

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

DAVIS WRIGHT TREMAINE LLP
865 S. FIGUEROA ST.
SUITE 2400
LOS ANGELES, CALIFORNIA 90017-2566
TELEPHONE (213) 633-6800
FAX (213) 633-6899

FREDERICK F. MUMM (State Bar No. 91259)
MARC A. FULLER (State Bar No. 225462)

Attorneys for Defendant eNOM, INC., a Nevada Corporation, erroneously sued as eNOM, Inc., a Washington Corporation and ENOM FOREIGN HOLDINGS CORPORATION, a Washington Corporation

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

REGISTERSITE.COM, an Assumed Name of ABR PRODUCTS INC., a New York corporation; et al.,

Plaintiffs,

vs.

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

Defendants.

Case No. CV04-1368 ABC (CWx)

NOTICE OF MOTION AND MOTION TO DISMISS FIRST AMENDED COMPLAINT BY DEFENDANT ENOM, INC.; MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF; EXHIBITS A AND B

Date: July 12, 2004
Time: 10:00 a.m.
Courtroom: 680

The Honorable Audrey B. Collins
Roybal Fed. Building

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that on July 12, 2004, at 10:00 a.m., or as soon thereafter as the matter may be heard, in the Courtroom of the Honorable Audrey B. Collins, located at 255 E. Temple Street, Los Angeles, California, defendant eNom,

COPY

1 Inc. (“eNom”) will and hereby does move, pursuant to Rule 12(b)(6) of the Federal
2 Rules of Civil Procedure, to dismiss Claims 1 through 3, and 5 through 8, of the First
3 Amended Complaint (the “FAC”) for failure to state a claim for relief. Good cause
4 exists to grant this motion, as follows:

5 1. The First Claim (“Unfair Trade Practices Act” – Illegal Lottery) fails to
6 state a claim for relief because (a) plaintiffs lack Article III standing in that they
7 cannot allege any injury to themselves; and (b) the allegations of the FAC on their
8 face demonstrate that the predicate “unlawful” activity is not unlawful;

9 2. The Second Claim (“Unfair Trade Practices Act” – CLRA violation)
10 fails to state a claim for relief because (a) plaintiffs lack Article III standing in that
11 they cannot allege any injury to themselves; (b) the allegations of the FAC on their
12 face demonstrate that the Consumers Legal Remedies Act activity is not applicable,
13 and (c) the FAC alleges no misrepresentations by eNom;

14 3. The Third Claim (“Unfair Trade Practices Act” – Misleading
15 Statements) fails to state a claim for relief because (a) plaintiffs lack Article III
16 standing in that they cannot allege any injury to themselves; and (b) the allegations of
17 the FAC on their face demonstrate that eNom made no misleading statements as a
18 matter of law;

19 4. The Fifth Claim (“Unfair Trade Practices Act” – Deceptive Sales) fails
20 to state a claim for relief because (a) plaintiffs lack Article III standing in that they
21 cannot allege any injury to themselves; and (b) the allegations of the FAC on their
22 face demonstrate that eNom made no misleading statements or engaged in any
23 deceptive sales as a matter of law;

24 5. The Sixth Claim (“Unfair Trade Practices Act” – False Representations)
25 fails to state a claim for relief because (a) plaintiffs lack Article III standing in that
26 they cannot allege any injury to themselves; and (b) the allegations of the FAC on
27 their face demonstrate that eNom made no false representations as a matter of law;
28

1 6. The Seventh Claim (“Unfair Trade Practices Act” – Deceptive and
2 Unfair Practice) fails to state a claim for relief because (a) plaintiffs lack Article III
3 standing in that they cannot allege any injury to themselves; and (b) the allegations of
4 the FAC on their face demonstrate that eNom made no misleading statements or
5 engaged in any deceptive sales or unfair practices as a matter of law;

6 7. The Eighth Claim (“Unfair Trade Practices Act” – Federal Trade
7 Commission Act Violations) fails to state a claim for relief because (a) plaintiffs lack
8 Article III standing in that they cannot allege any injury to themselves; (b) the
9 Federal Trade Commission Act does not provide for private enforcement; and (c) the
10 allegations of the FAC on their face demonstrate that eNom did not violate the
11 Federal Trade Commission Act as a matter of law;

12 8. The Ninth Claim (“Sherman Act” – Unlawful Tying Arrangement) fails
13 to state a claim for relief because (a) plaintiffs fail to allege any facts regarding ;
14 eNom, (b) plaintiffs lack standing to bring the claim; and (c) the facts alleged do not
15 state a claim for violation of the Sherman Act.

