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13
14 **UNITED STATES DISTRICT COURT**

15 **NORTHERN DISTRICT OF CALIFORNIA – SAN FRANCISCO**

| | | | |
|---|---|--------------------------------------|------------------------|
| 16 DANIEL L. BALSAM, |) | Case No.: | 09-CV-03585-CRB |
| |) | | |
| 17 Plaintiff, |) | PLAINTIFF’S OPPOSITION TO | |
| |) | DEFENDANTS’ MOTION TO DISMISS | |
| 18 v. |) | | |
| |) | | |
| 19 |) | | |
| 20 TUCOWS INC., a Pennsylvania corporation, |) | Date: | Oct. 16, 2009 |
| TUCOWS CORP., a Mississippi corporation, |) | Time: | 10:00 a.m. |
| 21 ELLIOT NOSS, an individual, |) | Courtroom: | 8 – 19th floor |
| PAUL KARKAS, an individual, and |) | Judge: | Hon. Charles R. Breyer |
| 22 DOES 1-100, |) | | |
| |) | | |
| 23 Defendants. |) | Action Commenced: | June 29, 2009 |

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25 [Caption – No Text]
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1 **SUMMARY OF ARGUMENT**

2 The Internet Corporation for Assigned Names and Numbers (“ICANN”) Registrar
3 Accreditation Agreement (“RAA”) requires that

4 Any Registered Name Holder that intends to license use of a domain name to a
5 third party is nonetheless the Registered Name Holder of record A
6 Registered Name Holder licensing use of a Registered Name according to this
7 provision shall accept liability for harm caused by wrongful use of the Registered
8 Name, unless it promptly discloses the identity of the licensee to a party providing
9 the Registered Name Holder reasonable evidence of actionable harm.

10 RAA at ¶ 3.7.7.3.

11 It is undisputed that: 1) By providing private Internet domain name registration services,
12 Defendant Tucows Inc. became the Registered Name Holder (i.e., legal owner) of the domain
13 name *AdultActionCam.com* (a website dedicated to promoting random sexual encounters and
14 pornography); 2) Plaintiff Daniel L. Balsam (“Balsam”) was harmed by wrongful use of the
15 domain name, as confirmed by the judgment entered by the District Court; 3) Tucows is bound
16 by the RAA; 4) Balsam presented Defendants with reasonable evidence of actual harm; and 5)
17 Defendants refused to provide Balsam with the identity of their licensee using their domain name
18 *AdultActionCam.com*.

19 Nevertheless, Defendants argue that Balsam cannot enforce ¶ 3.7.7.3 because Balsam is
20 not an intended third party beneficiary of the RAA.

21 However, the plain text of ¶ 3.7.7.3 and generally accepted rules of contractual
22 interpretation support Balsam’s argument that he *is* an intended third party beneficiary at least of
23 ¶ 3.7.7.3, even if not of the entire RAA. Every wrong must have a remedy. Specific contractual
24 provisions control over general language. It is not necessary that the RAA identify Balsam by
25 name; it is sufficient that Balsam is a member of a class for whose benefit the contract was made.
26 Courts will disregard general, catch-all “no third party beneficiary” contractual language if
27 specific provisions show an intent to benefit third parties. *Prouty v. Gores Technology Group*,
28 121 Cal. App. 4th 1225, 1233 (3d Dist. 2004); *see also Milmo v. Gevity HR Inc.*, No. C 06-
04721 SBA, 2006 U.S. Dist. LEXIS 71121 at *5 (N.D. Cal. Sep. 20, 2006).

1 Defendants' interpretation of ¶ 3.7.7.3 means that individuals like Balsam who are
2 harmed by wrongful use of privately registered Internet domain names cannot enforce the
3 paragraph and thus have no remedy, and ICANN (and only ICANN) could theoretically enforce
4 the paragraph, except that ICANN can not demonstrate "actionable harm" because ICANN is not
5 harmed by wrongful use of privately registered domain names directed at individuals like
6 Balsam. Defendants' interpretation would lead to absurd results that violate public policy and
7 make ¶ 3.7.7.3 superfluous and unenforceable by anyone, thereby exempting wrongdoers from
8 liability.

9 Defendants also argue that only ICANN or the registrar can ask for information from a
10 Registered Name Holder, but when domain names are privately registered, as is the case here,
11 the registrar/privacy service *becomes* the Registered Name Holder. A Registered Name Holder
12 does not need to ask *itself* who its licensee is. Therefore, by Defendants' own logic, ICANN
13 would be the only other party who could ask for the information. But if ICANN is the only other
14 party, then the last sentence of ¶ 3.7.7.3 would not need to say "a party"; it would expressly
15 identify "ICANN" as the *sole* party who can ask the Registered Name Holder for the identity of
16 its licensee.

17 ICANN itself rejects Defendants' interpretation of ¶ 3.7.7.3, informing Balsam in a
18 previous situation, with an identical fact pattern, that it would not take action on Balsam's behalf
19 to enforce the harm suffered by Balsam, and implicitly indicating that Balsam had the right to
20 seek a remedy from the Registered Name Holder.

21 Defendants' suggestion that they only have to produce the identity of their licensee in
22 response to a subpoena is unsupported by the plain language of the provision, and would create
23 enormous financial barriers to enforcement *and* a chicken-and-egg problem because subpoenas
24 can only be served after parties are served, but the parties cannot be identified without the
25 Registered Name Holder's response to a subpoena. Furthermore, Defendants do not respond to
26 subpoenas anyway.

27 All Defendants had to do to avoid liability was honor their responsibilities and
28 contractual obligations and provide Balsam with the identity of their licensee operating the

1 domain name *AdultActionCam.com*. Instead, to protect the identity of their spammer licensee,
2 Defendants refused to provide Balsam with the identity... and thereby chose to accept all
3 liability for their licensee's wrongful use of the *AdultActionCam.com* domain name.

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1 **I. INTRODUCTION**

2 Plaintiff Daniel L. Balsam (“Balsam”) is an advocate for protecting consumers’ rights
3 and combating unlawful Unsolicited Commercial Email (“spam”) advertising. In contrast,
4 Defendants Tucows Inc. and Tucows Corp., and their Chief Executive Officer Elliot Noss
5 (“Noss”) and Compliance Officer Paul Karkas (“Karkas”) (collectively, “Defendants”) profit by
6 assisting unlawful spammers in hiding their identities by allowing them to “privately register”
7 their Internet domain names – here, the domain name *AdultActionCam.com*. The
8 *AdultActionCam.com* website is intended to facilitate random sexual encounters, and includes
9 pornographic images and video.

10 Balsam brings this Action against Defendants for breaching the Internet Corporation for
11 Assigned Names and Numbers (“ICANN”) Registrar Accreditation Agreement (“RAA”),
12 negligence, and conspiracy, thereby harming Balsam. Paragraph 3.7.7.3 of the RAA requires
13 that a Registered Name Holder (Tucows) accept liability for wrongful use of a domain name
14 (*AdultActionCam.com*) that it licenses to a third party, unless it promptly provides the identity of
15 its licensee to a party (Balsam) presenting it with reasonable evidence of actionable harm.

16 Defendants’ Motion to Dismiss rests entirely on the theory that Balsam is not an intended
17 third party beneficiary of the RAA and cannot enforce it. However, the plain text of ¶ 3.7.7.3
18 and rules of contractual interpretation show that Balsam *is* an intended third party beneficiary at
19 least of ¶ 3.7.7.3, even if not of the entire RAA. Defendants’ interpretation would lead to absurd
20 results that violate public policy and make ¶ 3.7.7.3 superfluous and unenforceable by anyone.
21 ICANN rejected Defendants’ interpretation of ¶ 3.7.7.3. Paragraph ¶ 3.7.7.3 does not require
22 subpoenas, and Defendants do not respond to subpoenas anyway.

23 All Defendants had to do to avoid liability was honor their responsibilities and
24 contractual obligations and provide Balsam with the identity of their licensee operating the
25 domain name *AdultActionCam.com*. Instead, to protect the identity of their spammer-licensee,
26 Defendants refused to provide Balsam with the identity, and thereby chose to accept all liability
27 for their licensee’s wrongful use of their *AdultActionCam.com* domain name.

28 This Court should deny Defendants’ Motion to Dismiss.

1 **II. STATEMENT OF FACTS**

2 **A. Underlying Judgment: The District Court Found that Balsam was Harmed by Unlawful**
3 **Spam Advertising the AdultActionCam.com Website**

4 Balsam received 1,125 unlawful spams in 2005-2006 advertising the *AdultActionCam.com*
5 *com* website, Verified Complaint (“VC”) at ¶ 29, which (purportedly) facilitates random sexual
6 encounters, and displays pornographic images and video. At one time, the domain name
7 *AdultActionCam.com* was registered to Angeles Technology Inc. (“Angeles”). *Id.* at ¶ 31. But
8 since October 2005, *AdultActionCam.com* has been “privately registered” through Tucows’
9 *Contact Privacy.com* service, so anyone who queried the publicly accessible Whois database
10 would only see *ContactPrivacy.com* (i.e., Tucows), not the identity of the actual spammer. VC
11 at ¶¶ 33-36 and 38-39, Declaration of Daniel Balsam (“Balsam Decl.”) at ¶¶ 4-7 and Attach. 1-3.

