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U.S. DISTRICT COURT
N.D. OF ALABAMA

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
WESTERN DIVISION

MICHAEL MOORE; RONALD P. GENTRY, Plaintiffs, v. INTERNET CORPORATION FOR ASSIGNED NAMES AND NUMBERS; ENOM, INC.; and REGISTERFLY.COM, INC., Defendants.	CIVIL ACTION NO. 7:07-cv-01153-RDP (OPPOSED) ENOM'S REPLY IN SUPPORT OF ITS MOTION TO DISMISS AND OPPOSITION TO PLAINTIFFS' MOTION TO STRIKE

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I. Summary of Reply

Plaintiffs' Opposition to eNom's motion to dismiss relies on the assumption that pleading "13 pages of facts" is sufficient to defeat a motion to dismiss because, surely, there must be a claim buried somewhere in those "13 pages." Pl. Opp., 4. Plaintiffs are mistaken. Their Opposition to eNom's motion fails to support their claims for the following reasons:

First, plaintiffs' "Motion to Strike" misstates both the facts and the law. All documents in the Kane declaration were explicitly cited in the Amended Complaint. eNom may therefore rely on those documents without converting its motion to one for summary judgment.

Second, plaintiffs do not meaningfully address eNom's antitrust arguments. Plaintiffs fail to identify facts showing either standing to sue or a plausible antitrust theory.

Third, in attempting to salvage their RICO claims, plaintiffs use the same conclusory language in their Opposition that they use in their Amended Complaint. Plaintiffs also misstate the standard applicable to RICO claims and do not allege facts showing either that they have suffered injury through eNom's conduct or that eNom engaged in a conspiracy to commit mail or wire fraud. Further, the claims fail to satisfy Rule 9(b)'s particularity requirements.

Fourth, plaintiffs' misrepresentation and suppression claims cannot be salvaged. The Amended Complaint's allegations and the documents it cites show that eNom neither made false statements nor suppressed material facts. Further, the claims are not pleaded with particularity.

Fifth, plaintiffs do not cite any facts showing that eNom could be liable under either a breach of contract or a third-party beneficiary theory. eNom cannot defend against contract claims without knowing what contract term it supposedly breached.

II. Argument

A. *Bell Atlantic Corp. v. Twombly* Applies.

Before addressing plaintiffs' arguments regarding the claims they pleaded, we address their assertion that *Bell Atlantic Corp. v. Twombly* applies only to antitrust claims predicated on allegations of parallel conduct. Pl. Opp., 2. The Eleventh Circuit has issued two opinions applying *Twombly*'s heightened standard to ***non***-antitrust claims. *Powell v. Barrett*, No. 05-

16734, 2007 U.S. LEXIS App. 20083, at *25-*26 (11th Cir. Aug. 23, 2007) (applying *Twombly* to Eleventh Amendment claim); *Watts v. Florida Int'l Univ. Bd. of Regents of the State of Fla.*, No. 05-13852, 2007 U.S. App. LEXIS 19555, at *13-*15 (11th Cir, Aug. 17, 2007) (applying *Twombly* to First Amendment claim). S*ee also ASTI Comm'cns, Inc. v. Shaar Fund, Ltd.*, 493 F.3d 87, 98 and n.2 (2d Cir. 2007) ("We have declined to read *Twombly*'s flexible 'plausibility standard' as relating only to antitrust cases" as its "'language relating generally to Rule 8 pleading standards seems to be so integral to the rationale … as to constitute a necessary part of that holding.'") (citation omitted). District courts within the Eleventh Circuit have also embraced *Twombly*'s heightened standard outside the antitrust context:

> Until the recent Supreme Court decision in *Bell Atlantic Corp. v. Twombly*, courts routinely followed the rule set forth in *Conley v. Gibson*, that, "a complaint should not be dismissed for failure to state a claim unless it appears beyond a doubt that the plaintiff could prove no set of facts in support of his claim which would entitle him to relief." However, pursuant to *Twombly*, to survive a motion to dismiss, a complaint must now contain factual allegations which are "enough to raise a right to relief above the speculative level."

