Case No. 09-17625

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

DANIEL L. BALSAM,
Plaintiff/Appellant,

vs.

TUCOWS INC., a Pennsylvania corporation, TUCOWS CORP., a Mississippi corporation, ELLIOT NOSS, an individual, and PAUL KARKAS, an individual, and DOES 1-100,
Defendants/Appellees.

ANSWERING BRIEF OF DEFENDANT-APPELLEE TUCOWS INC., ET AL.

On Appeal from the United States District Court for the Northern District of California, Case No. 3:09-CV-03585-CRB

The Honorable Charles R. Breyer, Judge

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ORAL ARGUMENT REQUESTED

TABLE OF CONTENTS

Page

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

TABLE OF AUTHORITIES

Page(s)

TABLE OF AUTHORITIES

Page(s)

Statutes

Other Authorities

Rules

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, Defendant/Appellee Tucows, Inc. states that it is a Pennsylvania corporation, based in Toronto, Ontario, and is publicly traded on the American Stock Exchange under the trading symbol "TCX." Defendant/Appellee Tucows Corp., a Mississippi corporation, is a wholly owned subsidiary of non-party Tucows (Delaware) Inc., which in turn is a wholly owned subsidiary of Tucows, Inc. Defendant/Appellee Elliot Noss is the Chief Executive Officer of Tucows, Inc., and Defendant/Appellee Paul Karkas is the company's Chief Compliance Officer.

INTRODUCTION

This is an action brought by a professional anti-spam litigant, Daniel Balsam ("Balsam"), to collect on an uncollectible March 28, 2008 default judgment issued to him in another action against other parties. Unable to collect upon his default judgment, Balsam now seeks to hold a non-resident domain name registrar and two of its Canadian employees liable for his alleged damages.[1] Plaintiff alleges that Defendant Tucows, Inc. ("Tucows"), a domain name registrar, allowed non-party Angeles Technology, Inc. to opt into a privacy service—after its identity became known to Plaintiff—that removed the contact data for the domain name <adultactioncam.com> from the worldwide whois database. ER 190 at ¶38. Plaintiff's incredible theory is that but for his inability to access Angeles Technology Inc.'s contact details after they became private he would have been able to collect on his default judgment. *Id*. ER 193-94 at ¶¶67-70.

Balsam's theories of liability rest on the facially false premise that he is an intended third party beneficiary of a Registrar Accreditation Agreement, issued by an Internet regulatory body to the Defendant/Appellee, to which Balsam is not a party, which does not mention Balsam by name or class, and which contains an

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[1] Defendant/Appellee Tucows Corp., a Mississippi corporation, has no relationship to the facts alleged in Balsam's Complaint and appears to have been sued incorrectly. Tucows Corp. is a subsidiary of Tucows Inc. that develops internet-based payment and billing software for internet service providers. It is not a domain name registrar.

express "No Third-Party Beneficiaries" clause. As a fallback, Balsam argued that Defendants had a duty to Balsam to reveal the identities and personal contact details of its customers upon a simple letter request to do so, which Defendants breached. Balsam's Complaint also alleges causes of action for "conspiracy" and "declaratory judgment," based on these same infirm theories, which the District Court properly dismissed.

STATEMENT OF ISSUES PRESENTED

1. Is Daniel Balsam a third party beneficiary of ICANN's Registration Accreditation Agreement, in spite of a clause in that agreement expressly disclaiming an intention to benefit third parties?

2. Did the District Court err when it dismissed the Complaint with prejudice?

STATEMENT OF THE CASE

Daniel Balsam filed a Verified Complaint against Tucows, Inc., Tucows Corp. (collectively "Tucows"), Elliot Noss, and Paul Karkas on June 26, 2009 in the Superior Court of California, County of San Francisco. *See* Excerpts of Record (hereafter "ER"), at 186-247. Balsam asserted claims for breach of contract, negligence, and declaratory relief against Tucows, Mr. Noss, and Mr. Karkas. Balsam also asserted a claim for civil conspiracy against Mr. Noss and Mr. Karkas. Defendants removed the action to the United States District Court for the Northern

District of California, San Jose Division. By an order dated August 7, 2009, the San Jose Division transferred the action to the San Francisco Division.

On August 12, 2009, Defendants filed a motion to dismiss for failure to state a claim which Plaintiff opposed on September 25, 2009. On October 8, 2009, the District Court, the Honorable Charles R. Breyer presiding, ordered the parties to be prepared to address *Solid Host, NL v. NameCheap, Inc.*, 652 F.Supp.2d 1092 (C.D. Cal. 2009) at oral argument. ER 045. Defendants' motion was heard and argued on October 16, 2009. ER 022-043. The District Court took the matter under submission, and on October 23, 2009, granted Defendants' motion to dismiss with prejudice. ER 008-020. The District Court ruled that "all of Balsam's claims are based on his status as a third party beneficiary" and "[b]ecause Plaintiff cannot prove that he is a third party beneficiary, Plaintiff's claims fail as a matter of law." ER 008. On October 27, 2009, the District Court entered judgment in favor of Defendants. ER 006.

In his Opening Brief, Balsam discusses at length the facts and procedural history of an ancillary lawsuit which he filed against non-party Angeles Technology, Inc. and other defendants (the "Angeles lawsuit"). In that lawsuit, Balsam sought statutory damages in the amount of $1,000 per email for 1,125 email messages he allegedly received advertising <adultactioncam.com>. ER 224-225. Defendants were not parties to the Angeles lawsuit. ER 223. The district

court in the Angeles lawsuit entered a default judgment in favor of Balsam in the amount of $1,125,000. ER 223-225. The district court in that case made no findings as to whether or not Balsam was harmed by unlawful spam advertising <adultactioncam.com>. *Id*. Despite Balsam's suggestion in his Opening Brief that the Angeles lawsuit and the instant lawsuit are related, Balsam admitted at oral argument in this action that he did not file a notice of related case: *"My position is that this is not really a related action… It's not a related action. This is a breach of contract claim against Tucows. I'm not suing Tucows today for sending spam."* ER 038-039.

