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, INC'S BRIEF IN SUPPORT OF MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM

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I. Introduction

Plaintiffs have sued eNom for actions eNom did not take. Plaintiffs claim eNom is liable for antitrust violations for actions allegedly imposed on all domain name registrars by the federal Department of Commerce pursuant to recommendations from the Internet Corporation For Assigned Names And Numbers (ICANN). Plaintiffs also attempt to plead RICO and other statutory and common law claims against eNom for acts taken by RegisterFly. None of the claims against eNom has merit.

First, plaintiffs' antitrust allegations fail to state a claim because plaintiffs lack standing to bring the claims, plaintiffs fail to allege an antitrust violation, they identify no injury to competition, the challenged ICANN-imposed agreements are noncommercial restraints, and plaintiffs have not adequately pleaded a tying claim.

Second, the RICO claims against eNom should be dismissed because plaintiffs fail to plead an injury to their business or property.

Third, the misrepresentation claim should be dismissed because plaintiffs do not identify any false statement by eNom.

Fourth, plaintiffs' mail and wire fraud claims should be dismissed because there is no federal private right of action under those statutes and because plaintiffs' failure to identify any fraud by eNom is fatal to this claim as well.

Fifth, plaintiffs' suppression claim should be dismissed because plaintiffs can point to no fact that eNom failed to disclose. Nor do plaintiffs identify facts showing eNom had a duty to disclose any of the allegedly omitted facts, or that eNom had knowledge of those facts.

Sixth, plaintiffs' breach of contract and breach of third-party contract claims should be dismissed because plaintiffs do not identify any contract term that eNom breached. For these reasons, eNom asks the Court to dismiss the claims against eNom.

II. Statement of Facts

Pursuant to an agreement with the United States Department of Commerce, ICANN coordinates the Internet "Domain Name System" (DNS), the addressing system on which the

internet depends to deliver and retrieve data." Amended Complaint ¶ 14. To register a domain name, a registrant must go through an ICANN-accredited domain name registrar. *Id.* ¶ 20.

eNom is an ICANN-accredited Internet domain name registrar. Am. Compl. ¶ 13. RegisterFly was also an ICANN accredited registrar in 2005-2006 but it sometimes operated as a reseller of eNom's domain name services. *Id.* ¶ 23. To become a reseller of eNom's domain name services, RegisterFly entered into eNom's Reseller Agreement (the "eNom RSA"). Am. Compl. ¶ 112 (alleging that eNom entered into contracts with RegisterFly and ICANN); *see* Kane Decl. ¶ 2.[1] RegisterFly signed the eNom RSA on April 12, 2005, and assented to a "click-wrap"[2] revised version of the eNom RSA in 2006. *Id.* & Exs. 1 & 2 (2005 and 2006 eNom RSAs). Both versions of the RSA described the services eNom provided to RegisterFly,[3] specified that RegisterFly was responsible for providing customer service, billing and technical support to its customers, and classified RegisterFly as a non-agent independent contractor.[4] eNom had no control over RegisterFly's day-to-day operations. *Id.*, Ex. 1, § 13; Ex. 2, § 12(C).

RegisterFly had a standard contract that its customers entered into. Am. Compl. ¶ 109 (plaintiffs entered into contract with RegisterFly); *see* http://www.registerfly.com/info/terms.php (last checked August 23, 2007) Kane Decl. ¶ 3 & Ex. 4 (attaching agreement). That agreement set forth the terms and conditions Mr. Moore agreed to with RegisterFly. It stated that

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[1] To analyze the sufficiency of the Am. Complaint, the Court may consider the eNom RSA and other documents referred to in the Am. Complaint. *La Grasta v. First Union Sec., Inc.*, 358 F.3d 840, 845 (11th Cir. 2004).

[2] A "click-wrap" agreement is an online agreement that requires the user to assent to the agreement's terms by checking a box near an "I agree" statement. Services subject to such an agreement, such as eNom's, cannot be used absent assent. *See*, *e.g.*, *Feldman v. Google*, No. 06-2540, 2007 WL 966011, at *4 (E.D. Pa. March 27, 2007).

[3] The "Services" are defined in § 2(A) of each RSA. Kane Decl. ¶ 2 & Exs. 1 & 2.

[4] Section 13 of the 2005 eNom RSA and section 12(C) of the 2006 RSA, Kane Decl. ¶ 2 & Exs. 1 & 2, provide: "Independent Contractors. The parties to this RSA are independent contractors …. Nothing contained in this RSA shall be deemed or construed to create for any purpose an … agency relationship between the parties."

RegisterFly "may resell the services of other registrars or 3rd party providers" and that customers were "bound by their terms and conditions when this situation occurs." *Id.* (first unnumbered paragraph). When a user clicked his mouse on the term "registrars" in the agreement posted on the RegisterFly web site in 2005-2006, eNom's Registration Agreement ("eNom's Terms and Conditions") appeared on the user's computer. Kane Decl. ¶ 3 & Ex. 3; *see* http://www.enom.com/terms/agreement.asp (last checked August 23, 2007). By these statements and through the hyperlink in the RegisterFly Agreement, eNom's Terms and Conditions were incorporated in the RegisterFly Agreement. eNom's Terms and Conditions are therefore binding on plaintiffs. *See, e.g., DeJohn v. The .TV Corp. Intern.*, 245 F. Supp. 2d 913, 916-19 (N. D. Ill. 2003) (enforcing domain name registrar's agreement incorporated by reference in reseller's online agreement). Plaintiffs acknowledge and rely on their contractual relationship with eNom. Am. Compl. ¶ 109.

Plaintiff Moore registered 109 internet domain names with RegisterFly in 2005. *Id.* ¶ 33. When Mr. Moore registered his domain names, he did so with RegisterFly, not eNom. *See* Kane Decl. ¶ 4 & Ex. 6 (Jan. 18, 2006 email).[5] RegisterFly handled all customer service and billing issues for its customers, including Mr. Moore, and eNom provided "backend" services (i.e., DNS servers), which RegisterFly "used to facilitate the registration." *Id.* eNom had no access to any of RegisterFly's customer billing records. *Id.* The registrations were paid for by plaintiff Ronald Gentry, who did not register any domain names. Am. Compl. ¶ 35.

Plaintiffs claim that RegisterFly improperly charged Mr. Gentry's credit card between July 2005 and January 2006. *Id.* ¶ 36. Plaintiffs allege that Mr. Moore contacted RegisterFly to discuss those charges and eventually Mr. Gentry had his credit card company reverse the charges. *Id.* ¶¶ 36-39. As a result of this billing dispute, RegisterFly suspended Mr. Moore's account and demanded funds it claims he owed. *Id.* ¶¶ 40-41. Plaintiffs claim they paid the disputed amount to RegisterFly but that RegisterFly did not reactivate the account. *Id.* ¶ 42.