12 Balsam filed suit against Angeles and other entities for violating Cal. Business &
13 Professions Code (“B&P”) § 17529.5 and the Consumers Legal Remedies Act (“CLRA”), Cal.
14 Civil Code § 1750 *et seq.*, by sending and advertising in unlawful spams. VC at ¶ 37. The
15 District Court found that Balsam was harmed by the spams and entered judgment in Balsam’s
16 favor, *id.* at ¶ 57, but Balsam has not been able to collect on the judgment to date.¹

17 **B. Defendants are in the Business of Profiting by Hiding Unlawful Spammers’ Identities**

18 Defendants profit by hiding unlawful spammers’ identities by “privately registering” their
19 Internet domain names, which means that Tucows becomes the Registered Name Holder (taking
20 legal title to the domain names) and then licenses use of the domain names back to its spammer-
21 customers. *Id.* at ¶¶ 3-4, 25-28, 33-36. This causes Tucows (dba *ContactPrivacy.com*) to appear

22 _____
23 ¹ The District Court had authorized service via email to *AdultActionCam.com*, but because
24 Defendants refused to produce the identity of their licensee, it was unclear which entity was
25 using the domain name *at the time of service*, Angeles or Belvedere St. James Ltd., the assignee
26 of Angeles’ revenues. VC at ¶¶ 62-65. Because Balsam could not prove that Angeles still
27 controlled the domain name, the court denied his motion to seize it. *Id.* at ¶ 67. Because Balsam
28 could not prove that Belvedere controlled the domain name, Balsam could not prove that
Belvedere had been served and denied Balsam’s motion to amend the judgment to name
Belvedere. *Id.* at ¶ 68. Thus, to the extent that the judgment is “uncollectible,” it is the direct
and foreseeable result of Defendants’ failure to meet their contractual obligations and provide
Balsam with the identity of their licensee. *Id.* at ¶ 69.

1 in Whois query results for privately registered domain names, instead of the true identities of the
2 spammers. *Id.* at ¶¶ 38-39, Balsam Decl. at ¶¶ 4-7 and Attach. 1-3.

3 Spammers often hide or use fake information when registering domain names, to avoid
4 detection through Whois queries,² VC at ¶ 34, even though this violates the federal CAN-SPAM
5 Act at 18 U.S.C. § 1037(a)(4), (d)(2). Without prohibiting the practice of private domain
6 registration altogether,³ ICANN built contractual language into the RAA to discourage domain
7 registrars that provide private registration services – such as Tucows – from enabling and
8 supporting private registration that causes *actionable harm*. Registered Name Holders are
9 required to accept liability for actionable harm caused by wrongful use of their domain names,
10 unless they promptly disclose the identities of their licensees to a party providing them with
11 reasonable evidence of the harm.

12 Any Registered Name Holder that intends to license use of a domain name to a
13 third party is nonetheless the Registered Name Holder of record A
14 Registered Name Holder licensing use of a Registered Name according to this
15 provision shall accept liability for harm caused by wrongful use of the Registered
16 Name, unless it promptly discloses the identity of the licensee to a party providing
17 the Registered Name Holder reasonable evidence of actionable harm.

18 RAA at ¶ 3.7.7.3.

19 By signing the RAA, Tucows voluntarily accepted liability for harm caused by wrongful
20 use of its privately registered domain name *AdultActionCam.com*, unless it *promptly* provided
21 Balsam with identity of its licensee. VC at ¶ 70. Balsam repeatedly provided Defendants –

22 ² Defendants claim in their Motion to Dismiss at 3:26-27 n.3 that “Ironically, one of the principal
23 reasons customers opt into the Tucows’ privacy service is to keep their home addresses,
24 telephone numbers and email addresses away from those who would send them commercial
25 solicitations such as spam.” Defendants are incorrect; private registration does *not* stop spam,
26 because even private registrations still include email addresses that forward spam to the
27 customer. Balsam Decl. at ¶¶ 4-5 and Attach. 1-2, showing the email address *adultactioncam.
28 com@contactprivacy.com*. Defendants *are* correct, of course, that private registration *does* hide
the customer’s name and address, replacing it with *ContactPrivacy.com* and Tucows’ address.

³ There are valid reasons for private domain registration, such as constitutionally protected
political speech. However, the public does not benefit from spammers who send false and
deceptive commercial advertisements being able to hide their identities.

1 specifically, Karkas – with “reasonable evidence of actual harm,” beginning in October 2007,
2 and asked Defendants to produce the identity of Tucows’ licensee wrongfully using the domain
3 name *AdultActionCam.com*. All Defendants had to do to avoid liability was promptly provide
4 Balsam with the identity of their licensee, but they failed to do so, promptly or ever. *Id.* at ¶¶ 40-
5 55, 57, 71-74. Instead, Defendants chose to deny their responsibility to Balsam – and to the
6 Internet community at large – by protecting the identity of a spammer found by the District Court
7 to have sent 1,125 unlawful spams. *Id.*

8 **III. LEGAL STANDARDS**

9 **A. General Rules of Contractual Interpretation**

10 California law states that “Particular expressions qualify those which are general.” Cal.
11 Civ. Code § 3534. “Under well-settled contract principles, specific provisions control over more
12 general terms.” *Chan v. Society Expeditions Inc.*, 123 F.3d 1287, 1296 (9th Cir. 1997).

13 “Nothing indicates that [] – a general provision – is meant to subsume the more specific
14 requirement for reasonable detail in the requisition certificates. Indeed, principles of construction
15 provide otherwise.” *Shawmut Bank v. Kress Associates*, 33 F.3d 1477, 1494 (9th Cir. 1994).

16 Courts must avoid a statutory construction that makes some words surplusage. *Moyer v.*
17 *Workmen’s Comp. Appeals Bd.*, 10 Cal. 3d 222, 230 (1973).

18 “The language of a contract is to govern its interpretation, if the language is clear and
19 explicit, and does not involve an absurdity.” Cal. Civ. Code § 1638.

20 **B. Contractual Enforcement by Third Party Beneficiaries**

21 “A contract, made expressly for the benefit of a third person, may be enforced by him at
22 any time before the parties thereto rescind it.” Cal. Civ. Code § 1559.

23 Persons who are only incidentally or remotely benefited by a contract cannot enforce Cal.
24 Civil Code § 1559; it must appear to have been the intention of the contracting parties to secure
25 to a third party the benefit of the contract’s provisions. *Prouty v. Gores Technology Group*, 121
26 Cal. App. 4th 1225, 1233 (3d Dist. 2004).

27 It is not necessary that a contract identify or refer to a person by name for that person to
28 be a third party beneficiary; a person can enforce a contract by showing that s/he is a member of

1 a class for whose benefit the contract was made. *Prouty*, 121 Cal. App. 4th at *1233; *Alling v.*
2 *Universal Manufacturing Corp.*, 5 Cal. App. 4th 1412, 1440 (1st Dist. 1992).

3 **C. Courts Will Interpret Contracts in a Manner that Supports Public Policy**

4 “For every wrong there is a remedy.” Cal. Civ. Code § 3523.

5 “All contracts which have for their object, directly or indirectly, to exempt any one from
6 responsibility for . . . violation of law, whether willful or negligent, are against the policy of the
7 law.” Cal. Civ. Code § 1668.

8 In the interests of public policy, Courts have found certain provisions of contracts to have
9 third party beneficiaries, *even if* there is general “no third party beneficiaries” language.

10 [T]he contract between BUSD and Vanir and Todd specifically excluded third
11 party beneficiaries from having any rights under the contract. However, “public
12 policy may dictate the existence of a duty to third parties.” Ultimately, duty is a
question of public policy.

13 *The Ratcliff Architects v. Vanir Construction Management Inc.*, 88 Cal. App. 4th 595, 605 (1st
14 Dist. 2001) (citations omitted).

15 **D. FRCP 12(b)(6) Motion to Dismiss**

16 A motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6) should be
17 granted only if it appears beyond a doubt that the plaintiff can prove *no* set of facts in support of
18 his claim which would entitle him to relief. The complaint is construed in a light most favorable
19 to the plaintiff and all properly pleaded factual allegations are taken as true. *Hearns v. Terhune*,
20 413 F.3d 1036, 1043 (9th Cir. 2005).

21 **IV. DISCUSSION**

22 **A. The Specific Language of ¶ 3.7.7.3 of the Registrar Accreditation Agreement is**
23 **Controlling as to Third Party Beneficiaries, Not the General Language of ¶ 5.10**

24 Balsam was well aware, long before filing this Action, that the RAA includes a *general*
25 “no third party beneficiaries” catch-all clause at ¶ 5.10.