Frutera Real S.A. v. Fresh Quest, Inc., No. 07-60445-CIV, 2007 U.S. Dist. LEXIS 58036, at *3-*4 (S.D. Fla. Aug. 9, 2007) (applying *Twombly* to weigh breach of contract and commodities act claims) (internal citations omitted). The *Twombly* standard should similarly be applied here. Regardless of whether the *Twombly* or *Conley* standard is applied, however, the Amended Complaint fails to state a claim.

B. Plaintiffs' Motion to Strike Should Be Denied.

Plaintiffs' Opposition begins with a motion to strike that apparently asks the Court to strike Exhibit 2 to the Kane Declaration, a copy of the reseller agreement ("RSA") between eNom and RegisterFly. Pl. Opp., 1, 4; Kane Dec. Ex. 2. The case plaintiffs rely on states only that where "matters ***outside*** the pleadings are presented," the court must either ignore or exclude that evidence. *Filo Am., Inc. v. Olhoss Trading Co., LLC*, 321 F. Supp. 2d 1266, 1268 (M.D. Ala. 2004) (emphasis added). But eNom did not submit matters outside the pleadings.

Plaintiffs specifically refer to and rely on the RSA as a basis for their claims. Am.

Compl. ¶ 23 ("eNom, Inc. entered into a agreement with RegisterFly.com, Inc. which allowed and/or permitted RegisterFly.com, Inc. to act as a reseller of Internet names that would be registered through eNom, Inc."); ¶ 43 ("In registering Internet names for Michael Moore, RegistarFly.com, Inc. was acting as a reseller for eNom, Inc."); ¶ 112 ("Plaintiffs allege that and Defendants eNom, Inc. … and RegisterFly.com, Inc. entered into various contracts.").

The Eleventh Circuit has held that the "Court may consider the full text of documents referenced in, or central to, the allegations of the Complaint" and that if "an allegation is based on a writing and the writing contradicts the allegation, the writing controls." *Bickley v. Caremark Rx, Inc.*, 361 F. Supp. 2d 1317, 1323 (N.D. Ala. 2004) (citing *Brooks v. Blue Cross & Blue Shield of Fla., Inc.*, 116 F.3d 1364, 1369 (11th Cir. 1997), and *Associated Builders, Inc. v. Alabama Power Co.*, 505 F.2d 97, 100 (5th Cir. 1974)). Plaintiffs refer to the RSA in their Amended Complaint and it is central to their claims. Their motion to strike should be denied.

C. All of Plaintiffs' Claims Against eNom Should Be Dismissed.

1. Plaintiffs' Antitrust Claims Should Be Dismissed.

a. Plaintiffs' Antitrust Allegations Are Facially Invalid.

The essence of plaintiffs' antitrust claims is that defendants supposedly combined to eliminate non-price competition by agreeing to a set of dispute resolution procedures and these procedures inflated prices for domain name registration services. *E.g.*, Pl. Opp., 17. Plaintiffs explain nowhere allege in their Amended Complaint (nor explain in their opposition brief) how requiring a particular dispute resolution mechanism could lead to price inflation. Common sense suggests that agreeing to a mechanism for resolving disputes would ***not*** increase the price for domain name registration services and, in fact, analogous authority indicates it may ***reduce*** prices. *See Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585, 594 (1991) (enforcing forum clause; consumers subject to "a forum clause … benefit in the form of reduced fares reflecting the savings that the cruise line enjoys by limiting the fora in which it may be sued"). Because plaintiffs' antitrust claims do not identify any plausible anticompetitive effects of the conduct they challenge, the antitrust claims should be dismissed. *Twombly*, 127 S. Ct. at 1967.

b. Plaintiffs Lack Antitrust Standing.