[5] Plaintiffs rely on the emails between Mr. Moore and defendants. Am. Compl. ¶¶ 43, 44, 49, 51, 52.

Because RegisterFly suspended Mr. Moore's account, he was unable to renew the domain names as they came due, causing them to expire. *Id.* ¶ 46. During their attempts to resolve their billing dispute with RegisterFly, Mr. Moore contacted eNom through emails and registered letters, asking for assistance. *Id.* ¶ 43. eNom responded to several emails from Mr. Moore, each time explaining that RegisterFly was the company with which he had registered domain names, that eNom had no access to RegisterFly's billing records, that eNom had no ability to resolve billing disputes between RegisterFly and its customers, and that if Mr. Moore felt RegisterFly was not acting appropriately, he should contact ICANN. *Id.*; *see* Kane Decl. ¶ 4 & Exs. 5-7.

After Mr. Moore's rights in the domain names expired, Mr. Moore contacted eNom to attempt to get the domain names back. Am. Compl. ¶ 47. eNom explained that eNom "did not receive [a] renewal command [from RegisterFly] and [eNom was] not paid for the renewal of the domains." *Id.* ¶ 49. Because there was a 72-day redemption period to renew the registrations and because the domain names were registered through eNom's backend services, eNom advised Mr. Moore that, if he paid a renewal fee, eNom had "the authority to allow you to renew [the] domains directly through [eNom] if [he was] unable to facilitate the renewal through RegisterFly." *Id.* ¶¶ 47, 49. Rather than renew his domain names, Mr. Moore filed this action.

III. Argument

A. The Standard of Review After *Bell Atlantic Corp. v. Twombly*

The Eleventh Circuit has historically taken a literal approach to the statement in *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957), that a district may grant a Rule 12(b)(6) motion *only* where it is established that the plaintiff "'can prove no set of facts in support of his claim which would entitle him to relief.'" *E.g.*, *Day v. Taylor*, 400 F.3d 1272, 1275 (11th Cir. 2005). The Supreme Court recently disavowed that approach in *Bell Atlantic Co. v. Twombly*, 127 S. Ct. 1955 (2007). The Court held "*Conley*'s 'no set of facts' language has been questioned, criticized, and explained away long enough," and that "this famous observation has earned its retirement." *Bell Atl.*, 127 S. Ct. at 1969. "[F]actual allegations must be enough to raise a right to relief above the

speculative level" that existed under the *Conley* standard. *Id.* at 1965.[6] To survive a motion to dismiss, a complaint must contain "enough facts to state a claim of relief that is ***plausible*** on its face." *Bell Atl.*, 127 S. Ct. at 1974 (emphasis added). "[S]omething beyond the mere possibility" of a claim "must be alleged, lest a plaintiff with a 'largely groundless claim' be allowed to 'take up the time of a number of other people, with the right to do so representing an *in terrorem* increment of the settlement value." *Id.* at 1966 (citations omitted).

The Court should construe the Amended Complaint in the light most favorable to plaintiffs and accept the factual allegations, *Day*, 400 F.3d at 1275, but the Court "need only accept 'well-pleaded facts' and 'reasonable inferences drawn from those facts.'" *Gonzalez v. Reno*, 325 F.3d 1228, 1235 (11th Cir. 2003) (citations omitted). "[C]onclusory allegations, unwarranted factual deductions or legal conclusions masquerading as facts will not prevent dismissal." *Davila v. Delta Air Lines, Inc.*, 326 F.3d 1183, 1185 (11th Cir. 2003). *See also Bell Atl.*, 127 S. Ct. at 1964-65 ("a plaintiff's obligation to provide the 'grounds' for his 'entitlement to relief' requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do") (citation omitted); *Marsh v. Butler County, Ala.*, 268 F.3d 1014, 1036 n.16 (11th Cir. 2001) ("court need not 'swallow plaintiff's invective hook, line and sinker; bald assertions, unsupportable conclusions, periphrastic circumlocutions, and the like need not be credited.'") (citation omitted).

To the extent that the Amended Complaint's allegations conflict with documents central to or referenced in the complaint, the documents control. *See Nishimatsu Constr. Co., Ltd. v. Houston Nat'l Bank*, 515 F.2d 1200, 1206-07 (5th Cir. 1975). A review of the Amended Complaint's allegations and the documents upon which plaintiffs rely in this case shows that plaintiffs have not "nudged their claims across the line from the conceivable to plausible, [and] their complaint must be dismissed." *Bell Atl.*, 127 S. Ct. at 1974.

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[6] Plausibility is acutely important in antitrust cases (such as *Bell Atl.*) because of the "potentially enormous expense of discovery" in such cases. *Bell Atl.*, 127 S. Ct. at 1967. "[A]a district court must retain the power to insist upon some specificity in pleading ...." *Id.* (citation omitted).

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

1. Plaintiffs' Antitrust Claims Should Be Dismissed.

a. Plaintiffs Lack Standing to Bring their Antitrust Claims.

Private antitrust suits may be brought only by persons injured "by reason of anything forbidden in the antitrust laws." 15 U.S.C. § 15(a). As a result, plaintiffs must allege facts sufficient to show "antitrust standing." *Assoc. Gen. Contractors of Cal., Inc. v. Cal. State Council of Carpenters*, 459 U.S. 519, 535 n.31 (1983) ("[T]he focus of the doctrine of 'antitrust standing' is somewhat different from that of standing as a constitutional doctrine…. [T]he court must make a further determination whether the plaintiff is a proper party to bring a private antitrust action. "); *Todorov v. HCA Healthcare Auth.*, 921 F.2d 1438, 1448 (11th Cir. 1991) ("Antitrust standing is best understood in a general sense as a search for the proper plaintiff to enforce the antitrust laws.").

Private plaintiffs must plead and prove two elements to establish antitrust standing: "First, a court should determine whether the plaintiff suffered 'antitrust injury;' second, the court should determine whether the plaintiff is an efficient enforcer of the antitrust laws, which requires some analysis of the directness or remoteness of the plaintiff's injury." *Id.* Of course, an antitrust plaintiff must also satisfy "the general standing requirements that apply to all plaintiffs in federal court," *Gulf States Reorganization v. Nucor Corp.*, 466 F.3d 961, 966 (11th Cir. 2006), and demonstrate traditional causation. *Todorov*, 921 F.2d at 1459. A plaintiff's standing — antitrust and constitutional — is determined as a matter of law. *JES Properties, Inc. v. USA Equestrian, Inc.*, 458 F.3d 1224, 1228 (11th Cir. 2006).