26 Nevertheless, specific contractual provisions control over general contractual provisions.
27 Cal. Civ. Code § 3534; *Chan*, 123 F.3d at 1296; *Shawmut Bank*, 33 F.3d at 1494. As described
28 herein, the specific ¶ 3.7.7.3 of the RAA identifies a class of persons – those who have been
harmed by wrongful use of a privately registered domain name and provide the Registered Name

1 Holder with reasonable evidence of actionable harm – who benefit from ¶ 3.7.7.3. The RAA at
2 ¶ 3.7.7.3 demonstrates an intent to benefit these harmed persons, for upon learning the true
3 identity of the Registered Name Holder’s licensee who controls the domain name, these harmed
4 persons are better able to take legal action to protect their rights.

5 It is not necessary that the ¶ 3.7.7.3 of the RAA identify Balsam by name for him to be a
6 third party beneficiary; Balsam is a member of that class of harmed persons. *Prouty*, 121 Cal.
7 App. 4th at *1233; *Alling*, 5 Cal. App. 4th at 1440.

8 **B. Courts Have Held that Specific Provisions of Contracts Have Intended Third Party**
9 **Beneficiaries, Notwithstanding Catch-all “No Third Party Beneficiary” Provisions**

10 In *Prouty*, a case squarely on point,⁴ the Court looked past a general “no third party
11 beneficiary” statement, found that particular contractual provisions were really intended to
12 benefit third parties, and held that the plaintiffs could enforce the contract.

13 Applying the law of third party beneficiaries to the language of the contract
14 discloses GTG and Hewlett-Packard expressly intended to grant plaintiffs the
15 promises [no early termination, severance benefits] contained in section 6 of the
16 amendment. Indeed, section 6 is a classic third party provision. . . . The provision
17 expressly benefits them, and only them.

18 121 Cal. App. 4th at 1232. The court rejected GTG’s argument that Section 10.5 precluded
19 plaintiffs from becoming third party beneficiaries, finding that “If GTG and Hewlett-Packard had
20 not wanted to benefit plaintiffs, they would not have written section 6.” *Id.* at *1234. The court
21 then held that

22 [Section 10.5] cannot be harmonized with section 6. . . . In this circumstance,
23 under well established principles of contract interpretation, when a general and a
24 particular provision are inconsistent, the particular and specific provision is
25 paramount to the general provision. *Section 6 of the amendment thus is an*
26 *exception to section 10.5 of the original contract [], and plaintiffs can enforce it.*

27 ⁴ Defendant Gores Technology Group (“GTG”) agreed to buy VeriFone Inc. from Hewlett-
28 Packard. 121 Cal. App. 4th at 1227. Section 10.5 of the agreement was a general “no third party
beneficiaries” provision, but in Section 6 of an amendment to the agreement, GTG and HP
agreed to certain no-termination and severance provisions. *Id.* GTG terminated plaintiffs within
one week of closing, and offered only two months salary. *Id.* at *1229. Plaintiffs sued as third
party beneficiaries, alleging that if GTG had complied with the contract, they would have
received significantly more money. *Id.* The trial court granted GTG’s motion for summary
judgment, holding that plaintiffs were neither parties nor third party beneficiaries. *Id.* at *1230.

1 *Id.* at *1235 (emphasis added).

2 The U.S. District Court for the Northern District of California also considered the same
3 issue of general “no third party beneficiaries” language and a specific provision that seemed to
4 show intent to benefit a third party, and – citing to *Prouty* – denied the defendant’s motion to
5 dismiss. *Milmoe v. Gevity HR Inc.*, No. C 06-04721 SBA, 2006 U.S. Dist. LEXIS 71121 at *9,
6 12-13 (N.D. Cal. Sep. 20, 2006).

7 **C. Paragraph 3.7.7.3 Describes Harm and Actionability, Beyond the Signatories**

8 This Court must now determine if the *specific* ¶ 3.7.7.3 shows intent to benefit third
9 parties, notwithstanding the *general* “no third party beneficiaries” language of ¶ 5.10.

10 A Registered Name Holder licensing use of a Registered Name according to this
11 provision shall accept liability for *harm* caused by wrongful use of the Registered
12 Name, unless it promptly discloses the identity of the licensee *to a party*
providing the Registered Name Holder reasonable evidence of *actionable harm*.

13 RAA at ¶ 3.7.7.3 (emphasis added).

14 Liability in the Action turns on the phrase “to a party.” Balsam submits that “to a party”
15 really means “to a third party who has been harmed,” as described in the very same paragraph.
16 Defendants argue that “to a party” means that only signatory parties to the RAA – Defendants
17 and ICANN – can enforce ¶ 3.7.7.3.

18 **1. For Every Wrong, There is a Remedy**

19 Defendants ignore the maxim of jurisprudence expressed by Cal. Civil Code § 3523: “For
20 every wrong there is a remedy.” Even though Balsam has been indisputably harmed by the
21 *AdultActionCam.com* spam, as confirmed by judgment in his favor, Defendants argue that they
22 have no obligation to Balsam. This cannot be the case – since Balsam has been wronged,
23 Balsam must have a remedy. And ¶ 3.7.7.3 of the RAA provides such a remedy: the Registered
24 Name Holder must provide Balsam with the identity of its licensee, or accept all liability for
25 harm caused by its licensee. Defendants refused to provide Balsam with the identity; therefore,
26 Defendants accepted all associated liability.

27 The intent of the contracting parties is clear: the people who are harmed by wrongful use
28 of privately registered domain names are precisely the people who can present reasonable
evidence of actionable harm to the Registered Name Holders, and receive the benefit of: a)

1 learning the identity of Registered Name Holders’ licensees, or b) recovering their damages from
2 the Registered Name Holders. There is no benefit to ICANN or to the Registered Name Holder
3 from the Registered Name Holder providing such information to ICANN; the only benefit of
4 ¶ 3.7.7.3 is to wronged individuals, such as Balsam.

5 **2. Defendants’ Absurd Interpretation Would Make ¶ 3.7.7.3 Superfluous and**
6 **Unenforceable**

7 Defendants would have this Court believe that even though *Balsam* was indisputably
8 harmed by receiving wrongful *AdultActionCam.com* spam, only *ICANN* – as the other signatory
9 party to the RAA – could enforce the RAA. However, Defendants’ interpretation would make
10 ¶ 3.7.7.3 unenforceable by *anyone*. Under Defendants’ theory, no person who suffers harm has a
11 remedy under or can enforce ¶ 3.7.7.3, even as *ICANN* (and only *ICANN*) could theoretically
12 enforce ¶ 3.7.7.3 except that *ICANN* suffers no harm for wrongful spam received by others and
13 therefore has no standing. Defendants’ absurd interpretation, Civ. Code § 1638, would make
14 ¶ 3.7.7.3 superfluous, and such an interpretation cannot be valid. *Moyer*, 10 Cal. 3d at 230.

15 Additionally, Defendants attempt to mislead the Court by arguing in their Motion to
16 Dismiss at 8:26-9-1 that the last sentence of ¶ 3.7.7.3 “applies when either *ICANN* or *the*
17 *registrar* asks for information from a Registered Name Holder” (emphasis in original). But
18 when domain names are privately registered, as is the case here, the registrar/privacy service
19 (i.e., *Tucows*) *becomes* the Registered Name Holder. A Registered Name Holder does not need
20 to ask *itself* who its licensee is. Therefore, by Defendants’ own logic, *ICANN* would be the only
21 other party who could ask for the information. And if *ICANN* were the only other party, then the
22 last sentence of ¶ 3.7.7.3 would not need to say “a party”; it would expressly identify “*ICANN*”
23 as the *sole* party who can ask the Registered Name Holder for the identity of its licensee. The
24 phrase “a party” thus evidences intent for broader enforcement of ¶ 3.7.7.3 than just *ICANN*.

25 **3. Balsam Did Not Claim that Defendants Have to Disclose Their Licensee’s Identity**

26 In their Motion to Dismiss at 3:16-17, Defendants incorrectly claim that “All of Balsam’s
27 claims for relief rest on his assertion that Defendants had a legal duty to release a customer’s
28 contact details to Balsam upon his letter requests.” Balsam acknowledges that Defendants do *not*

1 have to disclose the identity of their licensee. They *can* choose to protect their licensee’s
2 identity. ICANN itself made that point clear to Balsam two years ago, *infra*.

3 However, Defendants’ decision means that they *shall* accept all liability for harm caused
4 by wrongful use of the domain name, pursuant to ¶ 3.7.7.3 of the RAA. Defendants cannot claim
5 that they are “surprised” by this liability; not only did Tucows sign the RAA, but Balsam’s
6 original letter and emails to Defendants, long before filing this Action, advised them of the
7 implications of refusal to provide the identity of their licensee. VC at ¶¶ 5, 8, 10, 40-56.

8 **4. ICANN Rejects Defendants’ Interpretation of ¶ 3.7.7.3**

9 In 2007, prior to and unrelated to this Action, Balsam made a complaint to ICANN
10 because a different domain registrar (Enom) refused to provide Balsam with the identity of its
11 licensee who had sent unlawful spams using privately registered domain names to hide its
12 identity. Balsam Decl. at ¶ 8.

13 Stacey Burnette, Director of Compliance at ICANN, responded to Balsam’s complaint.
14 *Id.* at ¶ 9 and Attach. 4. Burnette discussed ¶ 3.7.7.3 in general, and then addressed Balsam’s
15 complaint as to Enom in particular:

16 Under Section 3.7.7.3 of the RAA, Enom may withhold the identity of a licensee
17 indefinitely. Enom is under no obligation to disclose the name of the licensee,
18 even if Enom is presented with reasonable evidence of actionable harm.
19 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.

