

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;

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

4 DAVIS WRIGHT TREMAINE LLP
5 FREDERICK F. MUMM
6 MARC A. FULLER

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

1 (“If this is misleading, it is nothing more than puffing.”). In fact, just below that
2 headline, the following paragraph appears:

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. B at p. 1.) (emphasis added). This passage unambiguously informs any
10 prospective FIRST DIBS customer that registration of a domain name will only
11 occur if it becomes available. Moreover, on the same page, one of the “Frequently
12 Asked Questions” is “What happens if the domain name that I want is renewed by
13 the current registrant?” (*Id.* at p. 4.) eNom explains that in such a case, the FIRST
14 DIBS subscriber may have eNom monitor a different domain name. (*Id.*) It is clear,
15 therefore, that a FIRST DIBS subscriber will become the registered owner of a
16 domain only if the current registrant fails to renew his registration. No reasonable
17 consumer would believe, based on these representations, that a FIRST DIBS
18 subscription includes a guarantee of eventual ownership of the domain name.

19 Moreover, Plaintiffs allege vaguely that eNom should disclose the likelihood
20 that a WLS subscription will be “successful.” Apparently, they believe that
21 consumers would benefit from knowing what percentage of domain names are
22 allowed to expire each year. But further reflection reveals that this information
23 would, at best, be unhelpful and would be misleading in most circumstances. As
24 Plaintiffs concede, there are more than thirty million domain names registered with
25 the top level domains .com and .net. (FAC ¶ 4.20.) And according to Plaintiffs’ own
26 pleading:

27 The likelihood that a domain name will not be renewed from the registry
28 varies according to (among other things) the number of years that it has
already been registered, the number of characters it contains, and
whether or not it is a word in the English language. In general, the
longer a domain name has already been registered, and the shorter it is,
the less likely it is to be allowed to expire. Domain names that are
words in the English language are less likely to be allowed to expire
than domain names that are not.

1 (Id. at 4.57.) Given this complex calculus, it is a wonder that Plaintiffs suggest that
2 consumers would be aided by a general statistic that “in the aggregate, x percentage
3 of domain name registrations are allowed to expire.” In many cases, this statistic
4 would be wildly misleading. For example, Plaintiffs assert that 5% of domain names
5 are not renewed each year. (Id. at 4.58.) But assuming the truth of this statement,
6 does that mean that a WLS subscription to www.microsoft.com has a 5% chance of
7 being successful?

8 In essence, Plaintiffs cannot show that reasonable consumers are likely to be
9 misled by any of eNom’s representations or omissions. Viewed in the context in
10 which they appear on the website, eNom’s statements are clear and unambiguous,
11 and need no further explanation. The Third Claim should therefore be dismissed.


12 **3. CONCLUSION**

13 For the reasons discussed in detail above, the Court should dismiss the Third
14 Claim. In addition, the Court should dismiss all other claims alleged against eNom
15 for the reasons stated in the memorandum of points and authorities filed on behalf of
16 VeriSign and NSI.

17
18 DATED: May 28, 2004

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

19
20
21
22 By: _____


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

name of the ETP's downstream customer, if any.

5. The terms of eNom's implementation of VeriSign's WLS service, eNom's First Dibs™ service, are found below. You must agree to these terms to participate in this pre-order service. Without limitation, these terms which you must also agree to in order to participate in this pre-order service include important and substantial limitations on eNom's liability, indemnification of eNom, disclaimers of warranties by eNom, and a choice of law and venue provision. Please read all of the terms of eNom's First Dibs service carefully, because you are agreeing that all of these terms apply to this pre-order service.

