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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA – SAN FRANCISCO

DANIEL L. BALSAM, an individual,

Plaintiff,

v.

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

Defendants.

Case No. 09-CV-03585-CRB

Hon. Charles R. Breyer

NOTICE OF MOTION AND MOTION TO DISMISS PLAINTIFF'S COMPLAINT

DATE: **October 16, 2009 [Friday]**
TIME: **10:00 a.m.**
COURTROOM: **8 – 19th Floor**

Action Filed: June 26, 2009

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

NOTICE IS GIVEN that on October 16, 2009 at 10:00 a.m. in Courtroom "8" of the above-entitled Court located at the 19th Floor, 450 Golden Gate Ave., San Francisco, California 94102, Defendants TUCOWS INC., TUCOWS CORP., ELLIOT NOSS, and PAUL KARKAS, ("Defendants") will move the court to dismiss the action without leave to amend, pursuant to Federal Rules of Civil Procedure ("FRCP") section 12(b)(6) on the grounds that the Complaint of plaintiff DANIEL L. BALSAM ("Plaintiff") fails to state a claim upon which relief can be granted. This motion is based on the following grounds:

///

1. Plaintiff's First Cause of Action for "Breach of Contract" fails to state facts sufficient to constitute a claim for relief pursuant to FRCP 12(b)(6).

2. Plaintiff's Second Cause of Action for "Negligence" fails to state facts sufficient to constitute a claim for relief pursuant to FRCP 12(b)(6).

3. Plaintiff's Third Cause of Action for "Civil Conspiracy" fails to state facts sufficient to constitute a claim for relief pursuant to FRCP 12(b)(6).

4. Plaintiff's Fourth Cause of Action for "Declaratory Relief" fails to state facts sufficient to constitute a claim for relief pursuant to FRCP 12(b)(6).

The motion will be based on this Notice of Motion, the Memorandum of Points and Authorities, the Request for Judicial Notice, and the pleadings and papers filed.

Counsel for Defendants met and conferred with Plaintiff's counsel regarding this motion by way of correspondence and telephone on August 11, 2009 and August 12, 2009.

DATED: August 12, 2009

ADORNO YOSS ALVARADO & SMITH
A Professional Corporation

By: /s/ Bret A. Fausett
BRET A. FAUSETT
IMANI GANDY

Attorneys for Defendants Tucows Inc., Tucows Corp., Elliot Noss, and Paul Karkas

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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION AND SUMMARY OF ARGUMENT

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 a previous 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. The action is poorly conceived and inadequately researched. All of Balsam's theories rest on the facially false premise that he is an intended third party beneficiary of a contract to which he is not a party, which does not mention Balsam by name or class, and which contains an express "No Third-Party Beneficiaries" clause. As a fallback, Balsam argues that Defendants had a duty to Balsam to reveal the identities and contact details of its customers upon a simple letter request to do so, which Defendants breached. Balsam completes his Complaint with causes of action for "conspiracy" and "declaratory judgment," which must be dismissed with the other two.

In their motion, Defendants will establish the following points of law, requiring dismissal of Balsam's Complaint:

(1) Balsam's First Cause of Action is based on a theory that he is a third-party beneficiary of a registration accreditation agreement between Defendant Tucows, Inc. and a non-party Internet governance body. That agreement, however, contains a clause titled "No Third Party Beneficiaries" which specifically refutes Balsam's theory. Under California's intent test, Balsam is not a third-party beneficiary. Moreover, Balsam's claim for relief is based on a contractual misreading. Accordingly, his First Cause of Action must be dismissed. *See Martinez v. Socoma Cos.*, 11 Cal.3d 394, 113 Cal.Rptr. 585, 521 P.2d 841 (1974); *U.S. v. FMC Corp.*, 531 F.3d 813 (9th Cir. 2008); *Register.com v. Verio, Inc.*, 356 F.3d 393 (2d Cir. 2004).