20 Email from Stacey Burnette, Director of Compliance, ICANN, to Daniel Balsam (Sep. 19, 2007)
21 (on file with author).

22 Tellingly, *nothing* in Burnette’s response stated that only ICANN can enforce ¶ 3.7.7.3 of
23 the RAA. In fact, just the opposite is true: Burnette implicitly acknowledged that Balsam was
24 harmed by the spam at issue, that Balsam is a member of the class intended to be protected by
25 ¶ 3.7.7.3, and that Enom would be liable *to* Balsam, if Enom continued to withhold the identity
26 of its licensee. Since Burnette also said that “ICANN will not pursue compliance action against
27 Enom” for the harm suffered by Balsam, Burnette implicitly affirmed Balsam’s right to take
28 action himself. Thus, ICANN itself rejects Defendants’ interpretation of ¶ 3.7.7.3. *Id.*

1 **5. Defendants’ Attempt to Avoid Liability By Claiming that Balsam Never Sent a**
2 **Subpoena is Unavailing**

3 Defendants have suggested that they would have provided Balsam with the identity of
4 their licensee using the domain name *AdultActionCam.com*, if Balsam had sent a subpoena. VC
5 at ¶ 51, Balsam Decl. at ¶ 10. Defendants’ argument is meritless.

6 First, nothing in the plain language of ¶ 3.7.7.3 of the RAA requires a party to send a
7 subpoena. *All* that is required is that a party “provid[e] the Registered Name Holder [with]
8 reasonable evidence of actionable harm.” *See also* Balsam Decl. at ¶ 9 and Attach. 4 (ICANN’s
9 notable omission of any mention of a subpoena requirement). To serve a subpoena, a person
10 would have to spend hundreds if not thousands of dollars just to get a lawsuit filed, because
11 subpoenas can only be served as discovery in a *pending action*. This would create an enormous
12 financial barrier against enforcement by injured consumers and businesses harmed by wrongful
13 use of domain names, thereby violating public policy by granting tortfeasors a near free pass to
14 avoid liability for their wrongful actions.

15 Second, subpoenas can only be served *after* summons are served, Cal. Code Civ. Proc.
16 §§ 2020.010, 2025.210, but there would be no way to serve a summons in a lawsuit where the
17 defendant’s identity would be unknown *prior* to a response to a subpoena. Therefore, a
18 subpoena requirement would create a procedural chicken-and-egg problem, with the direct result
19 that a harmed party could never obtain the identity of a Registered Name Holder’s licensee
20 wrongfully using its domain name.

21 Third, other domain registrars/Registered Name Holders, such as Network Solutions and
22 Enom, have provided Balsam with the identity of spammers using privately registered domain
23 names when Balsam provided the Registered Name Holders with reasonable evidence of
24 actionable harm... and without requiring a subpoena. Balsam Decl. at ¶ 11. Defendants’
25 position is untenable, and not industry standard.

26 Fourth, Balsam is informed and believes and thereon alleges that Tucows does *not*
27 respond to subpoenas anyway, so any subpoena that Balsam had sent prior to filing this Action
28 would have been futile. William Silverstein of Los Angeles, California *twice* sent subpoenas to
Tucows demanding that it produce the identity of its licensees using privately registered domain

1 names to send unlawful spam. Both times, Tucows failed to do produce the identity of its
2 licensees. Declaration of William Silverstein (“Silverstein Decl.”) at ¶¶ 2-6.

3 Finally, since ¶ 3.7.7.3 does not require a subpoena, even *if* Balsam now sent a subpoena
4 and Defendants finally produced the identity of their licensee using the *AdultActionCam.com*
5 domain name in response to the subpoena, such production – two years after Balsam’s initial
6 request in October 2007, VC at ¶ 40 – is not *prompt* as required by ¶ 3.7.7.3.

7 **D. Defendants’ Interpretation of ¶ 3.7.7.3 Disregards Public Policy**

8 Contracts should be interpreted in a manner that serves the public interest.

9 “In choosing among the reasonable meanings of a promise or agreement or a term
10 thereof, a meaning that serves the public interest is generally preferred.” (*Rest.2d*
11 *Contracts*, § 207, p. 106.) . . . Barring plaintiffs from enforcing section 6 despite
12 its clear intent to benefit them would contravene the statutory policy of granting a
remedy to those expressly benefited as third party beneficiaries, and would render
section 6 of the amendment a nullity.

13 *Prouty*, 121 Cal. App. 4th at 1235. And *Ratcliff Architects* held that “public policy may dictate
14 the existence of a duty to third parties,” even if a contract “specifically excluded third party
15 beneficiaries from having any rights under the contract.” 88 Cal. App. 4th at 605.

16 Balsam admits that the RAA is not written as clearly as it might have been. Defendants
17 argue in ¶ 3.7.7.3 that “party” in “to a party” really only means a signatory party to the RAA.
18 But if Defendants’ interpretation were correct, then ¶ 3.7.7.3 does not serve the public interest,
19 because the very people who are harmed by wrongful use of privately registered domain names
20 would have no remedy, and while ICANN could theoretically enforce ¶ 3.7.7.3, ICANN is not
21 harmed by spams received by anyone else and therefore ICANN would have no standing to bring
22 claims on behalf of anyone else.

23 Additionally, Cal. Civil Code § 1668 states that “All contracts which have for their
24 object, directly or indirectly, to exempt any one from responsibility for . . . violation of law,
25 whether willful or negligent, are against the policy of the law.” Here, it is undisputed that
26 Tucows is the Registered Name Holder – the legal owner – of the *AdultActionCam.com* domain
27 name, and Tucows licenses use of the domain name to its customer. Under Defendants’
28 interpretation of ¶ 3.7.7.3, Defendants have no obligation to provide Balsam with the identity of

1 their licensee, *and* Defendants have no obligation to accept liability for harm caused by wrongful
2 use of *AdultActionCam.com*. Defendants’ interpretation would exempt them from any
3 responsibility for violations of law, which would violate Cal. Civil Code § 1668.

4 The only logical interpretation of ¶ 3.7.7.3, consistent with public policy, is that a third
5 party (Balsam) who is harmed by the wrongful use of a privately registered domain name
6 (*AdultActionCam.com*) can present (without a subpoena) reasonable evidence of such actionable
7 harm to the Registered Name Holder (Tu cows), who is then obligated to provide the third party
8 (Balsam) with the identity of its licensee, or to accept liability for the harm.

9 **E. Defendants’ Authority is Distinguishable and Not Binding on this Court**

10 Defendants cite several cases in their Motion to Dismiss at 5:11-7:16, but never explain if
11 or how any of the cases apply to Balsam’s claim, which is that Balsam is an intended third party
12 beneficiary of the specific ¶ 3.7.7.3 of the RAA, *despite* the general catch-all statement of ¶ 5.10.

13 Defendants’ Ninth Circuit authority, *U.S.A. v. FMC Corp.*, is distinguishable on its face,
14 because even the text quoted in the Motion to Dismiss at 6:23-24 states that “The Consent
15 Decree does contain a paragraph that discusses rights of non-parties to the Decree, but *that*
16 *paragraph* disclaims an intent to grant rights to third parties.” 531 F.3d 813, 821 (9th Cir. 2008)
17 (emphasis added). Here, it is *not* the case that the *same paragraph* that gives rights to non-
18 parties simultaneously disclaims an intent to grant rights to those third parties. Unlike *FMC*,
19 Balsam claims that there is a specific paragraph, ¶ 3.7.7.3, that is an *exception* to the general “no
20 third party beneficiaries” statement of ¶ 5.10. Moreover, the *FMC* court also came to its holding
21 by “factoring in the presumption against third-party enforcement for government consent
22 decrees.” 531 F.3d at 822. This Action does not involve a government consent decree.

23 Defendants’ Second Circuit authority, *Register.com Inc. v. Verio Inc.*, 356 F.3d 393 (2d
24 Cir. 2004), is not binding on this Court, is based on a completely different fact pattern, and
25 involved a different section of the RAA. Defendants argue in their Motion to Dismiss that
26 Balsam has no remedy pursuant to ¶ 3.7.7.3 and his only recourse was to petition ICANN.
27 Motion to Dismiss at 8:13. However, Balsam previously *did* complain to ICANN under identical
28 circumstances, *supra*; ICANN’s response was that the Registered Name Holder had a choice, to

1 provide Balsam with the identity of the licensee or to accept liability for the harm, but “ICANN
2 will not pursue compliance action against [the Registered Name Holder].” Balsam Decl. at ¶¶ 8-
3 9 and Attach. 4. Thus, ICANN implicitly confirmed *Balsam’s* right to seek damages against the
4 Registered Name Holder, for the harm that ICANN acknowledged that Balsam suffered.