STATEMENT OF FACTS

Tucows is a registrar of domain names, accredited by the Internet Corporation for Assigned Names and Numbers ("ICANN") to sell domain name registrations to the public. ICANN's Registration Accreditation Agreement ("RAA" or "Agreement") sets forth the terms under which domain name registrars like Tucows are obligated to operate in order to sell domain name registrations to third-party customers, or what the RAA calls "Registered Name Holders." Each of the claims Balsam pleads in his Complaint turn on whether Balsam is an intended third-party beneficiary of the RAA between Tucows and ICANN. As discussed below, the plain language of the Agreement, governing law, and ICANN's own policy statements regarding the RAA's no third-party beneficiary clause each

demonstrates that Balsam is not an intended third-party beneficiary of any part of the Agreement.

A. The Underlying Judgment.

On or about May 23, 2006, Balsam filed a lawsuit in Santa Clara County Superior Court seeking damages against a company that had allegedly sent him unsolicited commercial email messages (also known as "spam") advertising the website <adultactioncam.com>. ER 189-190 at ¶¶29, 37. The case was removed to the District Court as *Balsam v. Angeles Technology Inc., et al.*, No. CV 06-04114 JF. ER 189 at ¶37. On March 28, 2008, Balsam obtained a default judgment against one or more defendants, in the amount of $1,250,000. ER 192 at ¶¶57-58. To date, Balsam has been unable to collect on the default judgment. ER 193 at ¶¶60-66.

B. Alleged Conduct by Tucows.

Defendant Tucows, Inc. ("Tucows") is a publicly traded Pennsylvania corporation with a principal place of business in Toronto, Ontario. ER at ¶14.[2] Tucows is a registrar of domain names, accredited to sell domain name registrations by the Internet Corporation for Assigned Names and Numbers

[2] *See generally*, Tucows Investor Relations Information, Corporate Website, *available at* http://tucowsinc.com/investors/.

("ICANN").[3] ER 187 at ¶3; ER 189 at ¶25. Tucows is the registrar of record for the domain name <adultactioncam.com>. ER 189 at ¶26.

As a service, Tucows allows its domain name registration customers to use a privacy service that removes their names and addresses from the public database of the world's domain names (also known as the "whois" database). ER 187 at ¶4. In October, 2005, when Balsam first used the whois database to locate the registrant of <adultactioncam.com>, he found the name and address for "Angeles Technology, Inc.," the company Balsam ultimately sued in the underlying action. ER 190 at ¶¶31-32. Sometime thereafter, the registrant of <adultactioncam.com> opted into the Tucows privacy service. *Id.* at ¶¶38-39.

At various times after the contact data became private, Balsam wrote to Tucows and asked that it provide him the name and address for the registrant of <adultactioncam.com>. ER 190-192 at ¶¶40-56. By his own admission, at no time did Balsam use the non-party discovery tools available to him under the Federal Rules of Civil Procedure to seek the information he asked for by correspondence. ER 192 at ¶¶51-54. Balsam contends that he was not required to obtain a subpoena to obtain private customer information from Tucows and cites anecdotal evidence

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[3] The relationship between ICANN and domain name registrars, and a description of their respective roles, can be found in *Dotster, Inc. v. Internet Corp. For Assigned Names and Numbers*, 296 F.Supp.2d 1159, 1160-61 (C.D. Cal. 2003) and *Register.com, Inc. v. Verio, Inc.*, 356 F.3d 393, 395-96 (2d Cir. 2004).

that Tucows does not respond to subpoenas as reason for his failure to obtain a subpoena in the ancillary lawsuit. ER 061, 063, 072-073, 090-091. Tucows did not release its customer's information to Balsam. ER 194 at ¶73.

The basis for Balsam's action below, and now his current appeal, is that he is a third-party beneficiary of the RAA, despite the RAA's Paragraph 5.10 which expressly disclaims rights in third parties. He attempts to grounds this alleged duty first in contract (ER 195-96 at ¶¶82-93) and then in negligence.[4] ER 196-98 at ¶¶94-105. For the contract claim, Balsam contends that he is an intended third-party beneficiary of the RAA between ICANN and Tucows. ER 191 at ¶¶43-44; ER 195 at ¶¶84-85. He further claims that if he is not an intended third-party beneficiary of the entire Agreement, he is, at a minimum, an intended third-party beneficiary of Paragraphs 3.7.7 and 3.7.7.3, and that the third-party beneficiary status conferred by those specific paragraphs trumps the general third-party beneficiary disclaimer found in Paragraph 5.10.

For the negligence claim, Balsam again relies on the RAA, claiming that his status as a third-party beneficiary makes him a foreseeable plaintiff. *Id.* He alleges upon information and belief that had Tucows provided the information, the

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[4] By failing to argue negligence in his Opening Brief, Balsam has waived his negligence claim. *See Independent Towers of Washington v. Washington*, 350 F.3d 925, 929 (9th Cir. 2003). A party may not assert an issue or argument on appeal that is not specifically and distinctly raised in its opening brief. *Id.*

court in the ancillary lawsuit would have ruled in his favor, permitting him to collect on his default judgment. He then concludes, as to both theories, that Tucows' failure to provide him with the customer's contact data is the proximate cause of his failure to collect on his default judgment. Balsam demands payment of the $1.25M default judgment from Tucows.

As to the individual defendants, Balsam alleges that Defendant Paul Karkas is the employee of Tucows, Inc. who corresponded with him. ER 191-92 at ¶¶48-55. The only allegation against Defendant Elliot Noss is that he is the President and CEO of Tucows, Inc. ER 188 at ¶21; Balsam attributes no specific acts or omissions to Mr. Noss.