Plaintiffs' attenuated theory of causation is precisely the type of "radiating injury" against which the requirement of antitrust standing is designed to protect. eNom's Brief in Support of Mot. to Dism. ("eNom's Br."), 6-8. The restraint about which plaintiffs complain would occur (if plaintiffs' allegations were true) within the market for registrars. But nowhere do plaintiffs allege that they attempted to enter that market, which means that they are not part of "an identifiable class of persons whose self-interest would normally motivate them to vindicate the public interest in antitrust enforcement." *Associated Gen. Contractors of Cal., Inc. v. Cal. State Council of Carpenters*, 459 U.S. 519, 542 (1983). The more plausible assumption is that, if there were a registrar that truly wished to enter that market without the protection of the dispute resolution policies, it would have attempted to do so and would have challenged its exclusion. eNom is unaware of a single such challenge. Even if there were an antitrust violation, therefore, plaintiffs are not the most efficient enforcers of the antitrust laws. *Todorov v. HCA Healthcare Auth.*, 921 F.2d 1438, 1448 (11th Cir. 1991). Further, without alleging they attempted to enter this market, plaintiffs lack constitutional standing as well. *Gas Utils. Co. of Ala., Inc. v. Southern Natural Gas Co.*, 996 F.2d 282, 283 (11th Cir. 1993).

Plaintiffs' standing argument founders on another implausible assumption, i.e., that registrars operating without the protection of the challenged dispute resolution procedures would offer their registration services at prices lower than those that currently prevail in the market for domain name registration services. The remoteness and speculative nature of this assumption demonstrate that plaintiffs are not efficient enforcers of the antitrust laws. *Todorov*, 921 F.2d at 1448. There is no basis in economics or logic to assume that a supplier that would be subject to higher transaction costs due to increased uncertainty over domain name disputes and transfers and that would offer a product for which there appears to be little or no demand (a domain name subject to uncertain dispute and transfer procedures) could sell that product at a better price than the price currently offered by registrars that use the challenged dispute resolution procedures. Moreover, plaintiffs have not explained how the absence of such suppliers causes price inflation across the existing market; plaintiffs simply state that this is so. Plaintiffs' claims fail because they have not alleged facts that nudge their standing argument "across the line from conceivable to plausible." *Twombly*, 127 S. Ct. at 1974.

c. Plaintiffs Have Not Attempted to Demonstrate their Entitlement to Relief.

Plaintiffs do not attempt to rebut eNom's arguments regarding why their antitrust claims fail as a matter of law. In response to eNom's arguments that (a) the Legacy A root server is not a competitive market, (b) ICANN's dispute resolution policies are not commercial restraints, and (c) plaintiffs have not come close to alleging the elements of a tying claim (eNom Br., 9-14), plaintiffs offer one conclusory statement: "Plaintiffs specifically allege that Defendants entered into numerous contracts that restrain trade to include some exclusive dealing or exclusionary arrangements and also agreements that unlawfully tied various products and services together through these same contracts." Pl. Opp., 19-20. Leaving aside the merits of plaintiffs' literal reading of Section 1 — *compare* Pl. Opp., 16 ("Plaintiffs must prove an agreement between two or more people in an attempt to restrain trade."), *with Leegin Creative Leather Prods. v. PSKS, Inc.*, 127 S. Ct. 2705, 2712 (2007) ("While § 1 could be interpreted to proscribe all contracts, the Court has never taken a literal approach to its language.") — plaintiffs' argument ignores the fundamental principles of settled antitrust law that eNom raised in support of its motion. See eNom Br., 6-12. eNom will not belabor the unopposed points it made in its opening brief.[1]

[1] One misstatement in plaintiffs' opposition must be corrected. Seeking the Court's indulgence for a case "in its infancy," plaintiffs claim that the Supreme Court encouraged heightened solicitude of antitrust complaints in its recent *Twombly* decision. Pl. Opp., 16. The Supreme Court actually stated the opposite:

> [I]t is one thing to be cautious before dismissing an antitrust complaint in advance of discovery, *cf. Poller v. Columbia Broadcasting System, Inc.*, 368 U.S. 464, 473 (1962), but it is quite another to forget that proceeding to antitrust discovery can be expensive. As we indicated over 20 years ago in *Associated Gen. Contractors of Cal., Inc. v. Carpenters*, 459 U.S. 519, 528 n.17 (1983), "a district court must retain the power to insist upon some specificity in pleading before allowing a potentially massive factual controversy to proceed."….
>
> [I]t is only by taking care to require allegations that reach the level suggesting conspiracy that we can hope to avoid the potentially enormous expense of