5 **F. Balsam Stated a Valid Cause of Action for Negligence**

6 Defendants’ Motion to Dismiss as to Balsam’s negligence cause of action is based on the
7 theory that Defendants owe no duty to Balsam. As discussed above, the language and context of
8 ¶ 3.7.7.3, public policy, and ICANN’s email to Balsam confirm that Defendants *do* owe a duty to
9 Balsam – the duty to either provide Balsam with the identity of their licensee operating the
10 domain name *AdultActionCam.com*, or to accept all liability for harm arising from wrongful
11 spamming advertising the *AdultActionCam.com* website.

12 **G. Balsam Sufficiently Pled Conspiracy**

13 Balsam alleged that Karkas refused to provide him with the identity of Defendants’
14 licensee wrongfully using *AdultActionCam.com*. VC at ¶¶ 22, 40-56, 71-72, 78-79, 88-92.
15 Balsam alleged that Noss is the President and Chief Executive Officer of Tucows, *id.* at ¶ 21, and
16 as such, has knowledge of and is responsible for the actions of Tucows. Defendants’ allegation
17 in their Motion to Dismiss at 11:17-18 that “Nowhere does the Complaint state facts supporting a
18 conspiracy on the part of Noss and Karkas as individuals” is therefore false.

19 Officers of corporations can be held liable for their personal unlawful conduct. Cal.
20 Corp. Code §§ 204(a)(10), 309(c), 317(c); *see also Frances T. v. Village Green Owners Assn.*, 42
21 Cal. 3d 490, 503 (1986). Balsam sufficiently pled that Noss and Karkas acted with a common
22 purpose to refuse to provide Balsam with the identity of Tucows’ licensee wrongfully using the
23 domain name *AdultActionCam.com*, and to refuse to compensate Balsam for the harm suffered
24 by Balsam. VC at ¶¶ 108-109.

25 **H. Balsam Properly Asked for Declaratory Relief**

26 Defendants argue in a circular manner that a person cannot bring a cause of action for
27 declaratory relief under Cal. Code of Civil Procedure § 1060 unless that person has already
28 proven that certain rights or obligations exist. Of course, if those rights or obligations were

1 already proven, then there would be *no need* to seek declaratory relief under Section 1060.
2 Whether or not there are rights or obligations between Balsam and Defendants is precisely what
3 is at issue in this Action; Defendants fail to realize that the whole *point* of Section 1060 is to
4 provide a mechanism for a person to obtain a court declaration of rights and obligations.

5 **I. Balsam Could Amend the Complaint to Allege Additional Facts That Would Entitle**
6 **Him to Relief**

7 A motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6) should be
8 granted *only* if it appears beyond a doubt that the plaintiff can prove *no* set of facts in support of
9 his claim which would entitle him to relief. *Hearns*, 413 F.3d at 1043.

10 **1. Tucows Has “Direct” Liability for the Spams Under B&P § 17529.5 and the CLRA**

11 Even if this Court were to find that Balsam is not an intended third party beneficiary of
12 ¶ 3.7.7.3 of the RAA, Balsam can plead that Tucows has “direct” liability for the 1,125 unlawful
13 spams advertising *AdultActionCam.com* pursuant to B&P § 17529.5 and the CLRA because
14 Tucows is the undisputed Registered Name Holder – the legal owner – of *AdultActionCam.com*,
15 which means that *Tucows* advertised in, and is liable for, the 1,125 unlawful spams that led to the
16 underlying judgment. B&P § 17529.5(a), B&P § 17529(j), (k). That Defendants, for monetary
17 consideration, allowed some third party to use their domain name *AdultActionCam.com* does not
18 eliminate their liability,⁵ just as one who continues to supply a product knowing that the recipient
19 is using it to infringe trademarks is liable for contributory infringement in circumstances
20 indicating willful blindness. *Lockheed Martin Corp. v. Network Solutions Inc.*, 985 F. Supp.
21 949, 960-61 (C.D. Cal. 1997) (citations omitted).

22 **2. Defendants Further Violated the CLRA and B&P § 17200**

23 Balsam could also amend the complaint to allege that – in addition to the blatant CLRA
24 violations *within* the spams themselves (e.g., misrepresenting that services were free,
25 misrepresenting the name and address of the sender, misrepresenting the number of members of

26
27 ⁵ See also *Silverstein v. E360Insight.com et al*, No. CV 07-2835 CAS (VBKx) at *6 (C.D. Cal.
28 Oct. 1, 2007), a case strikingly similar Action, in which the District Court denied Moniker’s
motion to dismiss because plaintiff alleged that Moniker was the legal owner of privately
registered domain names used in unlawful spams. *Silverstein Decl.* at ¶ 7 and Attach. 1.

1 the *AdultActionCam.com* website) – Defendants violated the CLRA by misrepresenting the
2 source of services, by claiming that Tucows is the source when in fact its privacy-protected
3 licensee is the source. Cal. Civ. Code § 1770(a)(2). Tucows also misrepresented the nature of
4 its affiliation/connection with its customer, which is prohibited by Civil Code § 1770(a)(3).

5 Balsam could also amend the complaint to add a cause of action for B&P § 17200 (Unfair
6 Competition), based on violations of the CLRA. B&P § 17200 supports an important public
7 policy in California to prohibit deceptive advertising practices. *See, e.g., Colgan v. Leatherman*
8 *Tool Group, Inc.*, 135 Cal. App. 4th 663, 703 (2d Dist. 2006).

9 **3. Balsam Previously Petitioned ICANN for Relief Under ¶ 3.7.7.3; ICANN Indicated**
10 **that It Would Not Get Involved but Balsam Could Enforce ¶ 3.7.7.3**

11 Balsam could also amend the complaint to add allegations about his previous attempt to
12 petition ICANN, and ICANN’s implicit acknowledgement that Balsam has standing to enforce
13 ¶ 3.7.7.3 of the RAA. *See* Balsam Decl. at ¶¶ 8-9 and Attach. 4.

14 **V. CONCLUSION**

15 Balsam is an intended third party beneficiary of ¶ 3.7.7.3 of the RAA, even if not of the
16 entire RAA. Defendants’ absurd interpretation would make ¶ 3.7.7.3 superfluous, unenforceable,
17 and a violation of public policy. No subpoenas are required. Defendants’ authority is
18 distinguishable and not binding. ICANN itself implicitly rejected Defendants’ interpretation of
19 ¶ 3.7.7.3 and acknowledged Balsam’s right to pursue damages under that specific paragraph.

20 All Defendants had to do to avoid liability was provide Balsam with the identity of their
21 licensee using their domain name *AdultActionCam.com* in pornographic spam. Defendants made
22 their choice; Defendants must take responsibility for the consequences.

23 Even if Balsam were not an intended third party beneficiary of ¶ 3.7.7.3, Balsam could
24 amend the complaint to allege direct liability against Tucows for advertising in unlawful spam,
25 in violation of B&P § 17529.5, and for violations of the CLRA and B&P § 17200.

26 Balsam respectfully asks this Court to deny Defendants’ Motion to Dismiss.

27 Dated: September 25, 2009

28 THE LAW OFFICES OF DANIEL BALSAM
By /s/ Daniel L. Balsam
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Attorneys for Plaintiff

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12
13
14 **UNITED STATES DISTRICT COURT**

15 **NORTHERN DISTRICT OF CALIFORNIA – SAN FRANCISCO**

| | | | |
|---|---|-------------------------------------|------------------------|
| 16 DANIEL L. BALSAM, |) | Case No.: | 09-CV-03585-CRB |
| |) | | |
| 17 Plaintiff, |) | DECLARATION OF DANIEL BALSAM | |
| |) | IN SUPPORT OF PLAINTIFF’S | |
| 18 v. |) | OPPOSITION TO DEFENDANTS’ | |
| |) | MOTION TO DISMISS | |
| 19 TUCOWS INC., a Pennsylvania corporation, |) | | |
| 20 TUCOWS CORP., a Mississippi corporation, |) | Date: | Oct. 16, 2009 |
| 21 ELLIOT NOSS, an individual, |) | Time: | 10:00 a.m. |
| 22 PAUL KARKAS, an individual, and |) | Courtroom: | 8 – 19th floor |
| 23 DOES 1-100, |) | Judge: | Hon. Charles R. Breyer |
| |) | | |
| 24 Defendants. |) | Action Commenced: | June 29, 2009 |

