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8     eNOM, INC., a Nevada Corporation,  
9     erroneously sued as eNOM, Inc., a Washington  
10    Corporation and eNOM FOREIGN HOLDINGS  
11    CORPORATION, a Washington Corporation

11                             UNITED STATES DISTRICT COURT  
12                             CENTRAL DISTRICT OF CALIFORNIA

14     REGISTERSITE.COM, an Assumed Name  
15     of ABR PRODUCTS INC., a New York  
16     Corporation; et al.,

16                             Plaintiffs,

17             vs.

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

26                             Defendants.

Case No. **CV04-1368 ABC (CWx)**  
**REPLY IN SUPPORT OF  
MOTION TO DISMISS FIRST  
AMENDED COMPLAINT BY  
DEFENDANT ENOM, INC.**

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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **1. INTRODUCTION**

3 Plaintiffs have filed a separate opposition to eNom’s motion to dismiss only  
4 with respect to the Third Claim for Relief. This reply memorandum addresses only  
5 those arguments made in the separate opposition.<sup>1</sup> eNom incorporates by reference  
6 the reply memorandum filed by VeriSign and NSI with respect to the First, Second,  
7 Fifth, Sixth, Seventh, Eighth and Ninth Claims for Relief.

8 Plaintiffs’ separate opposition is based entirely on two statements from  
9 eNom’s website description of its Wait List Service (“WLS”), named FIRST DIBS.  
10 These statements, which appear in the context of a clear and accurate description of  
11 the FIRST DIBS service, are classic examples of “puffery.” By definition, puffery is  
12 not actionable because no reasonable consumer would take it literally. Nonetheless,  
13 Plaintiffs take eNom’s statements wildly out of context and ascribe to them an overly  
14 strained interpretation that no reasonable consumer would adopt. Specifically,  
15 Plaintiffs’ opposition contends that the statements “Get the domain name you want”  
16 and “If you were given the opportunity to have any domain name, which name would  
17 you choose?” will lead customers to believe they have a higher chance of obtaining a  
18 desired domain name than they actually have.

19 In fact, eNom’s website clearly states that the FIRST DIBS service merely  
20 enables a customer to be first in line for a currently registered domain name in the  
21 event that the current owner fails to renew the registration. eNom does not promise –  
22 nor could it – that the current owner will not renew the registration. Nor does it  
23 make any false representations about the likelihood of the domain name becoming  
24 available. Rather, eNom leaves it to the customer to determine if a \$35 right to be  
25

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26 <sup>1</sup> eNom incorporated by reference the arguments of VeriSign and Network  
27 Solutions, Inc. (“NSI”) in support of its motion to dismiss the First, Second, Fifth,  
28 Sixth, Seventh, Eighth and Ninth Claims for Relief. Plaintiffs similarly incorporated  
their opposition to the motion to dismiss such claims filed by VeriSign and NSI.

1 first in line is a good value. Regardless of whether Plaintiffs believe the customer's  
2 decision is a wise one, they cannot point to any statement by eNom that, when placed  
3 in its proper context, misrepresents the terms of the FIRST DIBS service.

4 **2. ENOM'S STATEMENTS MUST BE CONSIDERED IN THE CONTEXT**  
5 **IN WHICH THEY APPEAR ON ENOM'S WEBSITE.**

6 To support their allegations that eNom is misleading potential customers of the  
7 FIRST DIBS service, Plaintiffs ignore the context in which eNom's statements  
8 appear. Essentially, Plaintiffs complain about the following section from eNom's  
9 website:<sup>2</sup>

10 **Get First Dibs™** on ANY .com or .net domain name!  
11  
12 If you were given the opportunity to have ANY domain name,  
13 which name would you choose?  
14 Get the domain name you want Only **\$35/yr.**  
15 Your domain name is a unique and valuable asset, (includes registration)  
16 there is only one like it in the world.  
Protect your existing domain names

17 To the casual visitor to the eNom website, this section is accessible only if the  
18 visitor clicks<sup>3</sup> on the "preorder" icon<sup>4</sup> on the left side of the home page. The page  
19 that appears upon clicking "Get the domain name you want" contains the following  
20 disclosures:

21 \_\_\_\_\_  
22 <sup>2</sup> Plaintiffs concede that it is proper for the Court to consider as exhibits the  
web pages on which the alleged misrepresentations appear. (Op. Br. at p. 5 n.4.)

