

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 2007-cv-00188**

RESPONSE TO DEFENDANT ENOM'S  
MOTION TO DISMISS OR TRANSFER

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**I. Introduction**

On 7 May 2007, Defendant eNom filed a Motion to Dismiss or Transfer (“eNom Motion”) based on the assertion that Plaintiff Martinez’s claims are deficient as a matter of law pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure. Furthermore, it requested that the claims against eNom be dismissed due to improper venue pursuant to Rule 12(b)(3), or in the alternative, be transferred to the Western District of Washington. eNom Brief, 1. The legal remedies requested by Defendant eNom are inappropriate at this juncture and its requests for dismissal and transfer should be denied.

## **II. Facts Relevant to Ms. Martinez’s Motion**

### **A. The Relationship Between eNom and RegisterFly**

eNom is an ICANN accredited Internet domain name Registrar that in 2000, entered into an agreement with RegisterFly (“eNom RSA”) allowing RegisterFly to be a reseller of its domain name registration services. eNom Brief, 1. Although eNom correctly asserts in its brief that the eNom RSA “describes the services eNom provided to RegisterFly; specifies that RegisterFly was responsible for providing customer service, billing and technical support to its customers; and classified RegisterFly as an independent contractor and non-agent,” they neglect to introduce the Court to other key aspects of the RSA. eNom Brief, 2.

Also included in eNom RSA are the services that eNom provides, including: “a) Domain Name registration in the TLDs offered by the Backend Service Provider, including whois service; b) name server services (DNS); c) URL forwarding; d) email forwarding; e) POP & SMTP email; f) web-based email; g) website hosting; h) website and domain name availability monitoring; i) website and domain name traffic monitoring; j) website and domain name traffic monetization; k) pre-fabricated and hosted websites for the purpose of registering domain names and offering these services (“PDQ”); l) pre- and post-expiration domain name resale services; m) name my map, phone, etc.; n) dynamic (real-time) DNS; ...”. eNom RSA, § 2(A).

Additionally, eNom RSA requires that resellers use eNom’s “Technology” to utilize the services described above. eNom RSA, §5. Use of eNom’s “Technology” requires that resellers use only the interface provided by eNom, application programming interface (“API”) to carry out all transactions permitted by the RSA. *Id.*

eNom retains the right to “modify, adapt, incorporate with other material, and otherwise to use the materials provided by” the reseller. eNom RSA, §6. The RSA can be suspended or

terminated for selling domains to spammers, “fail[ure] to abide by customary industry acceptable use policies and all governing and applicable laws”, and other reasons. Interestingly, the contract is set for a one year term, indefinitely renewable, and terminable by either party with thirty (30) days notice. eNom, RSA §8.

During the time that RegisterFly was a Reseller for eNom, RegisterFly was able to, without ICANN accreditation, carry out the general functions of a Registrar – described in the relevant parts of eNom RSA, §2(A) – by acting under the supervision of ICANN-accredited eNom.<sup>1</sup>

The purpose of ICANN accreditation is to provide regulation over the process of purchasing/registering Internet domain names. It defeats the purpose of accreditation if an accredited Registrar fails to supervise the sale/registration of Internet domain names done by individuals acting under its authority. Appropriately, eNom did have the right to control the actions of RegisterFly as to the sale/registration of Internet domain names. eNom retained the right to control and modify the way Internet domain names were sold/registered by requiring RegisterFly to use its instruments and tools to Register the domain names.

Furthermore, although the existence and validity of any contract devised by eNom is not admitted, eNom constructively acknowledges that it authorized RegisterFly to enter into a contract on its behalf. eNom Brief, 2.

**B. eNom and Ms. Martinez**

Although Ms. Martinez did not register her domain names on 7 May 2007, eNom provides the 7 May 2007 edition of RegisterFly’s website as evidence that Ms. Martinez entered

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<sup>1</sup> One might consider the analogy of a medical student interning at a hospital under the supervision of a Medical Doctor, who is imputed with liability for the actions of the medical student because of the licensing requirements.

into the contract eNom presents as Exhibit 2. eNom Brief, 2. Without even addressing the validity or enforceability of the contract, the existence of the contract is not even adequately alleged. Confusingly, eNom included an undated general agreement without a signature or certification as evidence of a contract between itself and Ms. Martinez. *See* eNom Ex. 2.

