

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF NORTH CAROLINA
GREENSBORO DIVISION

ANNE MARTINEZ, individually and)
on behalf of all other persons)
similarly situated,)

Plaintiffs,)

v.)

REGISTERFLY, INC.,)
UNIFIEDNAMES INC.)

HOSTING SERVICES GROUP INC.)

KEVIN MEDINA, in his personal capacity and)
as an agent of RegisterFly, Inc. and)

as an agent of Unifiednames Inc.)

John Naruszewicz, in his capacity as an agent)
of both Unifiednames and RegisterFly,)

ENOM, and)

ICANN,)

Defendants.)

Civil Action No 07-cv-188

**PLAINTIFF'S MEMORANDUM
SUPPORTING MOTION FOR
IMMEDIATE CLASS
CERTIFICATION**

INTRODUCTION

This action arises out of the unlawful actions of RegisterFly, Inc. to systematically overcharge its clients, accept payment for registration or renewal of domain names without registering or renewing the domains, among other unlawful acts and the failure of ICANN to protect individuals from the unlawful acts of RegisterFly as its legal duty required. In order to protect the class during the preliminary injunctive phase of the litigation the class is in need of immediate certification. The Court retains at all times during the litigation process the inherent authority to amend, modify or revoke both the certification and the designation of lead counsel as may be appropriate in the future.

ARGUMENT

To obtain certification for a class, Plaintiff must demonstrate that all four threshold requirements of Rule 23(a) and one of the three provisions of Rule 23(b) are satisfied. Fed. R. Civ. P. 23(a) and (b); *see Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 162-63 (1974).

When evaluating the proposed classes, the Court must consider the substantive allegations of the complaint as true. *DeLoach v. Philip Morris Cos.*, 206 F.R.D. 551 (M.D.N.C. 2002); *see also Blackie v. Barrack*, 524 F.2d 891, 901 n.17 (9th Cir. 1975) (noting that this principle “necessarily make[s] the class order speculative in the sense that the plaintiff may be altogether unable to prove his allegations . . . the court may not put the plaintiff to preliminary proof of his claim”). At this stage, the Court may not inquire into the merits of plaintiffs’ underlying claims. *Eisen*, 417 U.S. at 177-78; *Barnes v. American Tobacco Co.*, 161 F.3d 127, 140 (3d Cir. 1998). The question for a class certification determination “is not whether the plaintiff or plaintiffs have stated a cause of action or will prevail on the merits, but rather whether the requirements of Rule 23 are met.” 417 U.S. at 178.

The United States Supreme Court has identified the important functions that class actions serve in our system of civil justice:

[Class actions achieve] the protection of the defendant from inconsistent obligations, the protection of the interests of absentees, the provision of a convenient and economical means for disposing of similar lawsuits, and the facilitation of the spreading of litigation costs among numerous litigants with similar claims.

United States Parole Comm’n v. Geraghty, 445 U.S. 388, 402-03 (1980). Many courts, recognizing the value of class actions, have adopted a liberal construction of Rule 23. In *Eisenberg v. Gagnon*, 766 F.2d 770 (3d Cir. 1985), the court held that “the interests of justice

require that in a doubtful case. ... any error, if there is to be one, should be committed in favor of allowing a class action." *Id.* at 785.

I. REQUIREMENTS OF FED. R. CIV. P. 23(A)

A. NUMEROSITY: FED. R. CIV. P. 23(A)(1)

It is the belief of Plaintiff and Plaintiff's expert witness – as per his affidavit – that there are in excess of 75,000 individuals worldwide with similar claims against Defendants. Clearly, the class population and geographic diversity sets it well within the parameters of the numerosity requirements of Rule 23(a)(1) (usually requiring a class larger than 5,000).

B. COMMONALITY: FED. R. CIV. P. 23(A)(2)

The claims of the class in the instant case all arise out of the same pattern of behavior by Defendants. In many instances, Defendants' actions that are the proximate cause of harm to members of the class are indistinguishable between harms to different individuals in the class. Furthermore, the facts surrounding each member of the class' claim are substantially similar, in that all class members were clients of RegisterFly and either registered, attempted to register, or renew the registration of a domain name with RegisterFly.

These common questions of law and fact include, but are not limited to:

1. whether Plaintiff and members of the Class are entitled to declaratory or injunctive relief against the Defendants, and if so, the nature and extent of such relief.
2. whether Defendants each owed a duty of care to Plaintiff and members of the Class;
3. whether Defendants RegisterFly, Medina, and eNom breached their contractual and fiduciary duties to Plaintiff and members of the Class.