(2) Balsam's Second Cause of Action seeks to convert his third-party beneficiary status into status as a foreseeable plaintiff for purposes of negligence. Since the First Cause of Action fails, so must this one. For a negligence claim to stand, a defendant must owe

the plaintiff a duty of care. Under California law, a defendant has no duty to protect another from harm, absent a special relationship of custody or control. *See Hoyem v. Manhattan Beach City School Dist.*, 22 Cal.3d 508, 150 Cal.Rptr. 1 (1978); *Nally v. Grace Comm. Church*, 47 Cal.3d 278, 763 P.2d 948 (1988).

(3) Balsam's Third Cause of Action for "civil conspiracy" is not actionable unless a wrongful act has been committed and damages result. As Balsam's tort cause of action is without merit, this cause of action similarly must be dismissed. *See Applied Equip. Corp. v. Litton Saudi Arabia Ltd.*, 7 Cal.4th 503, 869 P.2d 454 (1994).

(4) Balsam's Fourth Cause of Action for declaratory judgment must be dismissed because Balsam and Tucows do not have any legal relationship that requires their respective rights and obligations to be determined judicially. See, Cal. Code of Civ. Pro. §1060. *Tiburon v. Northwestern Pacific Railroad Co.*, 4 Cal.App.3d 160, 170, 84 Cal.Rptr. 46 (1970); *Cardellini v. Casey*, 181 Cal.App.3d 389 (1986).

II. FACTS

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." *See*, Complaint, at ¶¶29, 37. The case was removed to this Court as *Balsam v. Angeles Technology Inc., et al.*, No. CV 06-04114 JF. *Id.* at ¶37. On March 28, 2008, Balsam received a default judgment against one or more defendants, in the amount of $1,250,000. *Id.* at ¶¶57-58. To date, Balsam has been unable to collect on the default judgment. *Id.* at ¶¶60-66.

Alleged Conduct by Defendants. Defendant Tucows, Inc. ("Tucows") is a publicly traded Pennsylvania corporation with a principal place of business in Toronto, Ontario. Complaint, at ¶14; *See generally*, Tucows Investor Relations Information, Corporate Website, at http://tucowsinc.com/investors/.[1] Tucows is a registrar of domain names, accredited to sell domain

[1] Tucows Corp., also a named defendant, is a subsidiary of Tucows, Inc., formerly named Boardtown Corporation, that was acquired in 2004. Tucows Corp. is the producer and operator of the

name registrations by the Internet Corporation for Assigned Names and Numbers ("ICANN").[2] Complaint, at ¶¶3, 25. A copy of the Registrar Accreditation Agreement ("RAA") between Tucows and ICANN is attached as Exhibit "A" to the Defendants' Request for Judicial Notice, filed herewith. Tucows is the registrar of record for the domain name "adultactioncam.com." *Id.* 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). *Id.* at ¶4.[3] In October, 2005, when Balsam first used the whois database to locate the registrant of "adultactioncam.com," it found the name and address for "Angeles Technology, Inc.," the company it ultimately sued in the underlying action. *Id.* 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." *Id.* 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. *Id.* at ¶¶51-54. Tucows did not release its customers' information to Balsam. *Id*. at ¶73.

All of Balsam's claims for relief rest on his assertion that Defendants had a legal duty to release a customer's contact details to Balsam upon his letter requests. He attempts to grounds this alleged duty first in contract (Complaint, at ¶¶82-93) and then in negligence (*Id.* at ¶¶94-105). For the

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Platypus Billing System and Wombat Help Desk for Internet service providers. Tucows Corp. has no involvement in domain name registrar operations and is not an ICANN-accredited registrar. The only allegation against Tucows Corp. in the Complaint is at Paragraph 23, where Plaintiff makes the wild suggestion that the differences between the two corporations are designed to keep Balsam from obtaining monetary relief. *See*, Tucows/Boardtown Joint Press Release for Corporation Acquisition, http://tucowsinc.com/news/2004/04/tucows-to-acquire-boardtown-leading-provider-of-billing-and-customer-care-suite/.

[2] 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).

[3] Ironically, one of the principal reasons customers opt into the Tucows' privacy service is to keep their home addresses, telephone numbers and email addresses away from those who would send them commercial solicitations such as spam.

contract claim, Balsam contends that he is an intended third-party beneficiary of the RAA between ICANN and Tucows. *Id.* at ¶¶43-44, 84-85. 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.* at ¶¶43-44, 84-85. 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.