Plaintiffs' theory of injury (based on eNom's agreements with ICANN) is that the Uniform Dispute Resolution Policy and Domain Transfer Agreement have limited non-price competition among domain name registrars and preserved ICANN's alleged monopoly power over the Legacy A root server, and that these restraints have caused prices of domain name registration to rise (presumably, though not explicitly, to supracompetitive levels). Yet plaintiffs nowhere allege that ***they*** have attempted to enter either the market for domain name registrars or

the market for root servers. As a result, plaintiffs are not the most efficient enforcers of the antitrust laws based on this theory.[7]

The indirectness of plaintiffs' injury, the remoteness of the harm, the speculative nature of the injury, the potential for double recovery, and the existence of more direct victims of the alleged violation all weigh against a finding that plaintiffs would be efficient enforcers of the antitrust laws. *Assoc. Gen. Contractors*, 459 U.S. at 536–45; *Todorov*, 921 F.2d at 1451. There are several necessary links in the chain of causation from ICANN's alleged control of the Legacy A root server or its incorporation of dispute resolution rules into its agreements with registrars to the supracompetitive prices plaintiffs imply they have paid for domain names. The Amended Complaint omits several of those links, making the supposed connection between the alleged violation and injury speculative at best. "If what makes causation doubtful is the number or improbability of steps in the chain from alleged violation to injury, then dismissal for remoteness is in order." II PHILLIP A. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW ¶ 339b, at 326 (2d ed. 2000) ("AREEDA & HOVENKAMP"). In the wake of *Bell Atl.*, the implausibility of the causal link between injury (increased price) and the antitrust violation plaintiffs have alleged (exclusion of alternate roots and registrars) weighs heavily in favor of dismissal.

Moreover, plaintiffs' theory invites double recovery by plaintiffs, by excluded registrars, or would-be competitors in the root server "market." Under plaintiffs' theory, every registrar and registrant could sue for the same harm: registrars' and root server operators' exclusion from competition. Antitrust standing guards against exactly this type of "radiating injury":

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[7] For the reasons described in part III.B.1.c. (pages 9-10) below, plaintiffs also do not sufficiently allege injury to competition, the first element of standing analysis. Antitrust injury is "injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful." *Brunswick Corp. v. Pueblo Bowl-o-Mat, Inc.*, 429 U.S. 477, 489 (1977). To demonstrate this element of standing, private plaintiffs "must plead and prove that the injury they have suffered derives from some anticompetitive conduct and is the type the antitrust laws were intended to prevent." *Todorov*, 921 F.2d at 1450. The Eleventh Circuit has warned, however, that courts should not dismiss on the grounds of standing when they mean that there has been no antitrust violation. *Levine v. Central Fla. Med. Affiliates, Inc.*, 72 F.3d 1538, 1545 (11th Cir. 1996). eNom therefore addresses plaintiffs' failure to plead antitrust injury below rather than in this section.

> [S]uch radiating injuries through the economy are far beyond the ability or willingness of antitrust courts to trace and measure. Accordingly, courts wisely insist not only that the plaintiffs' injury be caused by the antitrust violation, but that there be a suitable degree of proximity between cause and injury.

II AREEDA & HOVENKAMP ¶ 339a, at 326. Prevention of double recovery under such circumstances would require an enormously complex apportionment of damages. Prudential standing is lacking when there is "the risk of duplicative recoveries on the one hand, or the danger of complex apportionment damages on the other." *Assoc. Gen. Contractors*, 459 U.S. at 543-44.

These deficiencies demonstrate that there are plaintiffs better situated to challenge the antitrust violations, if any, that plaintiffs allege. Potential entrants into the market for alternate root servers (if any) and registrars seeking to operate without the Uniform Dispute Resolution Policy and Domain Transfer Agreement (if any) are the most efficient plaintiffs to challenge those alleged restraints. Those potential plaintiffs are "an identifiable class of persons whose self-interest would normally motivate them to vindicate the public interest in antitrust enforcement …." *Id.* at 542.

Stated another way, plaintiffs lack prudential antitrust standing because they are not "within that sector of the economy endangered by a breakdown of competitive conditions in a particular industry [nor are they] the target against which anticompetitive activity is directed." *Florida Seed Co. v. Monsanto Co.*, 105 F.3d 1372, 1374 (11th Cir. 1997) (quotation omitted) (affirming dismissal for lack of antitrust standing). The breakdown about which plaintiffs complain is within the alleged competition for alternate roots and dispute resolution mechanisms for registrars. The targets of those activities are the hypothetically excluded providers of alternate roots and registrars who supposedly do not wish to abide by the Uniform Dispute Resolution Policy and the Domain Transfer Agreement. Yet plaintiffs nowhere allege that ***they*** are such providers or registrars, that ***they*** were the target of such exclusion, or that ***they*** were customers within such markets. As a result, plaintiffs not only lack prudential standing, they do not have constitutional standing to attack such exclusion. *Gas Utils. Co. of Ala., Inc. v. Southern Natural Gas Co.*, 996 F.2d 282, 283 (11th Cir. 1993) (*per curiam*) ("The law clearly requires a

showing of a intention and preparedness to enter the business to give a plaintiff a cause of action for being foreclosed from the market.").

b. Plaintiffs Have Not Alleged a Violation of the Antitrust Laws.

There are three elements to a Sherman Act, Section 1 claim: (1) a contract, combination or conspiracy, (2) that unreasonably restrains trade, and (3) impacts interstate commerce. *E.g., Retina Assocs. v. Southern Baptist Hosp.*, 105 F.3d 1376, 1380 (11th Cir. 1997). While an alleged restraint of trade may either be "*per se*" unreasonable or unreasonable under the "rule of reason," *FTC v. Indiana Fed'n of Dentists*, 476 U.S. 447, 457-58 (1986), the merits of plaintiffs' Complaint are properly analyzed under the rule of reason. *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 127 S. Ct. 2705, 2712-13 (2007) (stating that rule of reason is the standard for analyzing claims under § 1; *per se* treatment is the exception).

Recovery under the rule of reason requires proof of "(1) an anticompetitive effect of the defendant's conduct on the relevant market, and (2) that the conduct has no procompetitive benefit or justification." *Levine v. Central Fla. Med. Affiliates, Inc.*, 72 F.3d 1538, 1551 (11th Cir. 1996). Because plaintiffs' theory does not allege an actual or potential violation of the antitrust laws, there can be no anticompetitive effect and they have not stated a claim for relief under the Sherman Act. *E.g., Spanish Broadcasting Sys. of Fla., Inc. v. Clear Channel Commc'ns*, 376 F.3d 1065, 1072-74 (11th Cir. 2004) (affirming dismissal of antitrust claim where plaintiff failed to allege an injury to competition); *Nat'l Indep. Theatre Exhibitors, Inc. v. Buena Vista Distrib. Co.*, 748 F.2d 602, 607 (11th Cir. 1984) (stating that a violation of the antitrust laws is a prerequisite to a private antitrust action).

c. That a Single Entity Controls the Legacy A Root Server Does Not Demonstrate Injury to Competition.