SUMMARY OF ARGUMENT

1. The District Court correctly found that all of Appellant Balsam's claims arose out of his assertion that he was an intended third-party beneficiary of the RAA entered between ICANN and Tucows.

2. The District Court correctly held that the RAA's "no third-party beneficiaries" clause demonstrates a clear and unequivocal intent of the parties to the RAA not to benefit third-parties such as Balsam here. California case law and other interpretations of the RAA language at issue supports this conclusion.

3. The District Court correctly held that Balsam's Complaint should be dismissed with prejudice, as the contract was clear on its face and no additional pleading could overcome the unequivocal intent of the contracting parties.

ARGUMENT

I. STANDARDS APPLICABLE TO THIS APPEAL

A complaint is properly dismissed when it either does not allege a cognizable legal theory or alleges insufficient facts under a cognizable legal theory. *SmileCare Dental Group v. Delta Dental Plan of Calif., Inc.*, 88 F.3d 780, 783 (9th Cir. 1996). While the court must assume the truth of all properly pleaded allegations of fact, "conclusory allegations of law and unwarranted inferences are insufficient to defeat a motion to dismiss." *Ove v. Gwinn*, 264 F.3d 817, 821 (9th Cir. 2001). The court need not accept "legal conclusions cast in the form of factual

allegations if those conclusions cannot reasonably be drawn from the facts alleged." *Clegg v. Cult Awareness Network*, 18 F.3d 752, 754-55 (9th Cir. 1994). Nor is the court required to make "unreasonable inferences" or "unwarranted deductions of fact" on Balsam's behalf. *Sprewell v. Golden State Warriors*, 266 F.3d 979, 988 (9th Cir. 2001). "While a complaint… does not need detailed factual allegations, 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 Atlantic v. Twombly*, 550 U.S. 544, 545, 127 S.Ct. 1955 (2007) (internal quotation marks and citations omitted.)

The Supreme Court recently expanded upon its hallmark decision in *Bell Atlantic v. Twombly*: "[T]he tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions. Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice…. [O]nly a complaint that states a plausible claim for relief survives a motion to dismiss." *Iqbal v. Ashcroft*, 129 S.Ct. 1937, 1949-50 (2009).

As the District Court held, the proper application of these standards requires dismissal of this action.[5]

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[5] On a motion to dismiss, a court may properly review and consider documents referenced in or attached to the complaint and assume their contents are

II. THE DISTRICT COURT CORRECTLY HELD THAT BALSAM IS NOT A THIRD-PARTY BENEFICIARY TO THE CONTRACT BETWEEN TUCOWS AND ICANN

In California, third-party beneficiary claims are governed by Civil Code section 1559 which provides that "[a] contract, made expressly for the benefit of a third person, may be enforced by him at any time before the parties thereto rescind it." Cal. Civil Code, §1559. "A third party qualifies as a beneficiary under a contract if the parties intended to benefit the third party and the terms of the contract make that intent evident." *Karo v. San Diego Symphony Orchestra Ass'n*, 762 F.2d 819, 821-22 (9th Cir. 1985) citing *Strauss v. Summerhays*, 157 Cal.App.3d 806, 816, 204 Cal.Rptr. 227 (4th Dist. 1984); *accord Martinez v. Socoma Cos.*, 11 Cal.3d 394, 113 Cal.Rptr. 585, 521 P.2d 841 (1974).

A third-party beneficiary to a contract need not be identified by name or identified individually to be an express beneficiary. *Kaiser Eng'rs, Inc. v. Grinnell Fire Protection Sys. Co.*, 173 Cal.App.3d 1050, 1055, 219 Cal.Rptr. 626 (1st Dist. 1985). A third party seeking to enforce a contract may demonstrate that the parties to the contract intended to confer a benefit by showing "that he is a member of a class of persons for whose benefit it was made." *Spinks v. Equity Residential*

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true for the purposes of the motion if, as here, such documents form the basis of plaintiff's claims. *United States v. Ritchie*, 342 F.3d 903, 907-908 (9th Cir. 2003). The court may disregard allegations contradicted by facts established by such documents. *Sprewell*, 266 F.3d at 988.

Briarwood Apartments, 171 Cal.App.4th 1004, 1023, 90 Cal.Rptr.3d 453 (6th Dist. 2009) quoting *Garratt v. Baker*, 5 Cal.2d 745, 748, 56 P.2d 225 (1936). "If the terms of the contract necessarily require the promisor to confer a benefit on a third person, then the contract, and hence the parties thereto, contemplate a benefit to the third person." *Id*. quoting *Johnson v. Holmes Tuttle Lincoln-Merc*., 160 Cal.App.2d 290, 297, 325 P.2d 193 (2nd Dist. 1958); *accord Prouty v. Gores Tech. Group*, 121 Cal.App.4th 1225, 1233, 18 Cal.Rptr.3d 178 (3d Dist. 2004).

Civil Code section 1559 excludes enforcement of a contract by persons who are only incidentally or remotely benefited by the contract. *Lucas v. Hamm*, 56 Cal.2d 583, 590 (1961). The mere fact that performance of a contract would inure to the benefit of a third party is not enough to make the third party an intended beneficiary. *See Prouty*, 121 Cal.App.4th at 1233. Whether a third party may qualify as a beneficiary involves reading the contract as a whole in light of the circumstances under which it was entered. *Jones v. Aetna Cas. & Sur. Co.*, 26 Cal.App.4th 1717, 1725, 33 Cal.Rptr.2d 291 (1st Dist. 1994). Additionally, the party claiming to be a third-party beneficiary bears the burden of proving that the contracting parties actually promised the performance which the third party seeks. *Whiteside v. Tenet Healthcare Corp.*, 101 Cal.App.4th 693, 708-709, 124 Cal.Rptr.2d 580 (2nd Dist. 2002).