4. whether Defendant ICANN breached its contractual and fiduciary duties to Plaintiffs and members of the Class by failing to act prudently in its regulation of Certified Registrars;
5. whether Defendants breached their duty of care to Plaintiff and members of the Class by failing to fulfill their legal obligations to Plaintiff and members of the Class;
6. whether Defendants violated RICO;
7. whether Plaintiff suffered economic loss due to the Defendants' breaches of fiduciary duty and duty of care, and if so, the proper measure of economic loss; and
8. whether Defendants each owed a fiduciary duty to Plaintiff and members of the Class.

In addition immediate certification, among other things, enables the prospective class to research and later the creation of sub-classifications with regard to whether or not individual members were in the following sub-classes as members who:

1. were locked out of their domain name registration;
2. paid for and did not receive registrations;
3. paid for and did not receive renewals;
4. had the ownership of their domain name usurped;
5. temporarily have lost the use of their domain name;
6. permanently have lost the use of their domain name;

C. TYPICALITY: FED. R. CIV. P. 23(A)(3)

Plaintiff in the instant case fits the requirements of Rule 23(a)(3), as she has a claim common to the entire proposed class and she is not in conflict with any known or reasonably foreseeable interests of any member of the class related to the instant claim.

Fed. R. Civ. P. 23(a)(3) requires that the claims of the proposed representative plaintiffs be typical of the claims of the proposed class. That requirement is satisfied where the claims of the proposed representative plaintiffs arise from the same alleged course of conduct that gives rise to the claims of the proposed Class members, and where the claims are based on the same legal theory. In the instant case, the named Plaintiff alleges, among other things, that she entered into a relationship with Defendants during the Class Period, that Defendants treated her and all other clients alike, and that class wide relief is necessary and appropriate under current governing law. Under these circumstances, the claims asserted by the Named Plaintiff are sufficiently typical of the claims asserted by the Class as a whole to satisfy Fed. R. Civ. P. 23(a)(3).

D. FAIR AND ADEQUATE REPRESENTATION

Fed. R. Civ. P. 23(a)(4) states that the named plaintiff must be a fair and adequate representative of the entire class. This rule has been interpreted to include two separate requirements. The first requirement is that the plaintiffs be represented by adequate counsel. *See Central Wesleyan College v. W.R. Grace & Co.*, 6 F.3d 177, 183 (4th Cir. 1993). Plaintiff's counsel has been practicing law in North Carolina for over twenty years and counsel's firm has significant resources that are at his disposal for the purpose of managing and litigating the present case.

The second requirement of Rule 23(a)(4) is that the named plaintiff not have any interests antagonistic to the class. *See Barnett v. W.T. Grant Co.*, 518 F.2d 543, 546 (4th Cir. 1975). There are no aspects of the Plaintiff's case that are reasonably foreseeable conflicts with other members of class.

II. REQUIREMENTS OF FED. R. CIV. P. 23(B)(1)

Where a Defendant may have rights against, or be under duties toward, numerous persons constituting a class, and be so positioned that conflicting or varying adjudications in lawsuits with individual members of the class might establish incompatible standards to govern his conduct, the establishment of a Class Action under Rule 23(b)(1) is appropriate. The class action device can be used effectively to obviate the actual or virtual dilemma which would thus confront the party opposing the class. The matter has been stated, “[t]he felt necessity for a class action is greatest when the courts are called upon to order or sanction the alteration of the status quo in circumstances such that a large number of persons are in a position to call on a single person to alter the status quo, or to complain if it is altered, and the possibility exists that [the] actor might be called upon to act in inconsistent ways.” *Louisell & Hazard, Pleading AND PROCEDURE: STATE AND FEDERAL* 719 (1962); *see Supreme Tribe of Ben-Hur v. Cauble*, 255 U.S. 356, 366-67 (1921).

The instant case presents questions of the duty owed by ICANN and the duty owed by RegisterFly and eNom to the class members. Especially in the case of ICANN, it is crucial that ICANN not be sent a mixed message as to its legal obligations, which is the likely result if class certification were not ordered and ICANN was subject to individual litigation of cases arising out of the alleged actions in the instant case.

However, the need for consistency is significant for RegisterFly as well. RegisterFly will be subject to many suits for injunctive relief regarding the release and transfer of domain names. If various courts were to determine different duties, it would injure both Defendant and Class Members attempting to resolve the matters before the court in this case. Litigation of this case is

likely to result in determinations of different duties owed to class members by Defendants and thus call upon the Defendants to act in ways that are inconsistent. Consequently, the prosecution of separate actions by individual members of the class would create a risk of inconsistent adjudications with varying results which would create incompatible standards of conduct for Defendants and Class Certification is appropriate.

This the 19th day of March 2007.

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