The mere fact that VeriSign controls the Legacy A root server[8] is not an injury to competition because there can only be one supplier of this service if the Internet is to function

[8] Although plaintiffs allege that ICANN controls entry onto the Legacy A root server, Am. Compl. ¶ 19, that server is actually controlled by VeriSign pursuant to a contract between that company and the Department of Commerce. *See* ICANN's Motion to Dismiss, 2-3.

properly. Plaintiffs admit that the Domain Name System, which ICANN coordinates pursuant to its contract with the Department of Commerce, depends upon the Legacy A root server. Am. Compl. ¶ 16. ICANN's coordination of the DNS is critical to the operation of the Internet:

> [W]hile one goal of the privatization process was to create a competitive market in registration services, competing registrars (and registrants) must be able to determine whether a particular domain name has already been registered, which necessarily requires coordination. Accordingly, in order to obtain authorization to compete, every registrar … must enter into a contractual relationship with ICANN governed by a uniform Registrar Accreditation Agreement ("ICANN Agreement" or "RAA"). The ICANN Agreement resulted from extensive public comment and was approved by the Department of Commerce and NSI as part of a package of agreements.

Register.com v. Verio, Inc., 356 F.3d 393, 416 (2d Cir. 2004) (footnote and citation omitted). Competition at the level of root servers would undermine the "universal resolvability" of Internet communication that is the primary goal of the DNS. "Management of Internet Names and Addresses," 63 FED. REG. 31741, 31744 (1998) ("White Paper") ("In the absence of an authoritative root system, the potential for name collisions among competing sources for the same domain name could undermine the smooth functioning and stability of the Internet.").

Where there can only be one supplier of a service, it is a "matter of indifference" to the antitrust laws who holds that lawful monopoly. *Brunswick Corp. v. Riegel Textile Corp.*, 752 F.2d 261, 266-67 (7th Cir. 1984) (Posner, J.); *see also Columbia River People's Util. Dist. v. Portland Gen. Elec. Co.*, 217 F.3d 1187, 1190 (9th Cir. 2000); *Fischer v. NWA, Inc.*, 883 F.2d 594, 600 (8th Cir. 1989). Thus, in *Coalition for ICANN Transparency, Inc. v. Verisign, Inc.*, 464 F. Supp. 2d 948 (N.D. Cal. 2006) ("*CFIT*"), the court dismissed an antitrust challenge to ICANN's grant of exclusive control over the .com and .net registries to VeriSign where plaintiff did not (and could not) dispute that "there can only be one registry operator at a time." 464 F. Supp. 2d at 961.[9] The court held "[m]ere extension of VeriSign's lawful appointment as the sole

[9] The court reached this holding in its antitrust injury discussion, but in light of the *Levine* court's direction not to confuse standing with the merits, this holding is most applicable here.

registry operator does not constitute an antitrust violation." *Id.* Because registries are downstream from the Legacy A root server, the result here cannot be different.

d. The Challenged Dispute Resolution and Transfer Agreements Are Noncommercial Restraints.

ICANN's Uniform Dispute Resolution Policy and its Domain Transfer Agreement are not the type of restraints the antitrust laws were designed to prevent. The Sherman Act precludes only commercial restraints; it does not reach noncommercial restraints. *See, e.g., Apex Hosiery Co. v. Leader*, 310 U.S. 469, 495 (1940) (holding that Sherman Act requires "some form of restraint upon commercial competition in the marketing of goods and services"); *Nat'l Hockey League Players Ass'n v. Plymouth Whalers*, 419 F.3d 462, 473-74 (6th Cir. 2005) (holding that diminished athletic quality is not an economic injury under Sherman Act).

In terms of ***commercial*** competition, ICANN's procedural rules governing disputed domain names are no different from a uniform set of rules applicable to competing sports teams. Courts have routinely held that rules governing athletic competition are not subject to the antitrust laws because they are not commercial restraints. *See NCAA v. Bd. of Regents*, 468 U.S. 85, 101 (1984) (noting that rules regulating size of field, number of players on team and physical violence are outside of antitrust laws); *see also Smith v. NCAA*, 139 F.3d 180, 185 (3d Cir. 1998) (holding that Sherman Act did not apply to NCAA's eligibility rules, which are "not related to commercial or business activities"), *vacated on other grounds*, 525 U.S. 459, 470 (1999); *Pocono Invitational Sport Camp, Inc v. NCAA*, 317 F. Supp. 2d 569, 584 (E.D. Pa. 2004) (same). Just as college football players are circumscribed by a uniform set of rules governing not only competition on the field (e.g., field size and number of players) but also off the field (e.g., eligibility requirements), so too are registrars and registrants required to abide by certain rules for dispute resolution. By plaintiffs' own admission, the agreements attacked here are non-price, vertical restraints that ICANN imposes as a condition of competing within this arena; functionally, they are no different from similar restraints imposed by the NCAA upon its member schools and athletes as a condition of competing in college athletics.

At worst, these agreements are nothing more than competition-neutral standard setting. Courts have routinely held that even agreements between competitors to set industry standards can have procompetitive benefits that outweigh their anticompetitive effects. *E.g.*, *California Dental Ass'n v. FTC*, 526 U.S. 756, 779-81 (1999) (holding that rule of reason should apply to dental association restriction on advertising by dentists); *Thompson v. Metropolitan Multi-List, Inc.*, 934 F. 2d 1566, 1579-80 (11th Cir. 1991) (acknowledging procompetitive benefits of multiple listing service); *see also Foundation for Interior Design Educ. Research v. Savannah College of Art & Design*, 244 F.3d 521, 530 (6th Cir. 2001) ("Accreditation serves an important public purpose and can enhance competition."). At the very least, the rule of reason analysis applies to ICANN's rules and plaintiffs have made no effort either to allege that the agreements have an actual detrimental effect on competition or to define the market for registrars wishing to compete without such agreements, as is required under the rule of reason analysis. *See Levine*, 72 F.3d at 1551 (stating that proof of anticompetitive effects requires either a showing of actual detrimental effects on competition or definition of the relevant market and the defendant's power in that market); *CFIT*, 464 F. Supp. 2d at 959 (granting motion to dismiss, in part, for failure to allege relevant market for registration of expiring domain names); *Smith v. Network Solutions, Inc.*, 135 F. Supp. 2d 1159, 1169-70 (N.D. Ala. 2001) (granting summary judgment on same).

e. Plaintiffs Cannot Show Unlawful Tying.

Plaintiffs' claim that eNom has tied its registration services to unwanted administrative services, *see* Am. Compl. ¶¶ 96–99, suffers several deficiencies. The Eleventh Circuit requires proof of at least four elements to establish a *per se* tying violation:

> (1) that there are two separate products, a "tying" product and a "tied" product; (2) that those products are in fact "tied" together — that is, the buyer was forced to buy the tied product to get the tying product; (3) that the seller possesses sufficient economic power in the tying product market to coerce buyer acceptance of the tied product; and (4) involvement of a "not insubstantial" amount of interstate commerce in the market of the tied product.