A. The "No Third-Party Beneficiary Clause" of the ICANN Agreement Expressly Disclaims An Intent to Benefit Third Parties

Here, the intent behind the ICANN/Tucows Agreement could not be more clear:

> 5.10 No Third-Party Beneficiaries. This Agreement shall not be construed to create any obligation by either ICANN or Registrar to any non-party to this Agreement, including any Registered Name Holder.

This language is dispositive of Balsam's claims and can be determined as a matter of law. *McEldowney v. Nat'l Conf. of Bar Examiners*, 837 F.Supp. 1062, 1063 (C.D. Cal. 1993) (holding, as a matter of law on motion to dismiss, that unsuccessful examinee for Multistate Bar Exam was not third-party beneficiary of contract between State Bar and examination authority); *Panavision Int'l v. Toeppen*, 945 F.Supp. 1296, 1305 (C.D. Cal. 1996), aff'd on other grounds, 141 F.3d 1316 (9th Cir. 1998) (holding, as a matter of law, that trademark owner was not intended third-party beneficiary of domain name contract between registrar and registered name holder).

The Ninth Circuit recently examined a similar question in the context of whether a Native American tribe could enforce a consent decree between the United States and a mining company. *See U.S. v. FMC Corp.*, 531 F.3d 813 (9th Cir. 2008). The consent decree contained a provision that discussed the interests of non-parties, yet also disclaimed third-party rights. The Court wrote:

> The Consent Decree does contain a paragraph that discusses rights of non-parties to the Decree, but that paragraph disclaims an intent to grant rights to third parties. Paragraph 77 states in full:
>
> *Nothing in this Consent Decree is intended either to create any rights in or grant any cause of action to any person not a party to this Consent Decree, or to release or waive any claim, cause of action, demand, or defense in law or equity that any party to this Consent Decree may have against any person(s) or entity not a party to this Consent Decree.*
>
> In our view, paragraph 77 clearly expresses the parties' intent that third parties cannot enforce the Consent Decree.

Id., at 821 (emphasis added). Other cases are in accord. Both in California and as a matter of majority rule, express statements of intent are dispositive of third-party beneficiary status. *See Consolidated Edison, Inc. v. Northeast Utils.*, 426 F.3d 524, 528 (2nd Cir. 2005) (contractual text: "'This Agreement..., except for the provisions of Article II and Article 5.08, [is] not intended to confer upon any person other than the parties any rights or remedies.'" (alteration in original)); *McKesson HBOC, Inc. v. N.Y. State Common Ret. Fund, Inc.*, 339 F.3d 1087, 1091 (9th Cir. 2003) (contractual text under the heading "'No Third Party Beneficiaries'": "'This agreement [and other specified agreements] ... are not intended to confer upon any person other than the parties any rights or remedies.'"); *W. Alton Jones Found. v. Chevron U.S.A. Inc.* (*In re Gulf Oil*), 725 F.Supp. 712, 733 (S.D.N.Y. 1989) (contractual text: "'This agreement ... is not intended to

confer upon any other person any rights or remedies.'"); *See also* 9 Corbin on Contracts §44.6, p. 68 (rev. ed. 2007) (stating that it is "obvious" that, "where the terms of the contract expressly state the intention of the promisee and promisor concerning the enforceable rights of third parties, the critical question of whether the parties intended the third party to have such a right is easily answered").

None of the cases cited by Balsam in his Opening Brief support a contrary result. Balsam makes much of the fact that in this case, Tucows "wears two hats." He claims that nothing in the third-party beneficiary clause immunizes Tucows from liability in its role as a Registered Name Holder, because Paragraph 5.10 applies only as to ICANN and registrars. Opening Brief, p. 25. But, a basic reading of the Agreement establishes that Balsam's theory is ill-conceived.

The Agreement plainly binds only ICANN and Registrars: *"This REGISTRATION ACCREDITATION AGREEMENT ("Agreement") is by and between the Internet Corporation for Assigned Names and Numbers… and [Registrar Name], a [Organization type and jurisdiction] ("Registrar"),…"* ER 017; ER 112. (emphasis added). Accordingly, Paragraph 5.10 may not immunize Registered Name Holders from liability, but neither does it create liability for them because Registered Name Holders are *not signatories to the Agreement.* Further, Balsam fails to allege any facts in support of the notion that Tucows as Registered Name Holder is bound by the terms of the RAA. ER 017. And, his naked

conclusion that "[s]omeone must have liability for unlawful actions" (Opening Brief, p. 24) "will not do." *See Bell Atlantic*, 550 U.S. at 545.

B. The "No Third-Party Beneficiary" Clause in the ICANN/Tucows Agreement Has Been Interpreted to Prohibit Lawsuits Such as Balsam's.

Paragraph 5.10 of the Registration Agreement has been interpreted by the Second Circuit to prohibit actions such as the present one. In *Register.com, Inc. v. Verio, Inc.*, 356 F.3d 393 (2d Cir. 2004)—a case briefed below which Balsam ignores in his Opening Brief—Register.com, a domain name registrar like Tucows here, brought suit against a web development company, Verio, that was mining Register.com's whois database for details of new domain name registrations. Using the data it gathered from Register.com's servers, Verio would contact the Registered Name Holder of new registrations in order to market its web development services. To stop Verio's unwanted advertising, Register.com placed restrictions on the third-party use of its whois data. These restrictions allegedly violated the registrar's obligations to ICANN under the RAA to make that data publicly available. When Verio refused to acknowledge Register.com's restrictions and continued to mine the whois database, Register.com sued for trespass to chattels, breach of contract, and related intellectual property claims.