First Dibs™ Subscription Service Terms

1. The Terms of this First Dibs™ Subscription Service agreement (the "Agreement") may be modified by eNom at any time by posting the modified terms to the website where you are presently viewing this Agreement. By subscribing to and continuing to use the First Dibs service, you agree to be bound by the terms of this Agreement and any subsequent modifications.
2. The First Dibs™ subscription service is eNom's implementation of the "Wait List Service" ("WLS") which, it is anticipated, will be offered by Verisign, Inc., the registry for .com and .net TLDs.
3. The price is \$35 for a one year subscription. This price includes the price of a domain name registration, if any, which may result. When/if a First Dibs subscription ripens into a domain name registration, you agree that your resulting domain name registration will be governed by the Registration Agreement found at <http://www.enom.com/help/agreement.asp>.
4. What the service provides: If you have purchased a First Dibs subscription with respect to a particular domain name (the "First Dibs Domain"), and if the existing domain name registration becomes available during the term of your subscription, the domain name will be re-registered to you. **IMPORTANT:** Domain names do not immediately become available on the expiration date listed in the WHOIS output for the domain name. The currently listed registrant of a domain name has the opportunity to renew the domain name registration for up to approximately eighty days after the domain name's listed expiration date (the "renewal grace period"). If your First Dibs subscription lapses before the end of the renewal grace period, the First Dibs Domain will not be re-registered to you.
5. You may be allowed to change the First Dibs Domain (the domain name which your First Dibs subscription applies to) up to three times per year. There will be a charge for changing the First Dibs Domain, unless this service is listed as "free" through the website through which you procure this service.

6. The currently listed registrant will be notified when you acquire First Dibs on the registrant's domain name (this is a requirement of Verisign's WLS system).
7. You may elect to have your First Dibs subscription automatically renewed, in which case the credit card you have on file will be debited approximately 30 days before the expiration of the then extant subscription term. If, for whatever reason, your service provider is unable or unwilling to debit your card, then your First Dibs subscription will not be renewed and you may not be notified.
8. eNom may elect to discontinue offering First Dibs in the future.
9. LIMITATION OF LIABILITY:
- 9.1 YOU AGREE THAT ENOM WILL NOT BE LIABLE FOR THE FOLLOWING: YOUR USE OF A WLS OR FIRST DIBS SUBSCRIPTION OR A DOMAIN NAME REGISTRATION; INTERRUPTION OF BUSINESS (EITHER YOUR'S, ENOM'S, OR A THIRD-PARTY'S); ACCESS DELAYS OR ACCESS INTERRUPTIONS TO OUR SITE OR THE WEB SITE(S) OR SERVICES YOU ACCESS BY THE DOMAIN NAME REGISTERED IN YOUR NAME; LOSS OR LIABILITY RESULTING FROM ACTS OF GOD; DATA NON-DELIVERY, MIS-DELIVERY, CORRUPTION, DESTRUCTION OR OTHER MODIFICATION; EVENTS BEYOND ENOM'S CONTROL; THE PROCESSING OF YOUR APPLICATION TO PARTICIPATE IN THIS SERVICE; OR LOSS OR LIABILITY RESULTING FROM THE UNAUTHORIZED USE OR MISUSE OF YOUR ACCOUNT IDENTIFIER OR PASSWORD. ENOM ALSO WILL NOT BE LIABLE FOR ANY INDIRECT, SPECIAL, INCIDENTAL, OR CONSEQUENTIAL DAMAGES OF ANY KIND (INCLUDING LOST PROFITS) REGARDLESS OF THE FORM OF ACTION WHETHER IN CONTRACT, TORT (INCLUDING NEGLIGENCE), OR OTHERWISE, EVEN IF ENOM HAS BEEN ADVISED OF THE POSSIBILITY OF SUCH DAMAGES. IN NO EVENT SHALL ENOM'S MAXIMUM AGGREGATE LIABILITY EXCEED ONE HUNDRED DOLLARS (\$100.00). BECAUSE SOME STATES DO NOT ALLOW THE EXCLUSION OR LIMITATION OF LIABILITY FOR CONSEQUENTIAL OR INCIDENTAL DAMAGES, IN SUCH STATES, OUR LIABILITY IS LIMITED TO THE EXTENT PERMITTED BY LAW.