Technical Resource Servs. v. Dornier Med., 134 F.3d 1458, 1464 (11th Cir. 1998).[10] If a plaintiff fails to establish these *per se* elements, it must make a showing of actual adverse effects on competition. *Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2, 29, 31 (1984); *Amey, Inc. v. Gulf Abstract & Title, Inc.*, 758 F.2d 1486, 1503 (11th Cir. 1985).

Plaintiffs' primary failure is their failure to allege that eNom has sufficient economic power in the market for domain name registration to coerce registrants to buy extra administrative services. Plaintiffs have nowhere alleged that eNom has such power over domain name registration that it can force people to buy services they do not want or could obtain elsewhere on different terms. Such an allegation of market power is "the essential characteristic of an invalid tying arrangement." *Illinois Tool Works v. Independent Ink*, 547 U.S. 28, 34-35 (2006) (quoting *Jefferson Parish*, 466 U.S. at 12). Plaintiffs' failure to allege this market power is fatal to this claim. *See Technical Resource Servs*, 134 F.3d at 1466 (upholding entry of judgment against tying claim where plaintiff failed to prove economic power in tying market).

Nor do plaintiffs allege that there are two separate product markets, for registration services and administrative services. The test is not functional (i.e., could these two services be performed separately) but instead is based on actual market demand and whether the products are "distinguishable in the eyes of buyers." *Jefferson Parish*, 466 U.S. at 19-21. Consumer demand must make it efficient for a firm to provide the products separately. *Eastman Kodak Co. v. Image Tech. Servs., Inc.*, 504 U.S. 451, 462 (1992). Thus, in *Amey*, the court held that mortgage services and attorney fees associated with those services were not separate products. 758 F.2d at 1503. Plaintiffs make no allegation that registrars could unbundle those services, or that any registrant would want such inefficient unbundling.

Finally, plaintiffs do not allege any actual adverse effect on competition as a result of this alleged tie-in, except in the most conclusory way. *See* Am. Compl. ¶ 99. As the Supreme Court

[10] While the Eleventh Circuit recognizes a fifth element to a *per se* tying claim — proof of the defendant's economic interest in the tied product — *see Thompson*, 934 F.2d at 1574, this element is irrelevant to the present motion.

recently held, "a plaintiff's obligation to provide the grounds of his entitlement to relief requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Bell Atl.*, 127 S. Ct. at 1964-65. Plaintiffs have not suggested any plausible mechanism by which eNom's alleged tie-in will foreclose competition among registries and the Legacy A root server (over which eNom has no control), or among registrars (who are free to unbundle their registration and administrative services). eNom should not be forced to endure the expense of antitrust litigation based on such an implausible theory.

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

a. Plaintiffs' Substantive RICO Claim Should Be Dismissed.

The four primary elements of a RICO claim are "(1) conduct (2) of an enterprise (3) through a pattern (4) of racketeering activity." *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 496 (1985) (footnote omitted). Congress defined "racketeering activity" to mean the violation of any of the criminal statutes listed in § 1961(1). Section 1961, in turn, requires a RICO plaintiff to establish that a defendant could be convicted for violating any of its predicate statutes. *See Republic of Panama v. BCCI Holdings*, 119 F.3d 935, 948 (11th Cir. 1997) (citation omitted). "[T]o survive a motion to dismiss, a plaintiff must allege facts sufficient to support each of the statutory elements for at least two of the pleaded predicate acts." *Id.* at 949.

Plaintiffs rely on their claim that eNom committed mail and wire fraud to support their RICO claim. Am. Compl. ¶¶ 76-83. To establish a violation of these statutes, plaintiffs must prove: (1) defendants knowingly devised or participated in a scheme to defraud plaintiffs, (2) they did so willingly with intent to defraud, and (3) they used the U.S. mails or interstate wires to execute the scheme. *See Langford v. Rite Aid of Ala., Inc.*, 231 F.3d 1308, 1312 (11th Cir. 2000).

To have standing to pursue a RICO claim, a plaintiff must have been "injured in his business or property by reason of a [RICO] violation …." *Sedima*, 473 U.S. at 495. This requires showing an actual, out-of-pocket financial loss. *Commercial Union Assurance Co. v.*

Milken, 17 F.3d 608, 612-13 (2d Cir. 1994); *Ingles v. Lake Co. Fla.*, No. 504CV465OC10GRJ, 2005 WL 3448026, at *6 n.32 (M.D. Fla. Dec. 15, 2005) ("showing of 'injury' requires proof of concrete financial loss, and not mere 'injury to a valuable intangible property interest.") (citation omitted). Injuries that are speculative or unprovable in nature or amount are not recoverable; recovery must wait until the nature and extent of damages becomes definite. *Cruden v. Bank of N.Y.*, 957 F.2d 961, 977 (2d Cir. 1992). Plaintiffs allege only that, by "Defendants' overt acts of mail and wire fraud … Defendants have obtained money and property belonging to the Plaintiffs." Am. Compl. ¶ 83. To this vague claim, plaintiffs add only that, as a result of defendants' conduct, Internet users were not directed to Mr. Moore's websites. *Id.* ¶ 50. Plaintiffs do not allege that eNom received any money from them or that either Mr. Moore or Mr. Gentry, who only allowed his card to be used, lost money as a result of allegedly lost Internet visitors.

Moreover, because plaintiffs caused Mr. Moore's domain rights to lapse by refusing to pay to renew them and because eNom offered to renew and register the expired domain names (Am. Compl. ¶¶ 47, 49; Kane Decl. ¶ 4 & Exs. 8-10) but plaintiffs did not accept that offer, any injury plaintiffs could have sustained is self-inflicted and cannot form the basis for a RICO claim. *See Bhd. of Locomotive Eng'rs and Trainmen v. Surface Tranp. Bd.*, 457 F.3d 24, 27-30 (D.C. Cir. 2006) (union that waived right to bargain regarding transfer of tracks from one entity to another had no standing to challenge under which of two statutory bases the transfer fell; the waiver caused the union to have no right to bargain regardless of which statutory section applied); *Nova Health Sys. v. Gandy*, 416 F.3d 1149, 1156 n.8 (10th Cir. 2005) ("standing may be denied because the injury seems solely—or almost solely—attributable to the plaintiff") (interior quotes and citation omitted); *Pevsner v. Eastern Air Lines, Inc*., 493 F.2d 916, 918 (5th Cir. 1974) (*per curiam*) (plaintiff lacked standing where "injury" was "self-inflicted").