To defend itself, Verio asserted that Register.com was in violation of the RAA. Register.com countered that whatever its obligations under the RAA, Verio

was not entitled to enforce them. Before the Court of Appeals, ICANN filed an amicus brief in support of Register.com. ER 147-157. The Second Circuit sided with Register.com and ICANN, writing:

> We are persuaded by the arguments Register[.com] and ICANN advance. It is true that Register[.com] incurred a contractual obligation to ICANN not to prevent the use of its WHOIS data for direct mail and telemarketing solicitation. But ICANN deliberately included in the same contract that persons aggrieved by Register[.com]'s violation of such a term should seek satisfaction within the framework of ICANN's grievance policy, and should not be heard in courts of law to plead entitlement to enforce Register[.com]'s promise to ICANN.

Register.com, 356 F.3d at 399. The same result is warranted here.

C. Balsam's Interpretation of Paragraphs 3.7.7.3 and 3.7.7 is Incorrect

On appeal, Balsam concedes that the core of this dispute is whether a specific requirement conflicting with a "catch all" term controls over general terms. Opening Brief, p. 28. Balsam attempts to write Paragraph 5.10 out of the contract entirely on the theory that he is an intended third-party beneficiary of Paragraph 3.7.7.3 of the RAA, and Paragraph 3.7.7.3 trumps the "no third-party beneficiary" clause in Paragraph 5.10.

Balsam's theory is based upon two fundamental misinterpretations of the RAA: (1) that Paragraph 3.7.7.3 binds Tucows; and (2) that the term "to a party" in Paragraph 3.7.7.3 really means "to a third-party" or "to anyone."

1. Paragraph 3.7.7.3 is Not A Term of the RAA and Therefore Does Not Assign Liability to Registrars or Registered Name Holders

The District Court held that Balsam's interpretation of the RAA "fails to read section 3.7.7 in conjunction with section 3.7.7.3, resulting in the loss of important context." ER 015. The District Court noted that the two sections must be read together:

> 3.7.7 Registrar shall require all Registered Name Holders to enter into an electronic or paper registration agreement with Registrar including at least the following provisions:
> …
> 3.7.7.3 Any Registered Name Holder that intends to license use of a domain name to a third party is nonetheless the Registered Name Holder of record and is responsible for providing its own full contact information and for providing and updating accurate technical and administrative contact information adequate to facilitate timely resolution of any problems that arise in connection with the Registered Name. A Registered Name Holder licensing use of a Registered Name according to this provision shall accept liability for harm caused by wrongful use of the Registered Name, unless it promptly discloses the current contact information provided by the licensee and the identity of the licensee to a party providing the Registered Name Holder reasonable evidence of actionable harm.

Id. By its plain language, Paragraph 3.7.7.3 is a provision that requires a registrar to enter into a *separate agreement* with a Registered Name Holder. Each registrar has a registration agreement with its domain name customers. By the provisions in Paragraph 3.7.7 of the RAA, ICANN is mandating that these separate registration agreements contain certain terms. As the District Court held, "paragraph 3.7.7.3 is

not truly a term of the RAA that binds either of the two parties to the RAA." ER 018 (emphasis in original). Because Paragraph 3.7.7.3 is not a term of the RAA, nothing in that paragraph binds Tucows. Whether against Tucows qua registrar, or Tucows qua Registered Name Holder, a claim cannot be stated against Tucows based upon paragraph 3.7.7.3.[6]

Balsam's claim that Paragraph 3.7.7.3 is a specific contractual provision which trumps Paragraph 5.10 is meritless. His claim erroneously presupposes that Paragraph 3.7.7.3 is itself an RAA contract term which is binding on ICANN and Tucows. But, "[a]s section 3.7.7.3 is not truly a clause of Tucows' agreement with ICANN, Plaintiff's claim that this clause 'trumps' the contract's general disclaimer of third-party beneficiaries must fail." ER 016-017.

A federal district court in California recently interpreted the very contractual provisions at issue in this case. In *Solid Host, NL v. NameCheap, Inc*., 652 F.Supp.2d 1092 (C.D. Cal. 2009), a plaintiff filed an action against NameCheap and a Doe Defendant. As a result of a security breach, the Doe Defendant was able to hijack plaintiff's domain name and register that name with NameCheap. Plaintiff brought a breach of contract action against NameCheap for breaching the

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[6] Balsam sues only upon the theory that he is a third-party beneficiary to the RAA itself. Even if he had sued under Tucows' separate registration agreement with its customers, however, that agreement also has a "no third parties beneficiaries" clause. *See* Tucows Registration Agreement, *available at* http://opensrs.com/docs/contracts/exhibita.htm (Paragraph 26).

promise made to ICANN that NameCheap would "promptly disclose the identity" of the licensee for <solidhost.com> once it was provided "reasonable evidence of actionable harm." *Id.* at 1118. Solid Host alleged that NameCheap made the promise by entering into two agreements: the Registration Agreement with ICANN and a separate agreement with eNom, which incorporated ¶ 3.7.7.3 of the Registration Agreement. *Id.*

The *Solid Host* Court held that plaintiff did not state a claim against NameCheap for breach of the agreement with ICANN because Paragraph 5.10 "unambiguously manifests the parties' intents not to benefit third parties." *Id.* at 118-19. The court also held that "paragraph 3.7.7.3 is not itself a term of the ICANN agreement." *Id.* at 1119. Rather, "paragraph 3.7.7.3 merely required that NameCheap include such a provision in future contracts between it and parties to whom it registered domain names." *Id.* at 1119. Consequently, no claim for breach of the agreement between ICANN and NameCheap could be stated. *Id.*

The same principle applies here. The linchpin of Balsam's lawsuit against Tucows is that he is a third party beneficiary of the ICANN/Tucows agreement. ER 195. ("Balsam is one of the intended third party beneficiaries of Paragraph 3.7.7.3 of the ICANN Agreement.") The plain language of the contract as well as the court's ruling in *Solid Host* conclusively establish, however, that Balsam cannot state a claim against Tucows for breach of the RAA. And, unlike in *Solid Host*,

Balsam's suit is not based on the claim that Tucows did or did not enter into the separate agreement contemplated by Paragraph 3.7.7 or that the agreement did not include the provision set forth in Paragraph 3.7.7.3. ER 016 at n. 3.