Even more confusing, is the gigantic leap eNom makes from the passive Internet hyperlink (<http://www.registerfly.com/info/terms.php>) – the content of which was confirmed not even a month ago – unrelated to any purchase made by Ms. Martinez to the conclusion that “eNom’s Terms and Conditions are therefore binding on Ms. Martinez.” eNom Brief, 2. In an attempt to advance its factual allegations eNom cites paragraph 181 from Ms. Martinez’s complaint, fully aware of Ms. Martinez’s assertion that RegisterFly was an agent of eNom. eNom Brief, 3.

### **III. Argument**

#### **A. Standard of Review**

As the Court knows, the purpose of a Rule 12(b)(6) motion is to test the legal sufficiency of the pleadings, not to “resolve contests surrounding the facts, the merits of a claim, or the applicability of defenses.” *Edwards v. City of Goldsboro*, 178 F.3d 231, 244 (4th Cir. 1999). The burden is on the moving party to prove to the Court beyond certainty that “plaintiff cannot prove any set of facts in support of his claim entitling him to relief.” *Id.* “The issue is not whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims.” *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974).

In its brief, eNom repeatedly attempts to circumvent our judiciary’s well-established method for determining the truth of the facts alleged. From eNom’s explanation of the standard of review, one might conclude that in considering a Rule 12(b)(6) motion the Court should labor

to determine the veracity of the facts alleged. eNom brief, 4. However, scrutiny of the facts is not necessary or appropriate in the instant case; most of the facts alleged are publicly available at this point in time, the allegations of collaboration and conspiracy are not unreasonable or unusual, and that since the commencement of this action, Ms. Martinez has been joined in this suit by well over one-thousand (1,000) plaintiffs worldwide.

Finally, eNom represents to the Court that there are conflicts between exhibits and the factual allegations contained in the Complaint, citing cases that would work to resolve such a conflict if it actually existed. Nevertheless, eNom's representations are erroneous, as the causes of actions brought against eNom are based Plaintiff's assertion that RegisterFly was eNom's agent.

**B. Plaintiff's Claims Against eNom Are Sufficient to Meet the Requirements of Rule 12(b)(6).**

Despite the philistine allegations made by eNom or its counsel that Plaintiff "obviously engaged in this misleading cut-paste-and-edit effort" to make false allegations against eNom, such claims are rebarbative and without merit. As eNom knows and repeatedly acknowledges, it is the contention of Ms. Martinez that eNom is the principal of its agent, RegisterFly, and thereby shares the responsibility, culpability, and liability for RegisterFly's actions. No further discussion of eNom's contemptible claim is necessary.

**2. Plaintiff Presented a Prima Facie Case of Unjust Enrichment**

eNom attempts to assert a defense to unjust enrichment based on its own conclusion of facts, which is outside the scope of Rule 12(b)(6). *Edwards v. City of Goldsboro*, 178 F.3d at 244.

As the burden is on the moving party to prove to a certainty that the Plaintiff cannot prove any set of facts in support of her claims for relief, the Court should first look to eNom's argument. Then this Court must determine if the argument proves beyond certainty that the facts, viewed in a light most favorable to Plaintiff, could not possibly sustain the cause of action.

Furthermore, eNom relies entirely on its interpretations to claim that unjust enrichment is moot due to the existence of a contract. Especially under the current standard of review, eNom's argument fails; and since eNom asserted no additional arguments in support of its claim in this section, the unjust enrichment cause of action should be permitted to proceed.