Under the doctrine of avoidable consequences, no damages are permitted for any harm that "could have been avoided by the use of reasonable effort or expenditure after commission of the tort." RESTATEMENT (SECOND) OF TORTS § 918 (1979). This doctrine has been applied in

RICO cases to bar relief where, after the commission of the alleged predicate acts, the plaintiff elects not to take action that would prevent an injury. *See Oak Beverages, Inc. v. Tomra of Mass., LLC*, 96 F. Supp. 2d 336, 344-46 (S.D. N.Y. 2000) (dismissing plaintiff's RICO claim and holding that, where a plaintiff learns he has been subject to racketeering activity "and elects not to take action to prevent [injury from] that activity, the plaintiff's inaction, rather than the illegal conduct, is the cause of its injury and the plaintiff lacks standing to bring a RICO claim."); *Waste Conversion, Inc. v, Rollins Envtl. Servs. NJ, Inc.*, CIV. A. No. 88-7792, 1989 WL 79768, at *8 (E.D. Pa. July 7, 1989) (granting defendants summary judgment on RICO claim, citing RESTATEMENT (SECOND) OF TORTS § 918). Because any injury Mr. Moore may have suffered was speculative, avoidable, and self-inflicted, and because Mr. Gentry has alleged no injury at all, plaintiffs' RICO claim should be dismissed with prejudice.

Further, RICO claims predicated on mail and wire fraud must comply with Rule 9(b). *Brooks*, 116 F.3d at 1380-81. To satisfy Rule 9(b), RICO complaints must allege: (1) the precise misrepresentations made; (2) the time and place of and person responsible for the statement; (3) the content and manner in which the statements misled the plaintiff; and (4) what the defendants gained by the alleged fraud. *Id.* A RICO action should be dismissed if the conduct of multiple defendants is lumped together with no differentiation as to which defendant made which statement and performed which act. *Ambrosia Coal & Constr. Co. v. Morales*, 482 F.3d 1309, 1317 (11th Cir. 2007) (citation omitted).

Plaintiffs' Amended Complaint fails to satisfy the requirements of Rule 9(b) because it fails to state the time, place, or contents of eNom's purported false statements. "[S]trict application" of Rule 9(b)'s particularity requirement is important because "the mere invocation of the statute has such an *in terrorem* effect that it would be unconscionable to allow it to linger in a suit and generate suspicion and unfavorable opinion of the putative defendant unless there is some [articulated] factual basis which, if true, would warrant recovery under the statute." *Estate of Scott v. Scott*, 907 F. Supp. 1495, 1498 (M.D. Ala. 1995) (brackets by court) (citation omitted).

b. Plaintiffs' RICO Conspiracy Claim Should Be Dismissed.

Plaintiffs also allege a RICO claim for conspiracy to violate the substantive RICO provisions. Am. Compl. ¶¶ 87-89 (citing 18 U.S.C. § 1962(d)). RICO's Section 1962(d) conspiracy provision requires "a showing of the existence of a conspiracy, and the commission of an overt act in furtherance of the conspiracy that causes injury to the plaintiff." *Beck v. Prupis*, 162 F.3d 1090, 1098 (11th Cir. 1998), *aff'd*, 529 U.S. 494 (2000). Section 1962(d) is derivative of a substantive RICO violation, i.e., a violation of Section 1962(a), (b), or (c); there can be no conspiracy claim absent a valid RICO claim upon which the conspiracy is based. *Id.*, 529 U.S. at 505. Because there was no substantive RICO violation, plaintiffs' RICO conspiracy claim should be dismissed as well. *Id.*

Even if plaintiffs were able to state a plausible RICO claim, the conspiracy claim would still have to be dismissed for failure to plead the conspiracy with sufficient particularity. Fed. R. Civ. P. 9(b) is "particularly relevant when liability is premised on Section 1962(d) (conspiracy) because the link between a 1962(d) defendant and the acts of racketeering is of necessity more tenuous than the link between the racketeering activity and the primary violator." *Farlow v. Peat Marwick Mitchell & Co.*, 666 F. Supp. 1500, 1510 (W.D. Okla. 1987), *aff'd*, 956 F.2d 982, 990 (10th Cir. 1992), *abrogated on other grounds, Central Bank of Denver v. First Interstate Bank of Denver*, 511 U.S. 164, 191 (1994). To state a "conspiracy claim under 1962(d), plaintiffs must plead with particularity [both] an agreement to a pattern of racketeering activity, and an agreement to the statutorily proscribed conduct." *Brooks v. Bank of Boulder*, 891 F. Supp. 1469, 1479 (D. Colo. 1995). "[A] conspiracy claim must fail where plaintiffs fail to allege any agreement or concerted action." *Id.* (citing *Langley v. Adams County*, 987 F.2d 1473, 1482 (10th Cir. 1993)). "Mere association with conspirators, even with knowledge of their involvement in a crime, is insufficient to prove participation in a conspiracy." *Id.* at 1479. Thus, to state a claim under Section 1962(d), plaintiffs "must allege ***facts to support an agreement*** to violate a substantive provision of the RICO statute." *Aeropower LTD v. Matherly*, No. 1:03-cv-889-WKW, 2007 WL 163082, at *10 (M.D. Ala. Jan. 18, 2007) (emphasis added) (citation omitted).

Plaintiffs here allege no facts supporting an agreement to violate RICO. Instead, they merely allege: "Each of the Defendants agreed to participate, directly or indirectly, in the conduct of the affairs of the 'ICANN Enterprise' through a pattern of racketeering activity comprised of numerous acts of mail fraud and wire fraud and each Defendant so participated in violation of 18 U.S.C. 1962(c)." Am. Compl. ¶ 89. In *Aeropower*, the court held that this type of "conclusory allegation that the defendants conspired with each other is insufficient to survive a motion to dismiss as [plaintiffs] alleged no facts to show or to create a reasonable inference that the defendants made an agreement." 2007 WL 163082, at *10 (citation omitted). Plaintiffs' RICO conspiracy claim is similarly conclusory and should be dismissed.

3. Plaintiffs' Misrepresentation Claim Should Be Dismissed.

Plaintiffs claim that eNom made misrepresentations of material fact. Am. Compl. ¶¶ 61-68. Plaintiffs attribute four statements to all defendants: (1) "by registering Internet names and paying a certain sum … Plaintiffs would receive certain rights, titles, licenses or interest in these Internet names;" (2) "the rights, titles or interest in these Internet names could be renewed by paying a certain sum;" (3) "the rights, titles or interest in these Internet names could not be transferred;" and (4) "after [plaintiffs] had acquired the rights, titles or interest in these Internet names that [defendants] would abide by ICANN's rules, regulations, policies and procedures." Am. Compl. ¶¶ 54, 62. To prove this claim, also known as "legal fraud," *see* Ala. Code § 6-5-01, a plaintiff must prove: (a) defendant made a misrepresentation; (b) that concerned a material existing fact; (c) plaintiff relied on the misrepresentation; and (d) the reliance was detrimental to the plaintiff. *See Jewell v. Seaboard Indus., Inc.*, 667 So.2d 653, 657 (Ala. 1995). Plaintiffs fail to specify what false statements eNom, specifically, made to either of them, and the documents referred to in the Complaint, as well as the Complaint's other allegations, show that none of the purported statements attributed to all defendants is false.

a. Plaintiffs Complaint Fails to Identify any False Statements.