In his Opening Brief, Balsam discusses at length the contractual interpretation rules used to reconcile inconsistent contract terms. *See* Opening Brief, pp. 27-30, 38, and 46-47. None of this discussion helps Balsam, however, because no such reconciliation of contract terms is warranted here. Paragraph 5.10 is not inconsistent with Paragraph 3.7.7.3. The contract is quite clear, Paragraph 5.10 disclaims any intention to benefit third parties, and Paragraph 3.7.7.3 is not a provision that binds Tucows and ICANN. Paragraph 3.7.7.3, therefore, cannot possibly trump the express third-party beneficiary disclaimer in Paragraph 5.10.

2. Balsam improperly rewrites the Agreement's definition of "party" to mean "third-party"

Even assuming Paragraph 3.7.7.3 *is* a binding provision of the Registration Agreement—which Tucows does not concede—in order to establish his claim that he is an intended third-party beneficiary, Balsam reads the word "third-" into the contract where the contract references only "party." The key to his contextual interpretation is a deliberate misreading of Paragraph 3.7.7.3.

Balsam argues that a Registered Name Holder must disclose the identity of its licensee contract information "to anyone who presents the Registered Name Holder with reasonable evidence of actual harm." ER 195. Balsam further argues:

"Liability in this Action turns on the phrase 'to a party.' Balsam submits that 'to a party' really means 'to a third party who has been harmed." ER 069. Balsam is wrong; that is *not* what the language provides. The last sentence of Paragraph 3.7.7.3 does not say "to anyone," nor does it say "to a third party who has been harmed." It says "to a party." The phrase "to a party" in a contract between two parties is not ambiguous. As normally understood, a "party" to a contract is the opposite of a "third-party." Put another way, a "third-party" is "not a party." Balsam improperly reads them as interchangeable.

The provision in Paragraph 3.7.7.3 applies when either *ICANN* or *the registrar* asks for information from a Registered Name Holder. It does not apply to Balsam, who is a *third*-party. In the first sentence of the same paragraph, the RAA references "a third-party," which plainly shows that ICANN and the registrars who participated in negotiating the RAA understood the distinctions they were making between "third-parties" and "parties."

Any fair reading of the RAA shows that Balsam's black-really-means-white interpretation is not reasonable. The "parties" to the RAA are defined in the Definitions Section, Paragraphs 1.5 and 1.9 (in which both ICANN and the registrar are defined as "a party to this Agreement"). The RAA meticulously distinguishes between "party" and "third-party" throughout, using each word at least a dozen times. Rather than reading the Agreement as it was written, Balsam

reads it as it suits him for his present purposes. An unreasonable and tortured interpretation of an unambiguous contract provision does not, however, "plausibly suggest an entitlement to relief." *See Iqbal v. Ashcroft*, 129 S.Ct. at 1951.

III. THE DISTRICT COURT'S RULING DOES NOT CONTRAVENE PUBLIC POLICY

A. Balsam's Allegations Regarding the Policy Bases of Paragraph 3.7.7.3 and Paragraph 3.7.7.7 Are Without Any Factual Support

Balsam's argument that Paragraph 3.7.7.3 is void as against public policy presupposes that Paragraph 3.7.7.3 is a part of the ICANN/Tucows agreement. But, Paragraph 3.7.7.3 is not a clause of Tucows' agreement with ICANN, and therefore is not a provision which Balsam can enforce as a third-party. Balsam's public policy argument also presupposes that Paragraph 3.7.7.3 is intended to protect Balsam from spammers. Balsam concludes that it is, but alleges no facts to support his conclusion. Balsam's argument that the District Court's interpretation of Paragraph 3.7.7.3 undermines the importance of this Court's decision in *United States v. Kilbride*, 584 F.3d 1240 (2009) is unavailing for the same reasons.[7] *See* Opening Brief, p. 53.

Contrary to Balsam's assertions, this Court's holding in *United States v. Kilbride*, 584 F.3d 1240 (9th Cir. 2009) does not stand for any blanket proposition

[7] Balsam's reliance on *United States v. Kilbride* is curious since that case related to community standards used in federal obscenity prosecutions. *Kilbride* contains no relevant discussion of public policy.

about private domain name registrations. In *Kilbride*, the defendants challenged their convictions in a criminal fraud and conspiracy case in which they were found to have used unsolicited bulk email to advertise obscene adult websites. They challenged the legality of the statute under which they were convicted, 18 U.S.C. § 1037 (also known as the "CAN-SPAM Act"), on the ground that it was unconstitutionally vague. *Id*. at 1256-1259. A key component of the CAN-SPAM Act was to create transparency as to the source of emails. The Act prevents persons engaged in the dissemination of mass unsolicited emails from materially falsifying the source of those emails, including by providing materially false identification in a domain name registration. *Id.* at 1256.

The *Kilbride* defendants had materially falsified the data in their whois records, using intentionally false contact names and phone numbers. *Id*. at 1245. Although they had not used a private registration service themselves, they used the *example* of a private registration service at trial to mount a facial challenge to the CAN-SPAM Act, arguing that this common privacy service would be criminalized under the government's overbroad reading of the CAN-SPAM Act. *Id*. at 1259. This Court disagreed that the existence of private registrations rendered CAN-SPAM vague. The key factor was that the CAN-SPAM Act had a scienter element, requiring an intent to falsify data, and masking that data was some evidence of such intent. *Id.*

Kilbride in no way says that every use of a private registration service is a violation of law. At most, the *Kilbride* Court held mass email marketers to a strict standard for transparency, but it did not invalidate private registrations or opine in any way as to whether domain name registrars, such as Tucows here, could or should offer such services.