16 This motion is and will be based upon this notice of motion and motion, the
17 attached memorandum of points and authorities and exhibits thereto, the
18 memorandum of points and authorities filed by Verisign, Inc. and Network Solutions,
19 Inc., on the pleadings and papers on file in this action, and on such further argument
20 and evidence as the Court may consider.

21 ///

22 ///

23 ///

24 ///

25 ///


26 ///

27 ///

1 This motion is made following the conference of counsel pursuant to L.R. 7-3
2 which took place on May 21, 2004.

3 DATED: May 28, 2004

DAVIS WRIGHT TREMAINE LLP
FREDERICK F. MUMM
MARC A. FULLER

4
5
6
7
8 By: 

9 Frederick F. Mumm
10 Attorneys for Defendant
11 eNOM, INC., a Nevada Corporation,
12 erroneously sued as eNOM, Inc., a
13 Washington Corporation and ENOM
14 FOREIGN HOLDINGS
15 CORPORATION, a Washington
16 Corporation :

1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **1. INTRODUCTION**

3 Defendant eNom, Inc. (“eNom”)¹ is, like the Plaintiffs in this suit, a registrar
4 of domain names. Unlike Plaintiffs, however, eNom has elected to participate in the
5 Wait Listing Service (“WLS”) proposed by defendant VeriSign, Inc. eNom’s WLS-
6 related service is branded as the FIRST DIBS service. As a result of eNom’s
7 decision to offer this service, it has been dragged into this lawsuit. But the claims
8 against it are no more viable than Plaintiffs’ claims against VeriSign and Network
9 Solutions, Inc. (“NSI”). eNom therefore joins in and incorporates by reference those
10 defendants’ memorandum of points and authorities as to the First, Second,² Fifth,³
11 Sixth, Seventh, Eighth, and Ninth Claims.⁴ In addition, eNom joins in VeriSign and
12 NSI’s challenge to the Court’s Article III standing as to the above claims and the
13 Third Claim. Finally, eNom moves to dismiss the Third Claim on the additional
14 ground that it fails to state a cognizable claim for relief.

15
16
17
18 _____
19 ¹ Plaintiffs have sued the incorrect eNom entity. The proper designation
20 should be “eNom, Inc., a Nevada Corporation.” Plaintiffs have agreed to substitute
21 the correct corporate entity upon filing a Second Amended Complaint, should any of
22 their causes of action survive the instant motions to dismiss.

23 ² VeriSign and NSI’s arguments demonstrating the flaws of plaintiffs’ Second
24 Cause of Action apply with equal force to the statements attributed to eNom. Like
25 NSI, eNom clearly states that a subscription to WLS will ultimately result in a chance
26 to register the domain name *if* the current registrant does not renew the domain’s
27 registration. (First Amended Complaint “FAC” at ¶ 6.7.)

28 ³ Plaintiffs Fifth Cause of Action is particularly weak as to eNom because
eNom expressly informs customers to carefully check the registration renewal date
before purchasing a WLS subscription. It even explains that the date listed on the
WHOIS registration is not when the domain names will become available, as current
owners will have approximately 80 additional days to renew. (Ex. A at p. 2, ¶ 4.)

⁴ Plaintiffs have agreed to voluntary dismiss eNom from the Ninth Cause of
Action. In the alternative, eNom moves to dismiss this claim on the additional
ground that none of the allegations in support of it relate to eNom.

1 **2. THE THIRD CAUSE OF ACTION SHOULD BE DISMISSED**
2 **BECAUSE ENOM'S DESCRIPTION OF ITS "FIRST DIBS" SERVICE IS**
3 **NOT FALSE OR MISLEADING.**

4 Relying on selectively edited statements that appear on the eNom website,
5 Plaintiffs argue that the description of the FIRST DIBS service is false and
6 misleading, and therefore violates section 17200 of the Business and Professions
7 Code. But when considered in the full context in which they appear, these statements
8 are neither false nor misleading. Instead, they accurately and clearly state the terms
9 and conditions of the FIRST DIBS service to an audience of sophisticated
10 consumers. This cause of action should therefore be dismissed as a matter of law.