The Complaint and the documents it relies on show that the four statements attributed to all defendants are true. A domain name registrant receives certain rights ***during the registration***

period. *See* http://www.icann.org/faq/#registerdomain (last checked July 20, 2007) [11] (once parties register a domain name, "it will be associated with the computer on the Internet [they] designate ***during the period the registration is in effect***") (emphasis added). Plaintiffs concede that Mr. Moore was able to register 109 domain names with RegisterFly. Am. Compl. ¶¶ 33-34, 43. Plaintiffs' allegation that eNom represented that the registration rights would last forever, even if plaintiffs refused to pay the required costs to renew those rights, is implausible.

It is also true that "the rights, titles or interest in these Internet names could be renewed by paying a certain sum." Am. Compl. ¶ 62. But the right to renew does not guarantee renewal will occur. Plaintiffs admit they got into a dispute with RegisterFly over credit card charges, which caused RegisterFly to suspend Mr. Moore's account (which also suspended his ability to renew domain names). *Id.* ¶¶ 40-42. Even after Mr. Moore's domain name rights expired, he could have renewed them during a 72-day grace period. *Id.* ¶¶ 47, 49. eNom repeatedly told Mr. Moore that he could renew the domain names through eNom, albeit at an additional charge, if he were unable to do so with RegisterFly. *See id.* & Kane Decl. ¶ 4 & Exs. 8-10 (emails explaining renewal and redemption process). Plaintiffs' allegation that Mr. Moore was "prohibited from renewing [his] domain names," Am. Compl. ¶ 48, is refuted by the other allegations in the Amended Complaint and by the documents cited in those allegations. The Court, therefore, need not accept the allegation as true. *Nishimatsu*, 515 F.2d at 1206-07.

Plaintiffs' allegation that defendants represented to them that the "the rights, titles or interest in these Internet names could not be transferred" is refuted by Mr. Moore's contract with RegisterFly. *See* Kane Decl. ¶ 3 & Ex. 4. The agreement provides that, where there has been a credit card chargeback, RegisterFly may transfer domain names to itself and may refuse to transfer the names to another registrar:

> In the event of a charge back by a credit card company … in connection with the payments of the registration fee for your domain name registration, ***you agree and***

[11] Given that plaintiffs cite alleged representations of ICANN policy, Am. Compl. ¶ 62, the Court may take judicial notice of the actual ICANN policy. *Bell Atl.*, 127 S. Ct. at 1973 n.13; *La Grasta at* 845; Fed. R. Evid. 201(b).

> ***acknowledge that the domain name registration shall be transferred to Registerfly.com*** as the paying entity for that registration to the registry. We will reinstate your domain name registration solely at our discretion, and subject to our receipt of the initial registration or renewal fee and our then-current reinstatement fee, currently set at $250 USD …. Your request to transfer to another registrar may be denied in situations described in the Dispute Policy, including, but not limited to …. default in the payment of any fees.

Id. ¶¶ 3, 5 (emphasis added). Mr. Moore's agreement shows that not only was the alleged representation never made, but that the opposite statement was made by RegisterFly.

Finally, plaintiffs fail to identify the specific ICANN rule, regulation, policy, or procedure that eNom violated. *Cf.* Am. Compl. ¶ 62. To the contrary, plaintiffs concede that ICANN reviewed the situation and found no violation. *Id.* ¶ 44 ("Based on the information you have provided, it does not appear that there has been any violation of ICANN policy that would qualify as a violation of the registrar contract with ICANN.").

Listing a defendant's statements, then calling them "fraudulent misstatements" with no factual explanation of how or why they are false is nothing more than "a legal conclusion[] masquerading as facts [and] will not prevent dismissal." *Davila*, 326 F.3d at 1185. "There is no magic in the use of the word 'fraudulently' unless the averments show a set of facts or consequences which constitute fraud under Alabama law." *Crommelin v. Capitol Broad. Co.*, 195 So. 2d 524, 526 (Ala. 1967). Plaintiffs allege no facts showing that any statement attributed to eNom was false. Their fraud claims should therefore be dismissed.

b. Plaintiffs' Fraud Claim Fails to Satisfy Rule 9(b).

Fraud claims under Alabama law are subject to the particularity requirements of Rule 9(b). *See, e.g.*, *Miller v. Mobile County Bd. Health*, 409 So. 2d 420, 422 (Ala. 1981) (applying state rule 9(b)). To satisfy Rule 9(b), "Plaintiffs must allege (1) the precise statements, documents, or misrepresentations made; (2) the time, place, and person responsible for the statement; (3) the content and manner in which these statements misled the Plaintiffs; and (4) what the defendants gained by the alleged fraud." *Brooks v. Blue Cross & Blue Shield of Fla., Inc.*, 116 F.3d 1364, 1380-81 (11th Cir. 1997). Where there are multiple defendants, plaintiffs may not "lump[] together" the allegations against all defendants indiscriminately, and instead

must identify the time, place, and manner of those statements. *Id.* at 1381. Plaintiffs' Complaint fails these tests. *See* Am. Compl. ¶ 15.

Plaintiffs do not identify which statements eNom made (as opposed to the other defendants), when they were made, in what form (i.e., through documents, orally, or via publication), to whom they were made, in what context they were made, or who at eNom made them. Likewise, plaintiffs do not identify a specific ICANN rule, regulation, policy, or procedure that eNom violated. Nor do plaintiffs explain how or why the statements are false. If plaintiffs' misrepresentation claim against eNom is not dismissed for the reasons stated in part III.B.3.a. above (pages 18-20), it should be dismissed pursuant to Fed. R. Civ. P. 9(b).

4. Plaintiffs' Mail and Wire Fraud Claims Should Be Dismissed.

Plaintiffs purport to bring a claim for violating the federal mail and wire fraud statutes. Am. Compl. ¶¶ 76-84 (citing 18 U.S.C. §§ 1341 & 1343). But there is no federal private right of action for violating the mail and wire fraud statutes. *See Bell v. Health-Mor, Inc*., 549 F.2d 342, 346 (5th Cir. 1977); *Napper v. Anderson, Henly, Shields, Bradford & Pritchard*, 500 F.2d 634, 636 (5th Cir. 1974). Further, as shown in the preceding section, none of eNom's statements was fraudulent. Plaintiffs' mail and wire fraud claims should therefore be dismissed.