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

III. ARGUMENT

A. STANDARD FOR A MOTION TO DISMISS

The standards regarding motions brought under Federal Rule of Civil Procedure Rule 12(b)(6) are well known and will not be restated here, except to add two matters to the record by way of judicial notice. In evaluating a complaint on a motion, a court may take judicial notice of matters of public record in accordance with Federal Rule of Evidence 201 without converting the motion to dismiss to a motion for summary judgment. *Lee v. City of Los Angeles*, 250 F.3d 668, 688-689 (9th Cir. 2001) (citing *Mack v. South Bay Beer Distributors, Inc.*, 798 F.2d 1279, 1282 (9th Cir. 1986)). Courts may take judicial notice of documents outside of the complaint that are capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned. Fed. R. Evid. 201(d); *Wietschner v. Monterey Pasta Co.*, 294 F.Supp.2d 1117, 1109 (N.D. Cal. 2003). Courts can take judicial notice of such matters when considering a motion to dismiss. 294 F.Supp.2d at 1109; *MGIC Indem. Corp. v. Weisman*, 803 F.2d 500, 504 (9th Cir. 1986). *See also*, Kiesel, et al., Matthew Bender Practice Guide: Cal. Pretrial Civil Procedure, §11.28[2] (where exhibits of which the court takes judicial notice conflict with allegations of the Complaint, the exhibits should take precedence).

Here, the Court is entitled to and should take judicial notice of the Registrar Accreditation Agreement (hereafter "RAA") (identified in the Complaint as the "ICANN Agreement") referenced in Balsam's Complaint. The RAA is the predicate for all of Balsam's causes of action and is specifically

mentioned in Paragraphs 3, 5, 30, 35, 43-44, 81, 83-85, 96-98, 100-01, 109, 112, and 114. While Balsam appended nine separate documents to his Complaint, he failed to append a copy of the contract to which he claims to be a third-party beneficiary. Balsam's allegations can be seen in their true light only by reference to the entirety of the contract, including directly controlling provisions not cited in the Complaint. Similarly, ICANN, one of the parties to the RAA, has interpreted one of the controlling RAA provisions at issue in an amicus brief filed with the U.S. Second Circuit Court of Appeals ("ICANN Amicus Brief"). The ICANN Amicus Brief contains helpful background on the proper scope and interpretation of the RAA. It too is publicly accessible and the Court is entitled to and should consider by judicial notice. Both of these documents are attached to Defendants' Request for Judicial Notice.

B. PLAINTIFF FAILS TO STATE A CAUSE OF ACTION FOR BREACH OF CONTRACT

1. No Third-Party Beneficiaries

Balsam's lead cause of action, for breach of contract, is based entirely on the allegation that "Balsam is one of the intended third-party beneficiaries of paragraph 3.7.7.3 of the ICANN Agreement." Complaint, at ¶85. Balsam claims that he is an intended third-party beneficiary of Paragraph 3.7.7.3 (quoted in full at Complaint, ¶43 and in the RAA, attached as Exhibit "A" to the Defendants' Request for Judicial Notice). This is wrong for two independent reasons: the RAA specifically disclaims any intention to benefit third-parties and Balsam misreads the word "party" in Paragraph 3.7.7.3 to mean "third-party." These will be addressed in turn.

First, Paragraph 5.10 of the RAA unambiguously reads:

> *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.*

See RAA, Exhibit "A" to Tucows' Request for Judicial Notice, at ¶5.10.

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. The California Supreme Court

long ago set out the standards by which claims for third-party beneficiary status are to be judged. *See Martinez v. Socoma Cos.*, 11 Cal.3d 394, 113 Cal.Rptr. 585, 521 P.2d 841, 844-45 (1974) (adopting Restatement view that persons having enforceable rights under contracts to which they are not parties must be either creditor beneficiaries or donee beneficiaries). *Martinez* established an intent test, in which third-party beneficiary status for donee beneficiaries is determined by what the parties to the contract intended. "The test for determining whether a contract was made for the benefit of a third person is whether an intent to benefit a third person appears from the terms of the contract." *Souza v. Westlands Water Dist.*, 135 Cal.App.4th 879, 891, 38 Cal.Rptr.3d 78, 88 (Cal. Ct. App. 2006).