### **3. Ms. Martinez's Tort Claims Are Valid**

#### **a. RegisterFly Was an Agent of eNom**

eNom fervently claims that there is no question of material fact regarding its relationship with RegisterFly, yet still considered it necessary to produce competing facts – notably an affidavit from its own Vice President of Business Development, John Kane – in an effort to persuade the Court that RegisterFly is not its agent. Based on the exhibits attached to eNom's Motion, which contradict the facts alleged in its Brief, RegisterFly is, at minimum, a special agent of eNom.<sup>2</sup> The Restatement of Law, Second, Agency § 3(2) reads, “[a] special agent is an agent authorized to conduct a single transaction or a series of transactions not involving continuity of service.” eNom admits that it contractually permitted RegisterFly to obligate it to perform at least some duties. eNom Ex. 1 & 2. Viewed in a light most favorable to Plaintiff, the authorization conferred to RegisterFly from eNom renders the very reasonable legal conclusion that, at minimum, RegisterFly was a special agent of eNom, not an independent contractor.

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<sup>2</sup> Fed. R. Civ. P. 10(c); *New Beckley Mining Corp. v. Int'l Union, United Mine Workers of Am.*, 18 F.3d 1161, 1164 (4th Cir. 1994); *Fayetteville Investors v. Commercial Builders, Inc.*, 936 F.2 1462, 1465 (4th Cir. 1991).

It is an unambiguous legal principle that labeling a party an independent contractor in a contract does not make the label true. *Coastal Plains Utils., Inc. v. New Hanover County*, 166 N.C. App. 333, 345 (N.C. Ct. App. 2004). Regardless, eNom relies heavily on such a clause in its RSA to demonstrate that RegisterFly is not its agent. Considering the current standard of review, eNom’s contractual argument is lacking.

In its brief, eNom claims that the resellers “have ‘no right to bind or commit the other party in any way.’” eNom Brief, 7. However, in Exhibit 2, eNom presents the Court with a contract it claims RegisterFly customers entered when purchasing/registering an Internet domain name through its reseller RegisterFly. If eNom was not a direct party to the contract, it seems reasonable to conclude – particularly given the standard of review – that RegisterFly had actual authority to bind eNom to a contract with its customers.

While it is true that the “two essential ingredients in the principal-agent relationship” are “authority, express or implied, of the agent to act for the principal” and “the principal’s control over the agent,” there is sufficient evidence to support the conclusion that RegisterFly was eNom’s agent. *Id.* Considering that eNom required its resellers, including RegisterFly, to use its tools and instrumentalities to perform their contractual obligations, to follow a vague code – with risk of termination – of conduct to protect eNom’s ICANN accreditation, among other requirements discussed in Section II, A, of this brief, is sufficient evidence, when viewed in a light most favorable to Plaintiff, to conclude that eNom had the “right of control” over RegisterFly. *Wyatt v. Walt Disney World, Co.*, 565 S.E.2d 705, 710 (2002).

Speciously muddling the agency question of “right of control” with ability to remedy damage caused by its agent, eNom attempts to distort the facts of the case through its inability to

redress the problems caused by its agent, RegisterFly, to prove a lack of control within the milieu of agency. Under the current standard of review, this argument should not stand.

Since a question of material fact as to whether RegisterFly was eNom's agent seems to exist, eNom's request to dismiss all tort claims due to RegisterFly's independent contractor status should be denied.

**b. Plaintiff Alleged A Prima Facie Case As To All Tort Claims,  
Thus eNom's Request To Dismiss Should Be Denied**

**(1) Ms. Martinez Alleged A Prima Facie Claim of  
Negligence**

Plaintiff adequately asserts all necessary elements required for a *prima facie* negligence claim in North Carolina. eNom mistakenly claims that Ms. Martinez does not allege any damage other than the possibility of future economic injury. eNom Brief, 9. Paragraphs 47 and 48 of the Complaint allege that Ms. Martinez's domain name, <http://www.searchcertification.com>, expired as a result of RegisterFly's failure to renew the domain. Expiration of Internet domain names in the context of registration means that the Domain Name System (DNS) no longer lists the appropriate host for that domain name. Ms. Martinez sufficiently alleges that RegisterFly's negligence was the proximate cause of her domain, <http://www.searchcertification.com>, losing its DNS listing. As a result of <http://www.searchcertification.com> losing its DNS listing, the content hosted on the site was inaccessible, constituting physical damage – separate from the product itself – permitting recovery for economic loss in tort. *Ellis-Don Constr., Inc. v. HKS, Inc.*, 353 F. Supp. 2d 603, 606 (M.D.N.C. 2004).