10. INDEMNIFICATION OF ENOM:

- 10.1 You agree to release, indemnify, and hold all registry operators, eNom, their contractors, agents, employees, officers, directors and affiliates harmless from all liabilities, claims and expenses, including attorney's fees and court costs, for third party claims relating to or arising under this Agreement, the eNom services provided hereunder, or your use of the eNom services, including without limitation infringement by you, or someone else using any eNom service with your computer, of any intellectual property or other proprietary right of any person or entity, or from the violation of any eNom operating rule or policy relating to the service(s) provided. When eNom may be involved

in a suit involving a third party and which is related to our services to you under this Agreement, eNom may seek written assurances from you in which you promise to indemnify and hold eNom harmless from the costs and liabilities described in this paragraph. Such written assurances may include, in eNom's sole discretion, the posting of performance bonds or other guarantees reasonably calculated to guarantee payment to eNom. Your failure to provide such assurances may be considered by us to be a breach of this Agreement by you and may, in eNom's sole discretion, result in loss of your right to control the disposition of domain names and/or WLS subscriptions for which you are the registrant and in relation to which eNom is the registrar of record.

11. REPRESENTATIONS AND WARRANTIES:

11.1 YOU REPRESENT THAT, TO THE BEST OF YOUR KNOWLEDGE AND BELIEF, NEITHER THE ACQUISITION OF A WLS SUBSCRIPTION, FIRST DIBS™ SUBSCRIPTION, NOR REGISTRATION OF A DOMAIN NAME NOR THE MANNER IN WHICH ANY OF THESE SERVICES IS DIRECTLY OR INDIRECTLY USED INFRINGES THE LEGAL RIGHTS OF A THIRD PARTY. YOU FURTHER REPRESENT AND WARRANT THAT ALL INFORMATION PROVIDED BY YOU IN CONNECTION WITH ACQUISITION OF SERVICES FROM ENOM IS ACCURATE. ALL SERVICES ARE PROVIDED TO YOU "AS IS." EXCEPT FOR OUR STATEMENT REGARDING OUR ACCREDITATION AS AN ICANN-APPROVED DOMAIN NAME REGISTRAR IN THE INTRODUCTORY PARAGRAPH OF THIS AGREEMENT, WE MAKE NO REPRESENTATIONS OR WARRANTIES OF ANY KIND WHATSOEVER, EXPRESS OR IMPLIED, IN CONNECTION WITH THIS AGREEMENT OR OUR SERVICES, INCLUDING BUT NOT LIMITED TO WARRANTIES OF MERCHANTABILITY OR FITNESS FOR A PARTICULAR PURPOSE, UNLESS SUCH REPRESENTATIONS AND WARRANTIES ARE NOT LEGALLY EXCLUDABLE. WITHOUT ANY LIMITATION TO THE FOREGOING, ENOM MAKES NO REPRESENTATIONS OR WARRANTIES OF ANY KIND WHATSOEVER THAT REGISTRATION OR USE OF A DOMAIN NAME OR WLS SUBSCRIPTION UNDER THIS AGREEMENT WILL IMMUNIZE YOU EITHER FROM CHALLENGES TO YOUR DOMAIN NAME REGISTRATION OR WLS SUBSCRIPTION, OR FROM SUSPENSION, CANCELLATION OR TRANSFER OF THE DOMAIN NAME REGISTRATION OR WLS SUBSCRIPTION ACQUIRED BY YOU. SOME JURISDICTIONS DO NOT ALLOW THE EXCLUSION OF CERTAIN WARRANTIES, SO SOME OF THE ABOVE EXCLUSIONS MAY NOT APPLY TO YOU.

12. This Agreement, your rights and obligations and all actions contemplated by this Agreement shall be governed by the laws of the United States of America and the State of Washington, as if the Agreement was a contract wholly entered into and wholly performed within the State of Washington. Any action to enforce this Agreement or any matter relating to your use of the eNom website or services shall be brought exclusively in the United States District Court for the Western District of Washington, or if there is no jurisdiction in such court, then in a state court in King County, Washington state; you consent to the personal and subject matter jurisdiction of such courts. You agree that service of process may be accomplished by mailing notices, via first class mail or equivalent, with delivery confirmation where available, to the address provided by you.