B. The District Court's Ruling Comports With ICANN's Policy Statements And Regulatory Framework

In arguing that the RAA's "no third-party beneficiaries clause" should be read out of the contract entirely as a matter of public policy, Balsam ignores existing federal court precedent interpreting the very contract provision at issue. *Register.Com, Inc. v. Verio, Inc.*, 356 F.3d 393 (2d Cir. 2004) [discussed at Section II.B, above], is summarily dismissed in Plaintiff's Opposition as "not binding on this Court" (ER 074) and is not mentioned anywhere in his Opening Brief. That case is important, however, not only because it was decided by a sister court, but also because in it, ICANN, appearing as a friend of the Court, offered its interpretation and contextual background for the clause at the center of this appeal and its important regulatory purpose. ER 147-157.

In an Amicus Brief, ICANN described the origin and effect of the clause at issue in this case. That history is quoted here, in full, because of its importance for understanding the present dispute. ICANN wrote:

It is difficult to imagine how the contractual language quoted above could more clearly exclude third-party beneficiary status. This language is by no means "boilerplate," as characterized by Verio. Instead, it is language that was specifically drafted for the original Registrar Accreditation Agreement. It is vital to the overall scheme of the various agreements that enforcement of agreements with ICANN be informed by the judgment of the various segments of the Internet community as expressed through ICANN. In the fast-paced environment of the Internet, new issues and situations arise quickly, and sometimes the language of contractual provisions does not perfectly match the underlying policies. For this and other reasons, hard-and-fast enforcement of the letter of every term of every agreement is not always appropriate. An integral part of the agreements that the registrars and other participants entered with ICANN is the understanding that these situations would be handled through consultation and consideration within the ICANN process, including the various reconsideration, independent review, and other mechanisms available in that process. In the event a dispute cannot be resolved by these means, the parties further provided that a carefully calibrated procedure culminating in arbitration must be followed. See Registrar Accreditation Agreement sections II.P and II.N.

Allowing issues under the agreements registrars make with ICANN to be diverted from this carefully crafted remedial scheme to the courts, at the behest of third parties that are not responsible (as ICANN is) to implement the policies developed through community consensus, would seriously threaten the Internet community's ability, under the auspices of ICANN, to achieve a proper balance of the competing policy values that are so frequently involved.

If Verio had concerns regarding Register.com's conditions for access to Whois data, it should have raised them within the ICANN process rather simply taking Register.com's data, violating the conditions, and then seeking to justify its violation in this Court by complaining that Register.com has breached an agreement that is intended to be addressed only within the ICANN process.

ER 154-155 (emphasis added). Oddly, Balsam ignores this important pleading, and instead relies on an email from an ICANN employee, sent in regard to another matter involving another registrar, which he claims "implicitly confirms" his interpretation. *See* Opening Brief, p. 48; *see also* ER 089.

Balsam claims that he complained to ICANN because a different domain name registrar refused to provide Balsam with the identity of its registrant. In response to his complaint letter (which Balsam does not provide), an ICANN employee informed Balsam that ICANN would not pursue compliance against that registrar, eNom because it had determined, based on the information Balsam provided in his complaint letter, that eNom had not violated the Registration Agreement. ER 089. The employee went on to state as follows:

> The only way that the identity of the Registered Name Holder can be absolved from liability is when the Registered Name Holder discloses the identity of the licensee to a party providing the Registered Name Holder reasonable evidence of actionable harm.
>
> Under Section 3.7.7.3 of the RAA, eNom may withhold the identity of a licensee indefinitely. eNom is under no obligation to disclose the name of the licensee, even if eNom is presented with reasonable evidence of actionable harm. However, eNom must accept liability for harm caused by the wrongful use of the Registered Name as long as eNom continues to withhold the identity of the licensee.

Id.

This statement does not grant Balsam or any non-party the right to seek a remedy against the Registered Name Holder. Balsam's claim that this email acknowledges that Balsam was harmed by spam, that Balsam is a member of the class intended to be protected by Paragraph 3.7.7.3, that eNom would be liable to Balsam if it withheld the identity of the licensee, and that it "implicitly affirmed Balsam's right to take action against eNom" is factually unsupported. *See* Opening Brief, p. 48. Rather, the email is consistent with the interpretation of the agreement as set forth by the District Court in this case, by the court in *Solid Host*, and by the court in *Register.com,* as well as by ICANN itself.

ICANN's amicus brief also directly contravenes Plaintiffs argument that the "no third-party beneficiaries clause" is against public policy. As explained by ICANN, that provision is an important component of its regulatory environment, ensuring that Internet domain name policy is centrally coordinated under the ICANN regulatory umbrella.

C. Not Every Wrong Has A Remedy

Balsam argues that every wrong must have a remedy, and because he was wronged, the District Court was required to "do equity" and grant Balsam a remedy. *See* Opening Brief, p. 34-35. His argument boils down to "Somebody has to pay."

Balsam claims that "the district court in the related action found that Balsam was harmed by the spams [sic] and entered judgment in Balsam's favor" even though the district court made no such findings. Opening Brief, p. 15. The district court found only that: (1) Balsam's complaint alleged that the Angeles lawsuit defendants were responsible for the unlawful transmittal of 1,1,125 email messages; (2) Balsam sought statutory damages in the amount of $1,000 per email; and (3) Balsam's Motion for Default Judgment complied with Rule 55(b)(2). ER 223-225. The court did not make any findings as to whether or not Balsam was wronged.