Ms. Martinez cites extensively the presence of a duty of care – per ICANN bylaws, accreditation rules, etc. – sufficiently alleging a standard of care that RegisterFly breached. It is

sufficiently alleged that eNom breached its duty to Plaintiff through its agent, RegisterFly; however, this is a question of fact suitable for a jury, not a Rule 12(b)(6) motion.

As discussed at length elsewhere, whether eNom is liable for the negligence of RegisterFly goes to agency and is a question most suitable for a jury. It is not clear why eNom resurrected the agency question again at this juncture; particularly since it was apparently proceeding on the assumption that agency does exist. eNom Brief, Sec. III (B)(3)(b).

**(2) Ms. Martinez Alleged A Prima Facie Claim of Gross Negligence**

For the same reasons enumerated in the previous section, eNom's motion to dismiss the claim of gross negligence should be denied.

**(3) Ms. Martinez Alleged A Prima Facie Claim of Conversion**

eNom points out that in North Carolina “only goods and personal property are properly the subjects of a claim for conversion,” and “intangible interests such as business opportunities and expectancy interests” are not. *Norman v. Nash Johnson & Sons Farms, Inc.*, 537 S.E.2d 248, 264 (N.C. Ct. App. 2000), and eNom Brief, Sec. III (B)(3)(b). eNom asserts that this case then stands for the proposition that internet domain names are by definition an “intangible” interest because they are only a business expectancy. *Id.* However, Ms. Martinez's loss was not solely that of business expectancy, it was immediate and real loss of control and access to her domain name. The Defendant's hasty categorization of internet domain names into a realm not proper for conversion claims is not only sweeping, but disregards case law that specifically addresses the issue of how to treat domain names in conversion claims without overbroad categorizations.

In *Kremen v. Cohen*, 337 F.3d 1024 (2003), the United States Court of Appeals for the Ninth Circuit decided that domain names meet the Restatement (Second) of Torts § 242 (1965) requirement that the intangible interest merge with “a document.” *Id.* at 1033. That court held that as to domain names, the Domain Name System (DNS) is the document that fulfills the Restatement requirement. *Id.* at 1034. The court said that the issue of “[w]hether domain names are a species of property to which conversion applies is a question of law rather than of adjudicative fact,” and in addition to finding as a matter of law that conversion *does* apply to domain names, the court further noted that “courts routinely apply the tort [of conversion] to intangibles without inquiring whether they are merged in a document.” *Id.* at 1033-1034.

The case cited by Defendant makes no indication that North Carolina must adhere to a strict interpretation of the Restatement (Second) of Torts in categorizing interests as tangible or intangible for application of the theory of conversion. It only alludes that a domain name is an intangible business opportunity or expectancy interest because Ms. Martinez suffered lost income. As the Ninth Circuit Court of Appeals indicates in *Kremen*, conversion applies to domain names because the limiting factors of the old tort law distinction between tangible and intangible interests is outmoded and has been abandoned to some degree by “[v]irtually every jurisdiction.”

Finally, eNom argues that it is not liable for conversion because RegisterFly converted Ms. Martinez’s domain names *from* eNom. As an agent of eNom, and under the theory of respondeat superior, the tort of conversion committed by RegisterFly against Ms. Martinez is precisely what creates liability on the part of RegisterFly’s principal, eNom, without regard to which among them ultimately owns the domain names.

**(4) Ms. Martinez Alleged A Prima Facie Claim of Fraud**

In an effort to not be completely redundant, there exists a *prima facie* case for fraud for reasons strikingly similar to those enumerated in previous sections. Therefore, eNom's motion to dismiss as to the claim of fraud should be denied.