25 I, Daniel L. Balsam, declare as follows:

- 26 1. I am Plaintiff in the above-captioned action.
27
28

- 1 2. I am an attorney duly licensed to practice law before this Court, and I am co-counsel for
2 Plaintiff in the above-captioned action.
- 3 3. I make this declaration based upon personal knowledge, except those matters stated on
4 information and belief, and as to those matters I believe them to be true. I could and
5 would testify competently as to the facts herein if called upon to do so.
- 6 4. I personally queried the Whois database on July 5, 2006 and learned that the domain
7 name *AdultActionCam.com* was “privately” registered to Tucows dba
8 *ContactPrivacy.com*. Attachment 1 is a true and correct copy of my query results.
- 9 5. I personally queried the Whois database on September 21, 2009 and learned that the
10 domain name *AdultActionCam.com* was still “privately registered” to Tucows dba
11 *ContactPrivacy.com*. Attachment 2 is a true and correct copy of my query results.
- 12 6. I personally researched the registration history of *AdultActionCam.com* on September 21,
13 2009 using archives at *DomainTools.com* and learned that *AdultActionCam.com* was
14 “privately registered” to Tucows dba *ContactPrivacy.com* on numerous dates between
15 October 12, 2005 and September 21, 2009.
- 16 7. I personally queried the Whois database on January 21, 2009 and confirmed that the
17 domain name *ContactPrivacy.com* is registered to Tucows. Attachment 3 is a true and
18 correct copy of my query results.
- 19 8. On September 12, 2007, I complained to ICANN that a domain registrar, Enom
20 Inc./Whois Privacy Protection Services Inc., refused to provide me with the identity of its
21 licensee operating a privately registered domain name for which they were the Registered
22 Name Holder.
- 23 9. On September 19, 2007, I received a response via email from Stacey Burnette, Director
24 of Contractual Compliance at ICANN. This response acknowledged that I had been
25 harmed, and stated that Enom was not in violation of the Registrar Accreditation
26 Agreement (“RAA”) because Enom did not have to provide me with the identity of the
27 spammer; Enom had the choice of providing me with the identity or accepting liability.
28

1 So long as Enom refused to provide me with the identity, Enom was liable for the harm.
2 Because Enom had that choice, Enom was not violating the RAA and ICANN would not
3 take any compliance action against Enom. Attachment 4 is a true and correct copy of the
4 ICANN email to me.

5 10. I am informed and believe and thereon allege that in August or September of 2009, *after*
6 being sued, Defendants' attorney Bret Fausett suggested to my co-counsel, Timothy
7 Walton, that Defendants would have provided me with the identity of their licensee if I
8 had sent a subpoena.

9 11. In January 2008, without a subpoena or a lawsuit, Network Solutions provided me with
10 the identity of its licensee controlling a privately registered domain name, for which
11 Network Solutions was the Registered Name Holder, that the licensee was using to send
12 unlawful spam. In January 2009, without a subpoena or a lawsuit, Whois Privacy
13 Protection Services Inc. provided me with the identity of its licensee controlling several
14 privately registered domain names, for which WPPS was the Registered Name Holder,
15 that the licensee was using to send unlawful spam.

16
17 I declare under penalty of perjury under the laws of the State of California that the foregoing is
18 true and correct, and that this declaration was signed on September 25, 2009, at San Francisco,
19 California.

20 /s/ Daniel L. Balsam

21 Daniel L. Balsam

Attachment 1

Whois Query for *AdultActionCam.com* as of July 5, 2006

Identifying Tucows dba *ContactPrivacy.com*



Resellers Home Wholesale Services OpenSRS Platform Manage My Services About Tucows Cont

[SEARCH SITE](#)

OpenSRS Whois Utility

[SEARCH ▶](#)

Whois info for, **adultactioncam.com**:

[DOMAIN LOOKUP](#)

[WHOIS ▶](#)

Registrant:
 Contactprivacy.com
 96 Mowat Ave
 Toronto, ON M6K 3M1
 CA

Domain name: ADULTACTIONCAM.COM

[Existing Resellers](#)

[SIGN INTO RWI ▶](#)

[RESOURCE CENTER ▶](#)

Administrative Contact:
 contactprivacy.com, adultactioncam.com@contactprivacy.com
 96 Mowat Ave
 Toronto, ON M6K 3M1
 CA
 +1.4165385457
 Technical Contact:
 contactprivacy.com, adultactioncam.com@contactprivacy.com
 96 Mowat Ave
 Toronto, ON M6K 3M1
 CA
 +1.4165385457

[Become a Reseller](#)

Sign up now! ▶

FAQs Answered ▶



WWW

[Refer me to a Reseller](#)

Registrar of Record: TUCOWS, INC.
 Record last updated on 24-Oct-2005.
 Record expires on 21-Oct-2007.
 Record created on 21-Oct-2003.

Domain servers in listed order:
 NS1.ADULTACTIONCAM.COM 66.198.36.66
 NS2.ADULTACTIONCAM.COM 66.198.36.67

Domain status: REGISTRAR-LOCK

This domain's privacy is protected by contactprivacy.com. To reach the

The Data in the Tucows Registrar WHOIS database is provided to you by for information purposes only, and may be used to assist you in obtain information about or related to a domain name's registration record.

Tucows makes this information available "as is," and does not guarantee accuracy.

By submitting a WHOIS query, you agree that you will use this data only for lawful purposes and that, under no circumstances will you use this data to: (a) allow, enable, or otherwise support the transmission by e-mail, telephone, or facsimile of mass, unsolicited, commercial advertising or promotional solicitations to entities other than the data recipient's own existing customers; or (b) enable high volume, automated, electronic processes to send queries or data to the systems of any Registry Operator or ICANN-Accredited registrar, except as reasonably necessary to register domain names or modify existing registrations.

The compilation, repackaging, dissemination or other use of this Data expressly prohibited without the prior written consent of Tucows.

Tucows reserves the right to terminate your access to the Tucows WHOIS database in its sole discretion, including without limitation, for excessive querying of the WHOIS database or for failure to otherwise abide by the policy.

Tucows reserves the right to modify these terms at any time.

By submitting this query, you agree to abide by these terms.

NOTE: THE WHOIS DATABASE IS A CONTACT DATABASE ONLY. LACK OF A DOMAIN RECORD DOES NOT SIGNIFY DOMAIN AVAILABILITY.



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Attachment 2

Whois Query for *AdultActionCam.com* as of September 21, 2009

Identifying Tucows dba *ContactPrivacy.com*



Resellers Home Wholesale Services OpenSRS Platform Manage My Services About Tucows Contact Us

SEARCH SITE

OpenSRS Whois Utility

SEARCH

Whois info for, **adultaactioncam.com**:

DOMAIN LOOKUP

WHOIS

Registrant:
Contactprivacy.com
96 Mowat Ave
Toronto, ON M6K 3M1
CA

Existing Resellers

SIGN INTO RWI

RESOURCE CENTER

Domain name: ADULTACTIONCAM.COM

Administrative Contact:
contactprivacy.com, adultaactioncam.com@contactprivacy.com
96 Mowat Ave
Toronto, ON M6K 3M1
CA
+1.4165385457

Technical Contact:
contactprivacy.com, adultaactioncam.com@contactprivacy.com
96 Mowat Ave
Toronto, ON M6K 3M1
CA
+1.4165385457

Become a Reseller

Sign up now!

FAQs Answered

Refer me to a Reseller

Registrar of Record: TUCOWS, INC.
Record last updated on 22-Sep-2008.
Record expires on 21-Oct-2009.
Record created on 21-Oct-2003.

Registrar Domain Name Help Center:
<http://domainhelp.tucows.com>

Domain servers in listed order:
NS1.ADULTACTIONCAM.COM 66.198.36.66
NS2.ADULTACTIONCAM.COM 66.198.36.67

Domain status: clientTransferProhibited
clientUpdateProhibited

This domain's privacy is protected by contactprivacy.com. To reach the domain contacts, please go to <http://www.contactprivacy.com> a

The Data in the Tucows Registrar WHOIS database is provided to you by Tucows for information purposes only, and may be used to assist you in obtaining information about or related to a domain name's registration record.

Tucows makes this information available "as is," and does not guarantee its accuracy.

By submitting a WHOIS query, you agree that you will use this data only for lawful purposes and that, under no circumstances will you use this data to: a) allow, enable, or otherwise support the transmission by e-mail, telephone, or facsimile of mass, unsolicited, commercial advertising or solicitations to entities other than the data recipient's own existing customers; or (b) enable high volume, automated, electronic processes that send queries or data to the systems of any Registry Operator or ICANN-Accredited registrar, except as reasonably necessary to register domain names or modify existing registrations.

The compilation, repackaging, dissemination or other use of this Data is expressly prohibited without the prior written consent of Tucows.

Tucows reserves the right to terminate your access to the Tucows WHOIS database in its sole discretion, including without limitation, for excessive querying of the WHOIS database or for failure to otherwise abide by this policy.

Tucows reserves the right to modify these terms at any time.

By submitting this query, you agree to abide by these terms.

NOTE: THE WHOIS DATABASE IS A CONTACT DATABASE ONLY. LACK OF A DOMAIN RECORD DOES NOT SIGNIFY DOMAIN AVAILABILITY.



Site Map | Korean | Contact us | Tucows.com | Press Releases | Feedback | Help

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Attachment 3

Tucows is the Registrant of *ContactPrivacy.com*

WHOIS Search Results

Your WHOIS Search Results



contactprivacy.com

Make an instant, anonymous offer to the current domain registrant. [Learn More](#)

[Make an offer to buy this domain](#)



Registrant:
Tucows.com Co.
96 Mowat Ave.
Toronto, ON M6K 3M1
CA

Domain name: CONTACTPRIVACY.COM

Administrative Contact:
Admin, Domain domain_management@tucows.com
96 Mowat Ave.
Toronto, ON M6K 3M1
CA
+1.4165350123

Technical Contact:
Admin, Domain domain_management@tucows.com
96 Mowat Ave.
Toronto, ON M6K 3M1
CA
+1.4165350123

Registration Service Provider:
Tucows.com Co., tucowsdomains@tucows.com
416-535-0123

Registrar of Record: TUCOWS, INC.
Record last updated on 17-Mar-2008.
Record expires on 15-Apr-2009.
Record created on 15-Apr-2005.