Additionally, "doing equity" in this action would reward Balsam for his own procedural failings. In response to Balsam's email request for the identity of the registrant, Tucows informed Balsam that it would not provide the information sought without a court order. ER 219. Balsam chose not to subpoena the information, insisting that he had a right to enforce the RAA. *Id.* Balsam then chose to pursue other avenues to obtain the information, even signing up for an <adultactioncam.com> account in question in order to determine where the charges would go. ER 036-037. He subpoenaed the payment processor. *Id.* When those avenues led to dead ends, Balsam still failed to subpoena Tucows.

The reason he gives for his failure is that "Defendants do not respond to subpoenas anyway." ER 061, 063, 072-073, 090-091. In the normal case, however, a party seeking information from a third-party files third-party discovery. If the third-party does not respond, the party seeking discovery files a motion to compel. If the motion to compel is not answered, the party seeks sanctions, including a finding of contempt. Balsam had no problem finding and serving Tucows for purposes of filing this action.[8]

To explain away his failings, Balsam contends that Paragraph 3.7.7.3 does not require a subpoena to obtain information. Again, however, Paragraph 3.7.7.3 does not confer any benefit on Balsam and is not a term of the ICANN/Tucows agreement. Further, Balsam's claim that requiring a person to use legal process creates a chicken-and-egg problem because he would be required to file suit against someone whose identity was unknown to him (ER 040-041, 072) ignores two core facts of which he is clearly aware: he can file suit against Doe defendants

[8] To bolster his argument that a subpoena would have been futile, Balsam attaches a declaration from a third party asserting that Tucows did not respond to two subpoenas served in an unrelated lawsuit which sought the "true registration information for several domain names." ER 091. These attestations, however, do not excuse Balsam's failure to obtain the information he seeks through proper discovery channels.

(this case names Does 1-100) and, most importantly, that he was already a plaintiff in an existing action.[9]

The District Court committed no error. Balsam failed to exhaust the avenues of relief that were available to him. The wrongs suffered by Balsam—to the extent he suffered any—are of his own doing, and equity does not aid one who is the sole cause of his own misfortune. *Biescar v. Czechoslovak-Patronat*, 302 P.2d 104, 114 (1956).

IV. THE DISTRICT CORRECT CORRECTLY DISMISSED BALSAM'S CONSPIRACY CLAIM

Under California law, civil conspiracy is not a separate and distinct cause of action. Conspiracy is "a legal doctrine that imposes liability on persons who, although not actually committing a tort themselves, share with the immediate tortfeasors a common plan or design in its perpetration." *See Applied Equipment Corp. v. Litton Saudi Arabia Ltd.*, 7 Cal.4th 503, 510, 869 P.2d 454, 28 Cal.Rptr.2d 475 (1994).

As the District Court held, in order for a civil conspiracy to be actionable, an underlying tort must be committed. ER 019. Here, no such tort was committed. Nothing in the RAA required Tucows to provide Balsam the identity of its customer's information upon a simple letter request to do so, and Paragraph 3.7.7.3

[9] Notably, Balsam compounded his procedural errors in this lawsuit by failing to file a notice of related case. ER 038-040.

is not a term of the RAA that binds Tucows. Because the predicate for Balsam's conspiracy claim fails, Balsam's claim for civil conspiracy necessarily fails as well. Mr. Karkas and Mr. Noss are not liable to Balsam.

V. THE COURT DID NOT ABUSE ITS DISCRETION BY DISMISSING THE CASE WITH PREJUDICE

Balsam's claim that the District Court erred in dismissing the case without giving him an opportunity to amend misses the mark. In his Opposition to Tucows' Motion to Dismiss, Balsam described new claims that he could bring against Tucows, but he never actually brought any such claims. Further, at the time of the hearing, Balsam had an absolute right to amend his complaint, but he neglected to do so. *See* Fed.R.Civ.P. 15(a). His failure to amend, therefore, constitutes a waiver of the right. *See Shaver v. Operating Engineers Local 428 Pension Trust Fund*, 332 F.3d 1198, 1201 (9th Cir. 2003).

On appeal, Balsam does not argue that he can state facts that will cure his defective complaint, nor could he, because, as he conceded at oral argument, his lawsuit turns on whether or not he is a third party beneficiary to the contract:

> **THE COURT:** As I understand this, the plaintiff is basically trying to sue as a third-party beneficiary on the agreement between ICANN and Tucows; is that right?
>
> **MR. BALSAM:** Yes
>
> **THE COURT:** Not on the agreement between Tucows and the registered name holder?

> **MR. BALSAM:** Tucows is the registered name holder, Your Honor.
>
> **THE COURT:** Well, Tucows went into an agreement, did they not, with—I guess with your—not with your client, but with somebody who had some impact on your client.
>
> **MR. BALSAM:** That's correct….

ER 023. As argued above, neither the RAA or Paragraph 3.7.7.3 of that agreement confer third-party beneficiary status on Balsam. Accordingly, the District Court committed no error.

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VI. CONCLUSION

When contract language is clear on its face and supported by substantial case law and a compelling, consistent interpretation by the party who drafted it, the Court must give it effect. In the present case, the District Court properly ruled that Balsam's claims are barred by the contract on which he seeks to build his case, and properly dismissed the Complaint. Accordingly, and for the foregoing reasons, the Judgment of the District court in favor of Defendants/Appellees should be affirmed in all respects.

DATED: April 20, 2010

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that this brief is in compliance with Rule 32(a)(7)(B) of the Federal Rule of Appellate Procedure. This brief contains less than 14,000 words and was prepared in 14-point Times New Roman font.

STATEMENT OF RELATED CASES

Defendants/Appellees are not aware of any related case, as defined in Circuit Rule 28-2.6, pending in this Court.

DATED: April 20, 2010

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