Here, the intent behind the RAA 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 First Cause of Action 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 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 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. 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 (2d 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.' "); 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").

More specifically, this precise clause of the RAA 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), 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 new domain name registrations. Using the data it gathered from Register.com's servers, Verio then 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 the restrictions and continued to mine the 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 (attached to Defendants' Request for Judicial Notice as Exhibit "B"). 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 aggreived 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.

Id., 356 F.3d at 399. The same result is warranted here. Even assuming that Balsam is the "party" referenced in the last sentence of Paragraph 3.7.7.3 (see textual argument to the contrary below), his exclusive remedy for any violation of that provision was to petition ICANN. He has no remedy here.

Independently, this Court should dismiss Balsam's claims for a second reason. Balsam's claims are based on an intentional misreading of the RAA. Paragraph 3.7.7.3 provides:

> 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.

RAA, at 3.7.7.3. Emphasis is added above to illustrate Balsam's misreading. In his Complaint, Balsam claims that a Registered Name Holder must disclose registration contract information "to anyone who presents the Registered Name Holder with reasonable evidence of actual harm." Complaint, at P.84. That is *not* what the language provides. The last sentence of Paragraph 3.7.7.3 does not say "to anyone," it says "to a party." The provision applies when either *ICANN* or *the registrar* asks for

information from a Registered Name Holder.[4] 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." This interpretation also makes sense in light of Paragraph 5.10, discussed above, which disclaims liability to or any intention to benefit third-parties.

Third-party beneficiary status is the linchpin of all of Balsam's claims. The RAA, however, specifically disclaims an intent to benefit Balsam. The provision on which Balsam relies also specifically provides that its provides rights to "a party" which Balsam misreads to mean "anyone" or "a third-party." Against the case law and any plain reading of the RAA, Balsam's claims are unreasonable, unfounded in either fact or law, and must be dismissed with prejudice.

C. PLAINTIFF FAILS TO STATE A CAUSE OF ACTION FOR NEGLIGENCE

An action for negligence must allege (1) defendant's legal duty of care toward plaintiff; (2) defendant's breach of that duty; (3) injury to Plaintiffs as a result of the breach- proximate or legal cause; and (4) damage to plaintiff. *Hoyem v. Manhattan Beach City School District*, 22 Cal.3d 508, 514, 585 P.2d 851 (1978); Witkin, Cal. Proc. 4th (1997) Pleadings § 537, p. 624. A duty of care owed to a plaintiff is a prerequisite to establishing a claim for negligence. *Beauchamp v. Los Gatos Golf Course*, 273 Cal.App.2d 20, 32, 77 Cal.Rptr. 3d 130 (1969). "Related to the concept of negligence is the tort law that a person is ordinarily not liable for the actions of another and is under no duty to protect another from harm, in the absence of a special relationship of custody or control." *Burns v. Neiman Marcus Group, Inc.*, 173 Cal.App.4th 479, 487 citing *Nally v. Grace Community Church*, 47 Cal.3d 278, 279, 253 Cal.Rtpr. 97 (1988). The existence and scope of a legal duty are questions for the court. *Merrill v. Navegar, Inc.*, 26 Cal.4th 465, 477 (2001). Moreover "California courts have explicitly rejected the concept of universal duty. It must not be forgotten that 'duty' got into our law for the very purpose of combating what was then feared to be a dangerous delusion…that the law might countenance legal redress for all foreseeable harm." *The Mega Life and Health Insurance Co. v.*

[4] In the typical case, Registered Name Holders are not also registrars, so the idea that either ICANN or the registrar party would need and ask for this information is understandable.

Superior Court, 172 Cal.App.4th 1522, 1527, 92 Cal.Rptr.3d 399 (2009) citing *Dillon v. Legg*, 68 Cal.2d 728, 734, 69 Cal.Rptr. 72 (1968).