5. Plaintiffs' Suppression Claim Should Be Dismissed.

The elements of a claim for suppressing material facts are (1) a duty to disclose the facts; (2) concealment or nondisclosure of material facts by the defendant; (3) inducement of the plaintiff to act; and (4) action by the plaintiff to his injury. *Wilson v. Brown*, 496 So. 2d 756, 759 (Ala. 1986); Ala Code § 6-5-102. Silence is not "suppression" unless an obligation to communicate a material fact exists. *Sayer v. Lincoln Nat'l Life Ins. Co.*, No. 7:05-CV-1423-RDP, 2006 U.S. Dist. LEXIS 96126, at *33 (N.D. Ala. Oct. 12, 2006) (Proctor, J.), *aff'd sub nom Sayer v. AmSouth Inv't Serv., Inc.*, No. 06-15813 (11th Cir. June 28, 2007) (*per curiam*).

The supposedly suppressed facts are contradicted by plaintiffs' allegations or the documents relied on in the Complaint. Specifically, the ability to transfer Mr. Moore's domain names, *see* Am. Compl. ¶ 101(a), was not suppressed from plaintiffs; the Registration Agreement

Mr. Moore entered expressly provides that, if there were a credit card chargeback, RegisterFly could transfer the domains to itself. Kane Decl. ¶ 3 & Ex. 4, ¶ 3. Similarly, plaintiffs do not contest that is was RegisterFly, not eNom, that billed Mr. Gentry's credit card, that eNom had no ability to verify any of plaintiffs' payment transactions with RegisterFly, and therefore eNom could not have suppressed any facts relating to charges on Mr. Gentry's credit card. Am. Compl. ¶¶ 47, 49. Finally, eNom cannot have suppressed a refusal to "renew the Plaintiffs' domain names" because eNom repeatedly offered to renew the names. *Id.* ¶¶ 47, 49.

With respect to the alleged facts that are not contradicted by other allegations in the Amended Complaint, plaintiffs fail to allege facts showing that eNom had a duty to disclose any of those facts. The duty to disclose facts must arise from a confidential relationship between the parties or from the particular facts of the case. Ala. Code § 6-5-102. Plaintiffs do not allege a confidential relationship between the parties; instead, they suggest that the "[u]nder the circumstances, defendants had a duty to disclose to plaintiffs the material facts set forth above." Am. Compl. ¶ 25. Plaintiffs fail to identify what those circumstances might be. Plaintiffs' suppression claims should therefore be dismissed.

More importantly, even assuming plaintiffs' allegations as to RegisterFly's conduct are true — refusing to abide by rules, placing fraudulent charges on Mr. Gentry's credit card, and refusing to renew the domain names — plaintiffs provide no facts showing that eNom had a way of learning any of those facts. "[A]s a matter of law under section 6-5-102, one can only be held liable under this section for concealing facts [of] which one has knowledge." *Mitchell v. Indust. Credit Corp.*, 898 F. Supp. 1518, 1534 (N.D. Ala. 1995) (citing *Harrell v. Dodson*, 398 So. 2d 272 (Ala. 1981)). Because there is no reason to believe eNom had either a duty to reveal, or any knowledge of, the facts surrounding RegisterFly's allegedly improper conduct, plaintiffs' suppression claim should be dismissed.

Further, plaintiffs' suppression claim fails to satisfy Rule 9(b). As with the other fraud claims, "Rule 9(b) requires that a complaint alleging fraud by suppression state (1) what omissions were made, (2) the time, place and identity of the person responsible for the

omissions, (3) the manner in which the plaintiff was misled, and (4) what the defendants gained as a consequence of the fraud." *Lewis v. City of Montgomery*, No. 2:04-CV-858-WKW, at *7 (M.D. Ala. June 27, 2006) (citations omitted). Plaintiffs cannot meet this standard. They again lump all defendants together, fail to identify each defendant's conduct, and fail to provide any factual basis supporting the alleged omissions. Am. Compl. ¶ 15. Plaintiffs cite no rule, regulation, policy, or procedure that eNom violated. *Id.* ¶ 101(c). Likewise, plaintiffs provide no factual support for the claim that eNom intended to improperly transfer and take control of Mr. Moore's domain names. *Id.* ¶¶ 101(b), (f). Finally, plaintiffs do not identify a single undisclosed administrative fee, barring any claim that such fees were suppressed. *Id.* ¶ 101(e). If plaintiffs' fraud claim is not precluded by the allegations in their Complaint and by the documents on which they rely, the claim should be dismissed pursuant to Rule 9(b).

6. Plaintiffs' Breach of Contract Claims Are Conclusory and Fail to Identify any Contractual Breach or Damage.

The elements of a breach of contract claim are: (1) the existence of a valid contract binding upon the parties in the action, (2) the plaintiffs' own performance; (3) the defendant's nonperformance, or breach; and (4) damage. *See Mac East, LLC v. Shoney's LLC v. Shoney's LLC*, No. 2:05-cv-10:38-MEF, 2007 WL 60922, at *3 (M.D. Ala. Jan. 8, 2007) (citing *Teitel v. Wal-Mart Stores, Inc.*, 287 F. Supp. 2d 1268, 1285 (M.D. Ala. 2003)). Plaintiffs provide literally no facts showing eNom breached any contractual provision, failing to identify any provision that eNom violated or how they were damaged as a result. Mr. Gentry is not alleged to have entered into any contract with eNom. Plaintiffs' contract claim is so conclusory as to be insufficient to withstand dismissal. *Davila*, 326 F.3d at 1185 ("conclusory allegations, unwarranted factual deductions or legal conclusions masquerading as facts will not prevent dismissal").

Plaintiffs also allege that they should be able to recover against eNom as third-party beneficiaries to the reseller agreement between eNom and RegisterFly and the ICANN accreditation agreement between eNom and ICANN. Am. Compl. ¶¶ 112-14. To recover under a third-party beneficiary theory, a plaintiff must show: (1) that the contracting parties intended, at

the time the contract was created, to bestow a direct benefit upon a third party; (2) that the complainant was the intended beneficiary of the contract; and (3) that the contract was breached. *Collins Co. v. City of Decatur*, 533 So. 2d 1127, 1132 (Ala. 1988) (citation omitted). If the benefit to the third person is not intended to be a direct benefit, but rather to be merely an incidental benefit, the third person will not be entitled to damages based on a breach of that contract. *Id.* (citing *Mills v. Welk,* 470 So. 2d 1226, 1228 (Ala. 1985)). Where the contracts show that plaintiffs were not the intended beneficiaries of the contract, the Court may dismiss the claim. *Id.* Likewise, if there is no underlying breach of contract, there can be no third-party beneficiary claim. *Id.*

Plaintiffs do not explain which contractual provision(s) eNom breached, how eNom allegedly breached them, or how they were damaged through that breach. 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 these reasons, the Court should dismiss plaintiffs' third-party beneficiary claim.

IV. Conclusion

eNom respectfully requests that plaintiffs' Amended Complaint be dismissed with prejudice for failure to state a claim.

Respectfully submitted this 30th day of August, 2007,

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CERTIFICATE OF SERVICE

I hereby certify that on August 30, 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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and I hereby certify that I have mailed by United States Postal Service the document to the following non-CM/ECF participants:

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