#### **4. Ms. Martinez Alleged A Prima Facie Claim of Unfair and Deceptive Conduct**

Ms. Martinez's complaint does allege a case under the NC UDTPA. First, as shown *supra*, no matter what their characterization of their relationship might be in the RSA, eNom and RegisterFly operate on a principal-agent basis. As a principal, eNom is responsible for the harms done by its agent RegisterFly, which here includes overcharging the Plaintiffs. Further, the RSA between eNom is quite telling on this issue. The RSA allowed eNom to set the price for nearly every aspect of a domain name registration and subsequently charged fees for the transaction on a point system. As RegisterFly paid these fees for Ms. Martinez using the funds she paid, RegisterFly did little more than act as a collection agent for eNom. It is a vain argument on the part of eNom to claim that simply inserting a third party in the stream of commerce means that "eNom ever charged her [Ms. Martinez] anything." eNom Brief at 12.

Also, when Mr. Martinez paid her renewal fees, a portion of those fees went to eNom as per eNom's own contracts with RegisterFly. eNom must concede that anything done on a regular basis under a proscribed plan falls within the meaning of the term "systematic." Because this systemic plan of overcharging (how can paying for something one doesn't receive be anything but an overcharge) began from the fees laid out in the terms of eNom's RSA with Ms. Martinez, eNom was heavily involved in charging Ms. Martinez and a key party in the exact way Kevin Medina and RegisterFly overcharged her.

Given that eNom's sole claim for dismissal on the UDPTA issue is that they never charged Ms. Martinez any sum when they were actually just charging her through a middle man, Ms. Martinez has alleged enough in the complaint to survive eNom's motion on these claims.

Finally, eNom is correct in their footnote in stating that Ms. Martinez cannot recover on both fraud and UDTPA grounds. Such recovery would give Ms. Martinez double satisfaction for the same activities. However, in their haste to cite Rule 9(b) in the previous section of their brief, eNom seemingly missed Rule 8(a) which allows for alternative and inconsistent pleading. This is not grounds for dismissal. Rather, it is a question of fact to be proven and decided upon by a jury at trial.

#### **5. Ms. Martinez Plead RICO with Sufficient Particularity**

Ms Martinez alleges a sufficient RICO Claim for the purposes of surviving a 12(b)(6) motion Plaintiffs disagree with Defendant eNom's characterization of the laws surrounding civil RICO claims. Plaintiffs state in good faith that have a valid RICO claim sufficient to overcome this motion and move forward to discovery.

#### **C. The Middle District of North Carolina Is The Appropriate Venue**

The Middle District of North Carolina is the appropriate venue for this action. As eNom is a corporation and is subject to the personal jurisdiction of North Carolina and the Middle District of North Carolina, venue is proper under 28 U.S.C. § 1391(c):

(c) For purposes of venue under this chapter [28 USCS §§ 1391 et seq.], a defendant that is a corporation shall be deemed to reside in any judicial district in which it is subject to personal jurisdiction at the time the action is commenced. In a State which has more than one judicial district and in which a defendant that is a corporation

is subject to personal jurisdiction at the time an action is commenced, such corporation shall be deemed to reside in any district in that State within which its contacts would be sufficient to subject it to personal jurisdiction if that district were a separate State, and, if there is no such district, the corporation shall be deemed to reside in the district within which it has the most significant contacts.

eNom claims that there exists a forum selection clause in a contract that has somehow adhered itself to Ms. Martinez. However, as discussed earlier in this response, eNom has failed to sufficiently demonstrate the existence of a contract, and thus its ability to control venue in the instant case. Consequently, eNom's motion to dismiss for improper venue should be denied, as should its motion for transfer of venue.

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**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that a copy of the foregoing RESPONSE TO DEFENDANT ENOM'S MOTION TO DISMISS OR TRANSFER was duly served upon all parties in accordance with the provisions of Rule 5 of the Federal Rules of Civil Procedure by electronic service and/or depositing it in the United States Mail, first-class postage prepaid, addressed as follows:

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