Here, neither Tucows nor the individual Defendants owe Plaintiff a duty of care. Balsam's logic is that he is a foreseeable plaintiff *because he is a third-party beneficiary*. Specifically, Paragraphs 96-98 of the Complaint, the heart of Balsam's negligence claim, seek to convert third-party beneficiary status into a common law duty of due care. These allegations, however, are belied by the express terms of the ICANN Agreement. The ICANN Agreement concerns the policies and procedures applicable to the provision of Registration Services, and the duties which Registrars (such as Tucows) undertake in order to maintain their status as ICANN-accredited Registrars. The ICANN Agreement does not benefit persons or entities not a party to the Agreement, and accordingly, does not establish any duty of care owed to third parties or a relationship between the parties to the Agreement (ICANN and Tucows) and third parties such as Plaintiff.

In fact and contrary to Plaintiff's allegations, section 3.7.7.3 of the Agreement *does* limit who can present a Registered Name Holder with evidence of actionable harm. and that section *does not* contemplate third parties bringing evidence to the Registered Name Holder's attention. See Complaint, ¶¶97-98. The section refers to "a party," not a "third party." Further, Balsam's argument that he is a foreseeable Plaintiff because "Tucows and its agents refused to compensate Balsam for the damages he suffered from the wrongful use of the domain name *AdultActionCam.com*" is nonsensical. *See* Complaint ¶99. Balsam offers no support for any theory that Defendants were required by law to compensate him for an uncollected judgment obtained in an ancillary lawsuit.

At bottom, Balsam's negligence claim is a retread of its contractual claim, where common law duty has been substituted for contractual obligation, but the result must be the same. Defendants owed no duty to an unknown person, not in contractual privity, who was seeking to force the disclosure of a domain name registrant's address and contact information upon a simple letter request. Balsam had the power to seek non-party discovery, but intentionally chose to forego that opportunity. Balsam cannot now convert his own failure into the breach of a non-existent duty by Tucows. The negligence claim is

without merit, and the damages not the proximate result of any action or inaction by Tucows. The Second Cause of Action must be dismissed.

IV. PLAINTIFF FAILS TO STATE A CAUSE OF ACTION FOR CIVIL CONSPIRACY

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) ("Applied Equipment"). Further, "there is no civil action for conspiracy to commit a recognized tort unless the wrongful act itself is committed and damages result." *Mehrtash v. Mehrtash*, 93 Cal.App.4th 75, 82, 112 Cal.Rptr.2d 802 (2001). And, a conspiracy is not actionable unless a wrongful act has been committed resulting in some kind of damage to the plaintiff. *See Applied Equipment, supra*, 7 Cal. 4th 503, 511.

Here, Balsam alleges that Defendants—including Individual Defendants Noss and Karkas—"acting in agreement, concert, and conspiracy with each other, jointly and severally, as set forth fully above, acted with a common purpose to refuse to provide [Plaintiff] with the identity of Tucows' Licensee who privately registered the domain name *AdultActionCam.com*…." Complaint, ¶108. First, such allegations as to the individual Defendants are conclusory. Nowhere does the Complaint state facts supporting a conspiracy on the part of Noss and Karkas as individuals. Indeed, the conspiracy claim is precisely the sort of "everything but the kitchen sink" claim that must be dismissed. Balsam fails to allege any specific actions committed by the individuals, merely alleging that he sent letters and emails to Karkas seeking "the identity of the spammer," Complaint, ¶¶51-55, and that Karkas, after initially responding that "Tucows would abide by court orders as to producing the identity of its Licensees" refused to respond to further request to reveal the identity of the "spammer." Balsam makes no specific allegations as to Mr. Noss.

Plaintiff's allegations are insufficient to support a claim for civil conspiracy. Moreover, because the predicate for Plaintiff's conspiracy claim fails. Plaintiff's claim for civil conspiracy necessarily fails as well.