[First Dibs Pre-Order Queue](#) [First Dibs FAQ](#)



eNom, Inc. has been accredited by ICANN, the Internet Corporation for Assigned Names and Numbers. Please review our [Terms and Conditions](#), [Disclaimer](#), [Registration Agreement](#), [Privacy Policy](#), and [Dispute Policy](#). The entirety of this site Copyright © 1998-2004 eNom, Inc. All rights reserved.





Domain registration and services

- home
- my enom
- domain names
- web hosting
- web monitor
- resellers
- secure my site
- pre-order

- support center
- web hosting
- web monitor
- TLD overview
- abuse policy
- privacy policy
- terms
- dns demo
- password help

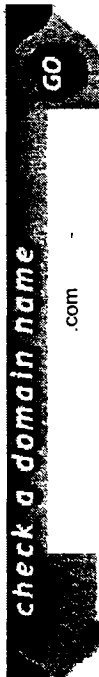
new account
log-in



W cart Who-Is about us ?

check a domain name .com

Easy Transfers click here



FAQ - First Dibs™

Get First Dibs™ on ANY .com or .net domain name!

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

Get the domain name you want

Your domain name is a unique and valuable asset, there is only one like it in the world.

Protect your existing domain names

Only **\$35/yr.**
(includes registration)

With First Dibs™ You Can Get the Domain Name You Want

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

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

Did you know that over 20,000 previously registered .COM or .NET names expire and are deleted each day?

It's true. These are names that were once owned by someone else and may already have valuable traffic associated with them.

Now, with the help of First Dibs, you can have the domain name you've always wanted the instant it becomes available again.

Don't spend another minute watching and waiting for your first choice domain name. Get First Dibs on the domain name that you have always wanted.

How do I get First Dibs on the domain name I want?

It's simple. Just subscribe for your desired domain name under eNom's First Dibs service. Once you have First Dibs, we will automatically register the name for you if it becomes available.

Benefits of First Dibs:

1. First Dibs reserves your spot at the front of the line at the registry. With First Dibs you will acquire the domain name when it expires and becomes available for registration.
2. As a First Dibs subscription holder, you will be the registered owner of your desired domain name if it is deleted or becomes available during your subscription period.
3. Just \$35/yr. maintains your First Dibs subscription to any .COM or .NET domain name. You can change the domain name associated with your subscription a total of (3) times during a 12-month subscription, subject to First Dibs availability. This is particularly important, should the existing registrant decide to renew the domain name during your subscription period. As long as you maintain your subscription, your place at the front of the line for the associated domain is secure.

[First Dibs Pre-Order Queue](#)

[First Dibs FAQ](#)

[First Dibs Terms and Conditions](#)

With First Dibs™ You Can Protect Your Existing Domain Names

eNom's First Dibs service enables you to securely protect your valuable domain names.

A domain name is a unique and valuable asset: there is only one like it in the world. A domain name provides a gateway where people from all around the world can stay connected with you and your business. Now with First Dibs you can protect this valuable asset. First Dibs will provide protection in the event your domain name unintentionally expires, by putting you at the front of the line at the registry should it inadvertently become available.

A domain name can unintentionally expire for the following reasons:

1. Renewal email notices sent to an employee that no longer works for the company but is still listed as the contact for

the domain name.

2. The credit card on file for the domain account has expired.
3. You recently changed your address, phone number or email address, and forgot to update your WHOIS information.
4. The accounting department missed the bill.

Benefits of protecting your domain name with First Dibs:

1. First Dibs insures that you and only you will remain the owner of your domain name should it expire.
2. There is absolutely no risk. First Dibs simply provides a layer of insurance on your domain name, in the event that it should expire unintentionally.
3. First Dibs saves you or your IT department from having to constantly monitor the status of your domain names.

Don't leave it up to chance. Your domain name is an asset. Now you can protect it.