Registrar Domain Name Help Center:
<http://domainhelp.tucows.com>

Domain servers in listed order:
DNS3.TUCOWS.COM
DNS2.TUCOWS.COM
DNS1.TUCOWS.COM

Domain status: clientDeleteProhibited
clientTransferProhibited
clientUpdateProhibited

The Data in the Tucows Registrar WHOIS database is provided to you by Tucows for information purposes only, and may be used to assist you in obtaining information about or related to a domain name's registration record.

Tucows makes this information available "as is," and does not guarantee its accuracy.

By submitting a WHOIS query, you agree that you will use this data only for lawful purposes and that, under no circumstances will you use this data to:

When you register a domain name, current policies require that the contact information for your domain name registration be included in a public database known as WHOIS. To learn about actions you can take to protect your WHOIS information visit www.internetprivacyadvocate.org.

NOTICE AND TERMS OF USE: You are not authorized to access or query our WHOIS database through the use of high-volume, automated, electronic processes or for the purpose or purposes of using the data in any manner that violates these terms of use. The Data in Network Solutions' WHOIS database is provided by Network Solutions for information purposes only, and to assist persons in obtaining information about or related to a domain name registration record. Network Solutions does not guarantee its accuracy. By submitting a WHOIS query, you agree to abide by the following terms of use: You agree that you may use this Data only for lawful purposes and that under no circumstances will you use this Data to: (1) allow, enable, or otherwise support the transmission of mass unsolicited, commercial advertising or solicitations via direct mail, e-mail, telephone, or

OUR WEB SITE PACKAGES NOW OFFER UP TO:

10x GREATER DISK STORAGE AND MORE | **10x BETTER DATA TRANSFER AND MORE**

GET THE ULTIMATE UPGRADE IN WEB HOSTING SOLUTIONS.
ULTIMATE PEACE OF MIND. ULTIMATE STORAGE. ULTIMATE VERSATILITY.

[Learn More](#)

RSS Feed Sample

renaissancetravelnantucket.com Expired 12/23/2008 [Make an Offer](#)

perlasttravel.com Expired 12/23/2008 [Make an Offer](#)

jaguarcarsofdallas.com Expired 12/23/2008 [Make an Offer](#)

davidjamescars.com Expired 12/23/2008 [Make an Offer](#)

bntravels.com Expired 12/23/2008 [Make an Offer](#)

[Previous Items](#)

[Next Items](#)

[Make Your Own Feed](#)

SEARCH AGAIN

Enter a search term:

e.g. networksolutions.com

Search by:

[Domain Name](#)

[IP Address](#)

[Search](#)

Attachment 4

ICANN Email to Balsam re: Balsam's Complaint About a Registrar

Dan Balsam

From: Stacy Burnette [stacy.burnette@icann.org]
Sent: Wednesday, September 19, 2007 1:10 PM
To: spammercommunications@danbalsam.com
Cc: 'Daniel Halloran'; 'Tim Cole'; sarah@demandmedia.com; brad.bailey@enom.com; charles@demandmedia.com; melissa.holz@enom.com; courtney@demandmedia.com; christina.radocha@enom.com; richard@demandmedia.com
Subject: Your Complaint Regarding Enom

Dear Mr. Balsam:

Thank you for taking time out of your busy day to write to ICANN regarding Enom's alleged non-compliance with the Registrar Accreditation Agreement (RAA).

Section 3.7.7.3 of the RAA states in relevant part, "...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 identity of the licensee to a party providing the Registered Name Holder reasonable evidence of actionable harm."

This Section of the RAA makes it clear that the Registered Name Holder will accept liability in all cases unless the Registered Name Holder discloses the identity of the licensee. The Registered Name Holder is under no obligation to ever disclose the identity of the licensee. However, if the Registered Name Holder continues to withhold the identity of the licensee, the Registered Name Holder must accept liability for the harm caused by wrongful use of the Registered Name. The only way that 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.

ICANN will not pursue compliance action against Enom, as it is our determination that Enom has not violated the RAA based on the information provided in your letter dated 12 September 2007.

Feel free to contact me at the telephone number below if you wish to discuss this matter further.

Best,

Stacy K. Burnette
Director
Contractual Compliance
The Internet Corporation for Assigned Names and Numbers
4676 Admiralty Way
Suite 330
Marina del Rey, CA 90292
(310) 301-3860

9/19/2007

1 Timothy J. Walton (State Bar No. 184292)
LAW OFFICES OF TIMOTHY WALTON
2 801 Woodside Road, Suite 11
Redwood City, CA 94061
3 Phone: (650) 216-9800
Fax: (650) 618-8687
4 Email: cand.uscourts.gov@computercounsel.com

5 Daniel L. Balsam (State Bar No. 260423)
THE LAW OFFICES OF DANIEL BALSAM
6 3145 Geary Blvd. #225
San Francisco, CA 94118
7 Phone: (415) 276-3067
Fax: (415) 373-3783
8 Email: legal@danbalsam.com

9 Attorneys for Plaintiff
DANIEL L. BALSAM

11 **UNITED STATES DISTRICT COURT**

12 **NORTHERN DISTRICT OF CALIFORNIA – SAN FRANCISCO**

13 DANIEL L. BALSAM,) Case No.: 09-CV-03585-CRB
14)
Plaintiff,) **DECLARATION OF WILLIAM**
15) **SILVERSTEIN IN SUPPORT OF**
v.) **PLAINTIFF’S OPPOSITION TO**
16) **DEFENDANTS’ MOTION TO DISMISS**
TUCOWS INC., a Pennsylvania corporation,)
17 TUCOWS CORP., a Mississippi corporation,) Date: Oct. 16, 2009
ELLIOT NOSS, an individual,) Time: 10:00 a.m.
18 PAUL KARKAS, an individual, and) Courtroom: 8 – 19th floor
DOES 1-100,) Judge: Hon. Charles R. Breyer
19)
Defendants.) Action Commenced: June 29, 2009

20
21 I, William Silverstein, declare as follows:

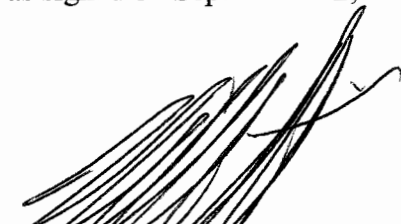
- 22 1. I make this declaration based upon personal knowledge. If called upon to do so, I could
23 and would testify to the truth of the facts stated in this declaration.

- 1 2. On or about October 18, 2005, I spoke with Paul Karkas, compliance officer of Tucows
2 Inc. During this conversation, he agreed to comply with a California subpoena. He also
3 agreed to waive personal service and accept the subpoena by email.
- 4 3. On or about January 18, 2006, I had a subpoena served on Tucows in the matter of
5 *Silverstein v. Liquid Minds et al*, no. BC340643 (Super. Ct. Cal. Cty. of Los Angeles filed
6 Sep. 30, 2005) requesting the true registration information for several domain names.
- 7 4. Tucows Inc. never responded to my subpoena, other than simply informing me that it had
8 been received.
- 9 5. On or about December 21, 2006, I had a subpoena served on Tucows in the matter of
10 *Silverstein v. Liquid Minds et al*, no. BC351414 (Super. Ct. Cal. Cty. of Los Angeles filed
11 Apr. 27, 2006) requesting the true registration information for several domain names.
- 12 6. Tucows Inc. never responded to this subpoena either.
- 13 7. I sued Moniker Online Services LLC, among other entities, for advertising in unlawful
14 spam that I received. Moniker filed a motion to dismiss on the grounds that it “just”
15 provided private registration services. I opposed, and argued that by providing private
16 registration services, Moniker became the legal owner of the domain names and thus
17 Moniker advertised in the spams at issue. The court denied Moniker’s motion to dismiss.
18 Attachment 1 is a true and correct copy of *Silverstein v. E360Insight.com et al*, No. CV
19 07-2835 CAS (VBKx) (C.D. Cal. Oct. 1, 2007) (order denying defendants’ motion to
20 dismiss the first amended complaint); *see* *6.
- 21 8. I have not been compensated in any way for making this declaration.

22 //

23 //

1 I declare under penalty of perjury under the laws of the State of California that the foregoing is
2 true and correct, and that this declaration was signed on September 22, 2009, at Los Angeles,
3 California.

4 
5 _____
6 William Silverstein

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Attachment 1

Silverstein v. E360Insight.com et al (Order on Defendants' Motion to Dismiss)

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

Priority
 Send
 Clsd
 Enter
 JS-5/JS-6
 JS-2/JS-3

CIVIL MINUTES - GENERAL

| | | | |
|----------|--|------|-----------------|
| Case No. | CV 07-2835 CAS (VBKx) | Date | October 1, 2007 |
| Title | WILLIAM SILVERSTEIN, an individual v. E30INSIGHT, LLC, BARGAIN DEPOT ENTERPRISES, LLC, AKA BARGAINDEPOT.NET, DAVID LINHARDT, an individual, MONIKER ONLINE SERVICES, LLC, And DOES 1-50; inclusive | | |

Present: The Honorable CHRISTINA A. SNYDER, JUDGE

CATHERINE JEANG

Laura Elias

Deputy Clerk

Court Reporter / Recorder

Tape No.