V. PLAINTIFF FAILS TO STATE A CAUSE OF ACTION FOR DECLARATORY RELIEF

Declaratory relief is not an independent cause of action; it is a remedy. *See Batt v. City and County of San Francisco*, 155 Cal.App.4th 65, 82, 65 Cal.Rptr.3d 716 (2007). California Code of Civil Procedure section 1060 sets forth the requirements for declaratory relief and states in relevant part:

> "Any person interested under a written instrument…or under a contract, or who desires a declaration of his or her rights or duties with respect to another …, may, in cases of actual controversy relating to the legal rights and duties of the respective parties, bring an original action…for a declaration of his or her rights and duties in the premises…"

According to the express statutory requirements, therefore, in order to state a claim for declaratory relief, a Plaintiff must plead some relationship, either contractual, or otherwise giving rise to "rights or duties," and that an actual and present controversy exists. *See* Cal. Code Civ. Proc. §1060; *see also Tiburon v. Northwestern Pacific Railroad Co.*, 4 Cal.App.3d 160, 170, 84 Cal.Rptr. 469 (1970); *Conroy v. Civil Service Commission*, 75 Cal.App.2d 450, 456, 171 P.2d 500 (1946); *Aetna Life Insurance Company v. Haworth*, 300 U.S. 227, 240-241 (1937).

In this case, Plaintiff contends that an "actual controversy has arisen between [Plaintiff] and Defendants as to Defendants' obligations as a domain name Registrar, the provider of private registration services for Internet domain names, and a Registered Name Holder, pursuant to the ICANN Agreement." *See*, Complaint ¶112. However, Plaintiff does not plead the existence of a relationship with Defendants giving rise to rights or duties between the parties an essential element of a claim for declaratory relief is the existence of justiciable questions relating to the rights or obligations between parties to a written instrument. Cal. Code Civ. Proc. §1060 (emphasis added); *see also Tiburon v. Northwestern Pacific Railroad Co.*, 4 Cal.App.3d 160, 170 (1970); *Conroy v. Civil Service Commission*, 75 Cal.App.2d 450, 456 (1946); *Aetna Life Insurance Company v. Haworth*, 300 U.S. 227, 240-241 (1937). In this case, Plaintiff's allegations that such rights or obligations exist between

Plaintiff and Defendants fails as a matter of law because the ICANN Agreement expressly does not create any rights or obligations between Plaintiff and Defendants.[5]

Thus, Plaintiff fails to plead an essential element of the claim for declaratory relief against Defendants, and there is no justiciable questions relating to the rights or obligations between Defendant and Plaintiff because no written agreement between the parties exists. *See, Tiburon v. Northwestern Pacific Railroad Co.*, 4 Cal.App.3d 160, 170 (1970). Plaintiff's cause of action for declaratory relief therefore fails and this court must dismiss the declaratory relief claim without leave to amend.

VI. CONCLUSION

The Complaint now before the Court is based, entirely, on a contract, the RAA, which Balsam and his counsel failed to read before filing. The RAA contains a provision directly at odds with Balsam's primary theories, which Balsam fails to even mention. The contract provision on which Balsam relies says the opposite of the meaning he gives it. Paragraph 3.7.7.3 provides rights to "a party," and Balsam pleads that "party" means "anyone," specifically "third-parties" such as himself.

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[5] Notably, Plaintiff lumps all Defendants together in an effort to plead a claim for declaratory relief. Without question, Defendants Noss and Karkas, as individuals, are not subject to the terms of the ICANN Agreement. Indeed, Plaintiff does not allege that Defendants Noss and Karkas were parties to the ICANN agreement, nor does Plaintiff allege any relationship with Defendants Noss and Karkas, either contractual or otherwise, which created rights or duties between Plaintiff on the one hand and either Defendant Noss or Defendant Karkas on the other.

Balsam then attempts to build on his errors by converting his non-existent contractual rights into a common law duty of due care. Without any regard for the facts, he adds causes of action against the CEO of his target, for conspiracy, without making any allegation that the CEO was involved in the actions he describes. All of this to recover on a default judgment issued to him against other parties. The Complaint is without merit, and Balsam should know it is without merit. The theories are so far-fetched that leave to amend would be futile. Accordingly, Defendants ask that this Court dismiss the Complaint, in its entirety, without leave to amend.

Respectfully submitted,

DATED: August 12, 2009

ADORNO YOSS ALVARADO & SMITH
A Professional Corporation

By: /s/ Bret A. Fausett
BRET A. FAUSETT
IMANI GANDY

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