[First Dibs Pre-Order Queue](#)

[First Dibs FAQ](#)

[First Dibs Terms and Conditions](#)

The First Dibs™ Service Frequently Asked Questions

[What TLD's are available for First Dibs?](#)

[How much does it cost to get First Dibs subscription?](#)

[If I have First Dibs on a domain name, will I be certain to obtain the domain name when the current registration expires?](#)

[What happens if the domain name that I want is renewed by the current registrant?](#)

[At what point does a domain name become available for registration?](#)

[Will the current registrant know that I have placed First Dibs on their domain name?](#)

[Do you offer refunds?](#)

[What if I don't want someone to know that I am interested in getting their domain name once it expires?](#)

What TLD's are available for First Dibs?

Currently, .COM and .NET are available for First Dibs.

How much does it cost to get a First Dibs subscription?

The cost for a one-year subscription to First Dibs is \$35. This includes registration of the domain name, should you acquire the domain name.

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

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

What happens if the domain name that I want is renewed by the current registrant?

If the current registrant decides to continue their domain name registration, you can select to have eNom monitor another domain name for you. You can identify another domain name up to 3 times during a single subscription or you can elect to auto-renew your 12 month subscription to the same domain name.

At what point does a domain name become available for registration?

If an active (registered) domain name is not renewed within the period that follows its expiration date, the Registry sets the domain status to Pending Delete and it will be made available to the general public for re-registration after 5 days.

Will the current registrant know that I have placed First Dibs on their domain name?

Yes, the existing registrant will be notified that First Dibs has been placed on the domain name.

Do you offer refunds?

While we do not offer refunds, you can apply your subscription to a different domain name that you would like us to monitor and attempt to register for you. You can change your subscription to apply to a different domain name up to (3) times during your 12 month subscription.

What if I don't want someone to know that I am interested in getting their domain name once it expires?

With **ID Protect**, you can get First Dibs on a domain name while remaining anonymous. All your personal information,

(name, phone number, email and home address) is protected from public exposure and the WHOIS directory.

[First Dibs Pre-Order Queue](#) [First Dibs Terms and Conditions](#)



eNom, Inc. has been accredited by ICANN, the Internet Corporation for Assigned Names and Numbers. Please review our [Terms and Conditions](#), [Disclaimer](#), [Registration Agreement](#), [Privacy Policy](#), and [Dispute Policy](#). The entirety of this site Copyright © 1998-2004 eNom, Inc. All rights reserved.



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

PROOF OF SERVICE BY MAIL

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action. My business address is Davis Wright Tremaine LLP, Suite 2400, 865 South Figueroa Street, Los Angeles, California 90017-2566.

On May 28, 2004, I served the foregoing document(s) described as: **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** by placing a true copy of said document(s) enclosed in a sealed envelope(s) for each addressee named below, with the name and address of the person served shown on the envelope as follows:

Laurence J. Hutt, Esq.
Arnold & Porter LLP
777 South Figueroa Street, 44th Floor
Los Angeles, California 90017-5844

Derek A. Newman, Esq.,
Newman & Newman, Attorneys At Law LLP
505 Fifth Avenue South
Suite 610
Seattle, Washington 98104

I placed such envelope(s) with postage thereon fully prepaid for deposit in the United States Mail in accordance with the office practice of Davis Wright Tremaine LLP, for collecting and processing correspondence for mailing with the United States Postal Service. I am familiar with the office practice of Davis Wright Tremaine LLP, for collecting and processing correspondence for mailing with the United States Postal Service, which practice is that when correspondence is deposited with the Davis Wright Tremaine LLP, personnel responsible for delivering correspondence to the United States Postal Service, such correspondence is delivered to the United States Postal Service that same day in the ordinary course of business.

Executed on May 28, 2004, at Los Angeles, California.

- State I declare under penalty of perjury, under the laws of the State of California, that the foregoing is true and correct.
- Federal I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct and that I am employed in the office of a member of the bar of this Court at whose direction the service was made.

Miriam Cardona
Print Name


Signature