2. Plaintiffs' RICO Claims Should Be Dismissed Because Plaintiffs Were Not Injured and They Fail to Plead Fraud with Particularity.

eNom's motion sought dismissal of plaintiffs' RICO claims because (a) plaintiffs lack standing because they do not allege an injury (i.e., an actual, out-of-pocket financial loss) resulting from any conduct by eNom, and any possible injury was self-inflicted; and (b) neither of plaintiffs' RICO claims was pleaded with the particularity required by Rule 9(b). eNom Br., 14-18. In response, plaintiffs argue that: (a) they pleaded 17 pages of allegations potentially applicable to the RICO claims, which should satisfy Rule 9(b); and (b) RICO should be construed liberally. Pl. Opp., 20-22.[2] Plaintiffs' arguments are meritless.

a. Sheer Volume of Non-Specific Allegations Is Insufficient to Satisfy Rule 9(b)'s Particularity Requirement.

Plaintiffs argue that they can avoid a motion to dismiss by alleging facts showing that the eNom committed at least two qualifying predicate acts. Pl. Opp., 21. But plaintiffs allege no facts sufficient to establish the predicate acts of mail or wire fraud, let alone a pattern of either. Plaintiffs do not allege the precise misrepresentations made by eNom; the time, place of, and person responsible for the statements; the content and manner in which the statements misled the plaintiffs; or what eNom gained by any alleged fraud. Pointing to undifferentiated allegations in

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> discovery in cases with no "reasonably founded hope that the [discovery] process will reveal relevant evidence."

Twombly, 127 S. Ct. at 1966-67. No amount of discovery will overcome the facial deficiencies in plaintiffs' antitrust claims: competition within the Legacy A root server market will not become beneficial; ICANN's dispute resolution policies will not become commercial restraints; and plaintiffs will not show the essential elements of their tying claims. Letting these claims to survive will force eNom to bear significant expense to prove only what is already known: plaintiffs cannot allege antitrust claims because no facts could support those claims. With no plausible theory of relief, plaintiffs should not be permitted to impose that burden on eNom.

[2] Notably, plaintiffs do not respond to eNom's argument that they lack standing to pursue a RICO claim due to a lack of injury. This failure to respond shows that their RICO claims should be dismissed. *See, e.g.*, *Lekas v. Briley*, 405 F.3d 602, 614-15 (7th Cir. 2005) (failure to respond to dismissal argument waived claim because "'our judges are busy people'" and if "'given plausible reasons for dismissing a complaint, they are not going to do the plaintiff's research and try to discover whether there might be something to say against the defendants' reasoning.'") (citation omitted). Nor do plaintiffs dispute eNom's argument that there exists no private right of action for violating the federal mail and wire fraud statutes. eNom Br., 21. Plaintiffs' mail and wire fraud claims should be dismissed on this basis as well.

a Complaint and broadly proclaiming that a cause of action exists, as plaintiffs do here, is insufficient to survive a motion to dismiss. *See*, *e.g.*, *Riley v. Murdock*, 828 F. Supp. 1215, 1225 (E.D.N.C. 1993) (RICO requires "more than the bare assertion that a cause of action exists."). Indeed, it is precisely this type of "shotgun" pleading, i.e., incorporating vague allegations into each subsequent claim with no differentiation among defendants, that the Eleventh Circuit has "condemned repeatedly" for 16 years. *Magluta v. Samples*, 256 F.3d 1282, 1284 (11th Cir. 2001) (citations omitted). Plaintiffs do not meaningfully respond to eNom's Rule 9(b) arguments. They do not identify the time, place, or contents of eNom's purported false statements. Plaintiffs' RICO claims should be therefore dismissed. *Estate of Scott v. Scott*, 907 F. Supp. 1495, 1498 (M.D. Ala. 1995) (Rule 9(b) strictly applied).

b. RICO's Liberal Construction Clause Cannot Save Plaintiffs' Claims.