23 <sup>3</sup> This click will take the customer to the web page addressed  
24 [www.enom.com/tlds](http://www.enom.com/tlds), where the above section appears. (A copy of this page is  
25 attached to this reply brief as Exhibit D.) If the visitor clicks on the "Get the domain  
name you want" icon, he will be taken to another page, which explains the basic  
26 **FIRST DIBS** program. (A copy of this page, addressed  
[www.enom.com/help/faq\\_dibs.asp](http://www.enom.com/help/faq_dibs.asp), is attached to this reply brief as Exhibit E.)

27 <sup>4</sup> A copy of the eNom homepage, [www.enom.com](http://www.enom.com), is attached to this reply  
28 brief as Exhibit C. Plaintiffs' Exhibit A, attached to their opposition memorandum,  
contains a home page that is only accessible to customers who have a retail account  
with eNom.

1 **If you were given the opportunity to have ANY domain name,**  
2 **which name would you choose?**

3 With eNom's First Dibs service, you can back-order ANY .COM or  
4 .NET domain name, even if it is currently registered by someone else.  
5 We monitor the status of your desired domain name 24 hours a day, 365  
6 days a year and if the domain becomes available, since you have First  
7 Dibs, you become the registered owner of the domain name. It's that  
8 simple.

9 (Ex. E.) Further down the same page, the service is described in the "FIRST DIBS  
10 Service Frequently Asked Questions." The third question asks:

11 **If I have First Dibs on a domain name, will I be certain to obtain the**  
12 **domain name when the current registration expires?**

13 No. With an active First Dibs subscription you are first in line at the  
14 registry for the associated domain name if it expires and becomes  
15 available. However, if the current registrant elects to renew or redeem  
16 the domain name during the redemption grace period, eNom will be  
17 unable to register the domain name for you. If the registrant elects not to  
18 continue their registration, then the domain name is automatically  
19 registered to you, because you've got First Dibs.

20 (*Id.*)

21 Plaintiffs fail to mention these other statements, focusing solely on the "Get  
22 the domain name you want" icon and the question that appears above it, which  
23 playfully wonders "If you were given the opportunity to have ANY domain name,  
24 which name would you choose?" But in determining whether eNom has made false  
25 representations about its FIRST DIBS service, the Court must consider the context in  
26 which these statements appear. *See Haskell v. Time, Inc.*, 857 F. Supp. 1392, 1399-  
27 1400 (E.D. Cal. 1994). When viewed in context, there is nothing misleading about  
28 any of the statements contained on eNom's website.

3. **NO REASONABLE CONSUMER WOULD INTERPRET ENOM'S  
STATEMENTS AS SUGGESTING THAT A FIRST DIBS  
SUBSCRIPTION WILL AUTOMATICALLY RESULT IN THE  
REGISTRATION OF THE DESIRED DOMAIN NAME.**

Remarkably, Plaintiffs contend that eNom's statements imply that a  
subscription to FIRST DIBS will guarantee the customer an opportunity to register  
any domain name he wants. They base this allegation on an overly strained

