the forum  
27 selection clause fraudulently was included in the Agreement due to concealment or  
28 other wrongful conduct. To the contrary, VeriSign’s Registry-Registrar Agreements