11 **A. Plaintiffs Must Show That Reasonable Consumers Will Likely Be**
12 **Deceived By eNom's Statements.**

13 Under Section 17200, Plaintiffs bear the burden of demonstrating that the
14 representations in question are false and misleading. *See Arizona Cartridge*
15 *Remanufacturers Assoc., Inc. v. Lexmark Int'l, Inc.*, 290 F. Supp.2d 1034, 1041
16 (N.D. Cal. 2003) (citing *Nat'l Council Against Fraud, Inc. v. King Bio*
17 *Pharmaceuticals, Inc.*, 107 Cal. App. 4th 1336 (2003)). This is not an easy burden to
18 satisfy. The mere fact that "a few misguided souls" might be mistaken about a
19 statement is insufficient to make it deceptive or misleading under Section 17200. *See*
20 *Lavie v. Procter & Gamble Co.*, 205 Cal. App. 4th 496, 507 (2003) (quoting *In re*
21 *Kirchner*, 63 F.T.C. 1282, 1282 (1963)). "A representation does not become 'false
22 and deceptive' merely because it will be unreasonably misunderstood by an
23 insignificant and unrepresentative segment of the class of persons to whom the
24 representation is addressed." *Id.* Instead, the focus is on the "reasonable consumer."
25 *Id.* Moreover, in cases such as this one, "[w]here the practice is targeted to a
26 sophisticated purchaser, 'the question of whether it is misleading to the public will be
27 viewed from the vantage point of members of the targeted group[.]'" *Arizona*
28 *Cartridge*, 290 F. Supp. 2d at 1041 (quoting *Lavie*, 105 Cal. App. 4th at 512). If,

1 applying these standards, the Court concludes that the statements are not deceptive as
2 a matter of law, it must dismiss the cause of action. *See Haskell v. Time, Inc.*, 857 F.
3 Supp. 1392, 1396 (1994) (dismissing § 17200 claims after concluding that statements
4 were not deceptive as a matter of law).

5 **B. Reasonable Consumers Will Not Likely Be Misled By eNom's Clear And**
6 **Accurate Description Of Its FIRST DIBS Service.**

7 Plaintiffs contend that eNom's description of its FIRST DIBS service is
8 deceptive and misleading because it does not "disclose the likelihood that a
9 subscriber will obtain the domain name to which it subscribes." (FAC ¶ 7.6)
10 According to Plaintiffs, this likelihood of success is actually very low for two
11 reasons: (1) although eNom will charge the credit cards of customers of its FIRST
12 DIBS service, there is no guarantee that it will obtain – or even attempt to obtain –
13 the WLS subscription from Verisign, and (2) even if eNom obtain a WLS
14 subscription for its customers, it is unlikely that the WLS subscription will be
15 successful, i.e., that the subscriber will ultimately be able to register the domain
16 name. Both of these allegations lack any merit.

17 The first allegation is based on a blatant mischaracterization of eNom's Terms
18 and Conditions. In fact, eNom clearly states that it will not charge any customer's
19 credit card without providing a WLS subscription. With respect to the second
20 allegation, Plaintiffs suggest that eNom should be forced to disclose the likelihood
21 that a WLS subscription will result in the actual registration of the domain name.
22 But such a statistic would be unhelpful at best, and, in many circumstances, it would
23 be grossly misleading.