1 interpretation of the phrases “Get the domain name you want” and “If you were  
2 given the opportunity to have ANY domain name, which name would you choose?”  
3 (Op. Br. at p. 7 ln. 1-2.) Neither of these statements can be interpreted as a guarantee  
4 of anything. Moreover, both of these statements are devoid of factual content and  
5 amount to nonactionable puffery. *See Cooke, Perkiss & Liehe, Inc. v. Northern*  
6 *California Collection Serv. Inc.*, 911 F.2d 242, 246 (9th Cir. 1990) (per curiam)  
7 (recognizing that nonactionable puffery includes claims that “are so exaggerated as to  
8 preclude reliance by consumers).<sup>5</sup> No reasonable consumer would believe that the  
9 FIRST DIBS program will allow him to obtain ANY domain name he wants. For  
10 example, it takes only a modicum of common sense to figure out that a \$35  
11 subscription to FIRST DIBS will not automatically yield ownership in a high profile  
12 domain name such as www.microsoft.com.<sup>6</sup>

13 Plaintiffs’ reliance on this Court’s decision in *Perfect 10, Inc. v. Cybernet*  
14 *Ventures, Inc.*, 167 F. Supp. 2d 1114, 1125 (C.D. Cal. 2001) is misplaced. That case  
15 involved a misleading advertisement for an adult website that stated “You Gotta  
16 Love Jennifer Love Hewitt Nudes.” *Id.* The Court concluded that this statement was  
17 not mere puffery, as a reasonable consumer might expect to find nude shots of the  
18 popular actress at that link. *Id.* By contrast, no reasonable consumer would construe  
19 the statements on the eNom website as anything other than puffery.

20 Similarly, Plaintiffs’ reliance on *Consumer Advocates v. Echostar Satellite*  
21 *Corp.* 113 Cal. App. 4th 1351, 1360-62 (2003) also is misplaced. The *Consumer*

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23 <sup>5</sup> It is clear that “[w]hether the alleged misrepresentations amount to mere  
24 puffery may be determined on a motion to dismiss.” *Haskell*, 857 F. Supp. at 1399.

25 <sup>6</sup> In describing the preorder program, eNom’s motion to dismiss stated that the  
26 FIRST DIBS preorder program was limited to eNom Technology Partners (“ETPs”).  
27 ETPs are commercial domain name resellers. Further investigation has revealed,  
28 however, that some retail customers were mistakenly permitted to place preorders.  
Of course, under the preorder program no payment is made until and unless the  
preorder results in an actual Wait List subscription; as a result, no preorder customers  
have been charged. eNom has since taken action to ensure that the preorder service  
remains limited to ETPs.

1 *Advocates* court considered several allegedly misleading statements, but held that  
2 only two were actionable. Specifically, it concluded that detailed, concrete  
3 representations that the defendant's satellite service provided 50 channels and  
4 showed the program schedule 7 days in advance were sufficiently factual to mislead  
5 the public. *Id.* at 1361-62. Yet the court refused to impose liability for statements  
6 that the service provided "crystal clear" video and "CD quality" audio, as these  
7 statements would not be reasonably understood as a literal promise of perfection. *Id.*  
8 at 1361. Clearly, eNom's representations are much closer to these latter statements  
9 than to the specific and believable statements about the number of channels or days  
10 of advance programming schedule.

11 Even assuming that the above statements, considered in isolation, could be  
12 reasonably interpreted as a promise that a FIRST DIBS subscription will result in  
13 ownership of any chosen domain name, eNom's other statements leave no doubt on  
14 the issue. As noted above, if a potential customer clicks on the "Get the domain  
15 name you want" icon, he is taken to a page that clearly explains the terms of the  
16 FIRST DIBS program. This page states that with a FIRST DIBS subscription, the  
17 customer will become the registered owner of the domain name only "*if* the domain  
18 becomes available," *i.e.*, if it is not re-registered by the current owner. (Ex. E  
19 (emphasis added).) In addition, the third "Frequently Asked Question" inquires:

20 If I have FIRST DIBS on a domain name, will I be certain to obtain the  
21 domain name when the current registration expires?