Although RICO should be liberally construed, such liberal construction cannot save plaintiffs' vague RICO claims in the Amended Complaint. *See Reeves v. Ernst & Young*, 507 U.S. 170, 183 (1993) (liberal construction clause "is not an invitation to apply RICO to new purposes that Congress never intended"); *Holmes v. SIPC Corp.*, 503 U.S. 258, 274 (1992) ("RICO's remedial purposes would more probably be hobbled than helped by [plaintiff's] version of liberal construction;" holding that to lessen RICO's requirements under the guise of liberal construction would "open the door to massive and complex damages litigation, which would not only burden the courts, but would also undermine the effectiveness of treble-damages suits") (internal quotations omitted). RICO is liberally construed only to effectuate its remedial purposes, not to determine what constitutes a violation. *Yellow Bus Lines, Inc. v. Local Union 639*, 913 F.2d 948, 955-56 (D.C. Cir. 1990) (*en banc*). Accordingly, RICO's liberal construction clause does not provide a substitute for the specificity mandated by Rule 9(b) or for the requirements of the statute itself. "'[A] legislative mandate to apply a liberal interpretation to an act will not justify the judicial creation of rights or liabilities under guise of 'construction.'"

United States v. Bonanno Organized Crime Family of La Cosa Nostra, 879 F.2d 20, 27 (2d Cir. 1989) (quoting 2A Sutherland Statutory Construction § 58.05, at 722 (4th ed. 1984)).

3. The Misrepresentation and Suppression Claims Should Be Dismissed.

In response to eNom's arguments for dismissal of plaintiffs' misrepresentation and suppression claims, plaintiffs argue issues that are irrelevant and were not raised by eNom: (a) that Alabama state Rule 9(b) has been satisfied because defendants are on "fair notice" of plaintiffs' claims; (b) that opinions can form the basis for a misrepresentation claim; and (c) that a third party injured by deceit upon another may still recover against a defendant. Pl. Opp., 9-12. None of these arguments has merit.

a. Plaintiffs' Misrepresentation and Suppression Claims Meet Neither Federal Rule 9(b) nor Alabama Rule 9(b).

Plaintiffs oddly insist that Alabama Civil Rule 9(b) applies to their fraud and suppression claims. Pl. Opp., 9-10. Of course, as this case is in federal court, the "*Federal* Rules of Civil Procedure apply …, notwithstanding [plaintiff's] insistence on citing the *Alabama* Rules of Civil Procedure." *Coats v. CTB, Inc.*, 173 F. Supp. 2d 1200, 1202 n.1 (M.D. Ala. 2001) (citation omitted) (emphasis in original). *See also Mays v. United Ins. Co. of Am.*, 853 F. Supp. 1386, 1388 n.2 (M.D. Ala. 1994) ("Alabama Rules of Civil Procedure are not binding on this court").

Even if Alabama's Rule 9(b) applied, that rule, like its federal counterpart, requires that plaintiff allege the time, place, and contents of the fact misrepresented or omitted by ***each*** defendant, how the plaintiff was misled, and what has been obtained as a result. *Mays*, 853 F. Supp. at 1389 (citing Alabama's Rule 9(b)). Not surprisingly, plaintiffs cite no paragraph in the Amended Complaint that provides these details. Plaintiffs' Amended Complaint supplies literally none of this information with respect to eNom. Instead, plaintiffs recite in conclusory fashion that their "Complaints [sic] can set forth an abundance of facts establishing all the necessary elements to make a prima facie case for both misrepresentation and suppression." Pl. Opp., 11-12. But they do not set forth those facts. As explained in eNom's opening brief, the facts eNom allegedly misrepresented or omitted were either true or were expressly disclosed.

eNom Br., 18-20, 22. Because plaintiffs have not satisfied Rule 9(b)'s requirements, their fraud and suppression claims should be dismissed.

b. Plaintiffs' "Opinion" Argument Is Irrelevant.