24 **1. Plaintiffs disingenuously rely on selectively edited statements**
25 **to give the false impression that eNom is misleading**
26 **customers.**

27 Plaintiffs contend that eNom will charge a customer's credit card for a FIRST
28 DIBS subscription even though it explicitly denies any duty to deliver any WLS to

1 the customer. This is a gross mischaracterization of what eNom actually states. The
2 eNom website clearly delineates between two separate FIRST DIBS services, each
3 aimed at a different type of customer.⁵ (Ex. A.) One service, the “pre-order”
4 program, is offered only to eNom Technology Partners (“ETPs”), which, as
5 commercial domain name resellers, are among the most sophisticated customers in
6 the market. As the Terms and Conditions for the pre-order program clearly state,
7 ETPs may participate in a special auction that will begin before VeriSign’s WLS
8 goes live. (*Id.* at p.1, ¶ 1.) eNom may also take part in this process and may choose
9 to claim a domain name for itself. (*Id.*) It is in this context that the statement cited
10 by Plaintiffs – paragraph 2 of the pre-order Terms and Conditions – appears:

11 When Verisign’s Wait List Service (“WLS”) goes live and begins
12 accepting orders from the public, eNom will attempt to acquire the WLS
13 subscription on some or all of the domain names which ETPs bid on. If
14 eNom succeeds in acquiring a WLS subscription with respect to one of
15 these domains, then eNom will award the First Dibs subscription to the :
16 highest bidder unless eNom had listed the domain name itself, in which
17 case eNom will award itself the First Dibs subscription.

18 (*Id.* at p. 1, ¶ 2.) The next paragraph warns that eNom may not successfully obtain
19 the WLS subscriptions in which ETPs have expressed an interest. (*Id.* at p. 1, ¶ 3.)
20 But ETPs are assured that they will be charged only if eNom delivers WLS rights to
21 their requested domain name. (*Id.* at p. 1-2, ¶ 4.) In other words, ETPs pay no
22 consideration for participating in the pre-order program unless and until they become
23 actual WLS subscribers.⁶

24 ⁵ eNom has attached as Exhibit A true and correct copies of screenshots from
25 its website. This Court may rely on this exhibit in ruling on this motion to dismiss
26 because Plaintiffs reference the website in their First Amended Complaint. *See*
27 *Shwarz v. United States*, 234 F.3d 428, 435 (9th Cir. 2000) (stating that the court
28 “may consider documents that are referred to in the complaint whose authenticity no
party questions”).

⁶ Plaintiffs do not allege that ETPs will be confused by the Terms and
Conditions of the pre-order program. Indeed, given ETPs’ sophistication, such
confusion is inconceivable. *See South Bay Chevrolet v. General Motors Acceptance*
Corp., 72 Cal. App. 4th 861, 884 (1999) (rejecting claim of deception in context of
sophisticated customer).

1 In addition to the pre-order program, eNom offers a separate and distinct
2 FIRST DIBS service. This other service is provided to regular retail customers, not
3 just ETPs, and is governed by a different set of Terms and Conditions. (*Id.* at p. 2-4)
4 These Terms and Conditions appear under a different heading than the ones
5 governing the pre-order program. Under the regular FIRST DIBS program,
6 customers may purchase available WLS subscriptions for a fee of \$35. Because
7 eNom guarantees that it will provide the requested WLS subscription, the customer's
8 credit card is immediately charged. In the regular FIRST DIBS program, unlike the
9 pre-order program, eNom retains no right to take the WLS subscription for itself.

10 Plaintiffs have disingenuously conflated the terms of the pre-order program
11 with the terms of the regular subscription service. They allege that eNom will
12 immediately charge the customer's credit card, but has reserved the right to refuse to
13 deliver the WLS subscription that the customer paid for. But as demonstrated above,
14 a customer's credit card is charged immediately only under the regular FIRST DIBS
15 service, wherein eNom is required to transfer the WLS subscription to the customer.
16 By contrast, eNom reserves the right to keep the WLS subscription for itself only
17 under the pre-order program. Yet under this program, no charge is levied unless and
18 until eNom delivers a WLS subscription.

19 **2. Reasonable consumers understand that FIRST DIBS**
20 **subscriptions may not result in actual domain name**
21 **registrations.**

22 Plaintiffs also allege that eNom's description of the FIRST DIBS service is
23 misleading because it does not disclose the likelihood that a WLS subscription will
24 lead to the registration of a particular domain name. They point to a line from the
25 eNom website asking "If you were given the opportunity to have ANY domain name,
26 which name would you choose?" (FAC ¶ 7.9.) Although they claim that this
27 headline "certainly suggests that optimism would be appropriate," (*Id.*), it is clear
28 that it is mere puffery, and therefore inactionable. *See Haskell*, 857 F. Supp. at 1402