22 The clear and obvious answer provided by eNom is:

23 No. With an active First Dibs subscription you are first in line at the  
24 registry for the associated domain name if it expires and becomes  
25 available. However, if the current registrant elects to renew or redeem  
26 the domain name during the redemption grace period, eNom will be  
27 unable to register the domain name for you.

28 Given these statements, Plaintiffs' contention that reasonable consumers will  
be tricked into believing that they are purchasing the domain name itself, rather than  
just the right to be first in line in case the domain name is not renewed, is patently

1 | disingenuous. In fact, eNom's statements about its FIRST DIBS service closely  
2 | resemble the advertisements found unobjectionable by the *Haskell* court. In that  
3 | case, the plaintiffs alleged that statements by a sweepstakes program such as "You've  
4 | never been closer to having a chance to win \$5,000,000.00" were deceptive. *See*  
5 | *Haskell*, 857 F. Supp. at 1399-1400. The court disagreed, finding that these  
6 | representations were mere puffery, especially in light of the fact that the sweepstakes  
7 | program was clearly explained in other prominent statements. *Id.* at 1400. Similarly,  
8 | eNom's statements – at worst nonactionable puffery – appear with other statements  
9 | that leave no doubt about what FIRST DIBS customers are purchasing with their  
10 | \$35.

11 | **4. PLAINTIFFS' PROPOSED "CLARIFICATION" WOULD**  
12 | **NEEDLESSLY CREATE CONSUMER CONFUSION.**

13 | In the First Amended Complaint, Plaintiffs improbably suggested that eNom  
14 | should be required to "disclose the likelihood that a WLS subscription will be  
15 | successful[.]" (FAC ¶ 7.11.) In its motion to dismiss, eNom pointed out that such a  
16 | disclaimer would be counterproductive and misleading. (Motion at p. 6-7.) With  
17 | more than thirty million top level domain names, the chance that a current owner will  
18 | fail to renew registration on any given domain name is impossible to know. Some  
19 | high profile domain names, like [www.microsoft.com](http://www.microsoft.com), will almost certainly be  
20 | renewed on time. But a recently registered, obscure name is much more likely to  
21 | become available.

22 | In their opposition to eNom's motion to dismiss, Plaintiffs back off their ill  
23 | considered proposal. They now focus on their suggestion that eNom should state  
24 | simply that "most subscriptions will not result in the actual registration of any  
25 | domain name." (Op. Br. at p. 8 ln. 13-14.) But this proposed disclosure is  
26 | unnecessary. First, eNom never claims that a FIRST DIBS subscription is likely to  
27 | result in the actual registration of a domain name. In fact, its website statements  
28 | make clear that whether a subscription will result in actual registration depends

1 entirely on the actions of the current owner. (Ex. E.) Second, even if Plaintiffs'  
2 proposed disclaimer is true – an untested hypothesis at best – it would be of little  
3 help. After all, a potential FIRST DIBS customer is concerned not with whether  
4 WLS subscriptions are *generally* successful, but whether the particular domain name  
5 he wants is likely to become available. The customer already has the tools to make  
6 that judgment. In addition to using his common sense, the customer can check the  
7 publicly available WHOIS directory, which provides sufficient and timely data about  
8 the registration. Thus, there is no need for Plaintiffs' proposed disclaimer.

9 **5. CONCLUSION**

10 Plaintiffs' Third Claim for Relief is fatally flawed, as it is based on statements  
11 that are nothing more than hyperbolic puffery. Furthermore, Plaintiffs conveniently  
12 ignore the clear and accurate description of the FIRST DIBS program that is featured  
13 prominently on eNom's website. In fact, no reasonable consumer could be deceived  
14 by any of the statements on eNom's website. As a result, Plaintiffs' Third Claim for  
15 Relief must be dismissed.

16  
17 DATED: June 30, 2004

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24 erroneously sued as eNOM, Inc., a  
25 Washington Corporation and eNOM  
26 FOREIGN HOLDINGS CORPORATION,  
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