Apparently in response to eNom's demonstration that any purportedly false statements made by eNom were true, plaintiffs resort to a non-sequitur, arguing that, where a defendant states an opinion, the opinion may in some cases be accepted as misrepresented fact for purposes of alleging a fraud claim. Pl. Opp., 10. This argument and the cases plaintiffs cite to support it may be legally correct but they are irrelevant here. Plaintiffs do not allege that eNom stated an opinion that they took as fact and eNom never claimed that any of its statements were opinions.

c. Plaintiffs' Third-Party Reliance Argument Is Irrelevant.

Plaintiffs next posit that, under certain circumstances, a third party injured by a fraud committed on another may recover as if the third party were directly defrauded. Pl. Opp., 12. But plaintiffs did not allege in the Amended Complaint that eNom committed fraud on another party, which, in turn, injured plaintiffs. Plaintiffs' third-party reliance arguments are irrelevant.

4. Plaintiffs' Breach of Contract Claims Should Be Dismissed Because Plaintiffs Do Not Allege that eNom Breached Any Contracts.

Although Rule 8 does not require a plaintiff to plead specific facts relating to each element of a cause of action, "a complaint must still contain either direct or inferential allegations respecting all material elements of a cause of action." *Snow v. DirecTV, Inc.*, 450 F.3d 1314, 1320 (11th Cir. 2006). Here, plaintiffs' Amended Complaint includes no allegations that would permit them to recover on their breach of contract claim. Plaintiffs fail to identify any contract or contractual provision eNom allegedly breached or how plaintiffs were damaged as a result. Their breach of contract claim should therefore be dismissed.[3] *Davila v. Delta Airlines*,

[3] In support of their breach-of-contract claim, plaintiffs suggest for the first time that "RegisterFly.com, Inc. and/or e, Nom, .com [sic] were placing unauthorized charges upon their credit cards in breach of the contracts." Pl. Opp., 13. Plaintiffs' Amended Complaint ***does not*** allege that eNom made any charges to plaintiffs' credit cards. In fact, plaintiffs allege the opposite: that RegisterFly made all charges and that eNom had no records relating to plaintiffs' credit card charges. Am. Compl. ¶¶ 35-37, 44. To the extent plaintiffs are attempting to make new allegations against eNom, they may not do so in their brief. *See Harrell v. United States*, 13

Inc., 326 F.3d 1183, 1185 ("conclusory allegations, unwarranted factual deductions or legal conclusions masquerading as facts will not prevent dismissal").

Plaintiffs' third-party beneficiary claim should likewise be dismissed. As an initial matter, plaintiffs do not allege what contract with any other party eNom supposedly breached, what provision of that contract it breached, or how. Because plaintiffs have not provided fair notice of the grounds upon which they base their third-party beneficiary contract claim, the claim should be dismissed. *Conley v. Gibson,* 355 U.S. 41, 47 (1957) (Rule 8 requires "fair notice of what the plaintiff's claim is ***and the grounds*** upon which it rests.") (emphasis added). Further, plaintiffs allege no facts showing that they were the intended beneficiaries of the contracts between the defendants. Nothing in eNom's agreements shows that the contracts were intended to directly benefit plaintiffs, rather than eNom. *See* Kane Decl. ¶¶ 2, 5 & Exs. 1, 2 & 11. For this additional reason, even if eNom had breached a contract with a third party, plaintiffs would not be entitled to damages based on a breach of the contract. eNom Br., 24. The Court should therefore dismiss plaintiffs' third-party beneficiary claim for this reason as well.

III. Conclusion

eNom respectfully asks the Court to dismiss plaintiffs' claims against eNom with prejudice for failure to state a claim.

Respectfully submitted this 19th day of September, 2007,

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F.3d 232, 236 (7th Cir. 1993) ("a plaintiff cannot amend his complaint by a brief he files in the district court").

Certificate of Service

I certify that on September 19, 2007, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to the following:

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