Attorneys Present for Plaintiffs:

Attorneys Present for Defendants:

F. Bari Nejadpour

Joseph Kish

Proceedings: Defendant's Motion to Dismiss the First Amended Complaint and Motion to Strike Plaintiff's Claim for Punitive Damages
(filed August 24, 2007)

Plaintiff's Motion for Reconsideration of Order Dismissing David Linhardt for Lack of Jurisdiction
(filed August 24, 2007)

I. INTRODUCTION & BACKGROUND

Plaintiff William Silverstein provides internet web hosting and e-mail services as a sole proprietorship. FAC ¶ 1. Plaintiff alleges that defendants E360Insight, LLC ("E360"), Bargain Depot Enterprises, LLC, aka bargaindepot.net ("Bargain Depot"), David Linhardt ("Linhardt"), and Moniker Online Services, LLC ("Moniker"), are engaged in the business of sending illegal, unsolicited commercial e-mail, otherwise known as "spam." On March 16, 2006, plaintiff filed a complaint in the Los Angeles County Superior Court, asserting claims against all defendants for: (1) violation of California Business and Professions Code § 17529.5 *et seq.*; and (2) violation of the Controlling the Assault of Non-Solicited Pornography and Marketing Act of 2003 ("the CAN-SPAM Act"), pursuant to 15 U.S.C. § 7702. Plaintiff seeks injunctive relief, statutory damages of \$1,000 for each of the complained of e-mails in accordance with California Business and Professions Code § 17529.5, statutory damages of \$123 per e-mail under the CAN-SPAM Act, aggravated damages of \$375 per e-mail in accordance with 15 U.S.C. § 7706(g)(3)(C), general damages to be determined at trial, punitive damages in an amount no less than \$11,700,000, and attorneys' costs and fees. On April 30, 2007, defendants removed the action to this Court based on federal question jurisdiction under the CAN-SPAM Act and diversity jurisdiction.

On June 25, 2007, this Court dismissed the complaint pursuant to Fed. R. Civ. P 9(b) for failure to plead his claims with sufficient particularity, but granted plaintiff leave to amend. The Court also granted with leave to amend, defendants' motion to dismiss the complaint against Moniker and Linhardt. On August 6, 2007, after allowing jurisdictional discovery, the Court denied Moniker's renewed motion

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

| | | | |
|----------|--|------|-----------------|
| Case No. | CV 07-2835 CAS (VBKx) | Date | October 1, 2007 |
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to dismiss him for lack of personal jurisdiction, but granted Linhardt's renewed motion to dismiss him for lack of personal jurisdiction.

On July 24, 2007, plaintiff filed his First Amended Complaint ("FAC") adding claims for (1) trespass to chattels; (2) violation of California Penal Code § 502; (3) negligence per se; and (4) libel per se.

On August 24, 2007, defendants filed the instant motion to dismiss the FAC. Plaintiff filed an opposition to defendants' motion on September 7, 2007. On September 24, 2007, defendants filed their reply.

Also on August 24, 2007, plaintiff filed his motion for reconsideration of this Court's August 6, 2007 order. Defendant Linhardt filed an opposition to plaintiff's motion on September 17, 2007. Plaintiff filed a reply thereto on September 24, 2007.

A hearing was held on October 1, 2007. After carefully considering the arguments set forth by the parties, the Court finds and concludes as follows.

II. LEGAL STANDARDS

A. MOTION TO DISMISS PURSUANT TO FED. R. CIV. P. 9(b)

Federal Rule of Civil Procedure 9(b) requires that the circumstances constituting a claim for fraud be pled with particularity. A pleading is sufficient under Fed. R. Civ. P. 9(b) if it "[identifies] the circumstances constituting fraud so that the defendant can prepare an adequate answer from the allegations." Walling v. Beverly Enterprises, 476 Fed.2d 393, 397 (9th Cir. 1973). Thus, "[a]llegations of fraud must be accompanied by the who, what, when, where, and how of the misconduct alleged." Vess v. Ciba-Geigy Corp. U.S.A., 317 F.3d at 1106 (internal quotation marks and citations omitted).

B. MOTION TO DISMISS PURSUANT TO FED. R. CIV. P. 12(b)(6)

A Fed. R. Civ. P. 12(b)(6) motion tests the legal sufficiency of the claims asserted in a complaint. A court must not dismiss a complaint for failure to state a claim "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Conley v. Gibson, 355 U.S. 41, 45-46 (1957); Cahill v. Liberty Mut. Ins. Co., 80 F.3d 336, 338 (9th Cir. 1996).

In considering a motion pursuant to Fed. R. Civ. P. 12(b)(6), a court must accept as true all material allegations in the complaint, as well as all reasonable inferences to be drawn from them. Pareto v. F.D.I.C., 139 F.3d 696, 699 (9th Cir. 1998); Cahill, 80 F.3d at 338. The complaint must be read in the light most favorable to the plaintiff. Sprewell v. Golden State Warriors, 266 F.3d 979, 988 (9th Cir. 2001); Parks Sch. of Bus., Inc. v. Symington, 51 F.3d 1480, 1484 (9th Cir. 1995). However, a court need not accept as true unreasonable inferences or conclusory legal allegations cast in the form of factual

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

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allegations. Sprewell, 266 F.3d at 988; Western Mining Council v. Watt, 643 F.2d 618, 624 (9th Cir. 1981).

Dismissal pursuant to Fed. R. Civ. P. 12(b)(6) is proper only where there is either a "lack of a cognizable legal theory" or "the absence of sufficient facts alleged under a cognizable legal theory." Balistreri v. Pacifica Police Dept., 901 F.2d 696, 699 (9th Cir. 1988).

Furthermore, unless a court converts a Fed. R. Civ. P. 12(b)(6) motion into a motion for summary judgment, a court cannot consider material outside of the complaint (e.g., facts presented in briefs, affidavits, or discovery materials). In re American Continental Corp. v. Lincoln Sav. & Loan Sec. Litig., 102 F.3d 1524, 1537 (9th Cir. 1996), rev'd on other grounds sub nom Lexecon, Inc. v. Milberg Weiss Bershad Hynes & Lerach, 523 U.S. 26 (1998). A court may, however, consider exhibits submitted with or alleged in the complaint and matters that may be judicially noticed pursuant to Federal Rule of Evidence 201. In re Silicon Graphics Inc. Sec. Litig., 183 F.3d 970, 986 (9th Cir. 1999); Hal Roach Studios, Inc. v. Richard Feiner & Co., 896 F.2d 1542, 1555 n.19 (9th Cir. 1989).

For all of these reasons, it is only under extraordinary circumstances that dismissal is proper under Fed. R. Civ. P. 12(b)(6). United States v. City of Redwood City, 640 F.2d 963, 966 (9th Cir. 1981).

As a general rule, leave to amend a complaint which has been dismissed should be freely granted. Fed. R. Civ. P. 15(a). However, leave to amend may be denied "when the court determines that other facts consistent with the challenged pleading could not possibly cure the deficiency." Schreiber Distributing Co. v. Serv-Well Furniture Co., 806 F.2d 1393, 1401 (9th Cir. 1986); Lopez v. Smith, 203 F.3d 1122, 1127 (9th Cir. 2000).

C. MOTION FOR RECONSIDERATION

Local Rule 7-18 sets forth the bases upon which this Court may reconsider a previous order. The Rule provides as follows:

A motion for reconsideration of the decision on any motion may be made only on the grounds of (a) a material difference in fact or law from that presented to the Court before such decision that in the exercise or reasonable diligence could not have been known to the party moving for reconsideration at the time of such decision, or (b) the emergence of new material facts or a change of law occurring after the time of such decision, or (c) a manifest showing of a failure to consider material facts presented to the Court before such decision. No motion for reconsideration shall in any manner repeat any oral or written argument made in support of or in opposition to the original motion.

L.R. 7-18.

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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

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D. MOTION TO STRIKE PURSUANT TO FED. R. CIV. P. 12(f)

A motion to strike material from a pleading is made pursuant to Fed. R. Civ. P. 12(f). Under Rule 12(f), the Court may strike from a pleading any "insufficient defense" or any material that is "redundant, immaterial, impertinent or scandalous." A Rule 12(f) motion is not a motion to dismiss for failure to state a claim upon which relief may be granted, and, where not involving a purportedly insufficient defense, simply tests whether a pleading contains inappropriate material. The Court may also strike under Rule 12(f) a prayer for relief which is not available as a matter of law. Tapley v. Lockwood Green Engineers, 502 F.2d 559, 560 (8th Cir. 1974). The essential function of a Rule 12(f) motion is to "avoid the expenditure of time and money that must arise from litigating spurious issues by dispensing with those issues prior to trial." Fantasy, Inc. v. Fogerty, 984 F.2d 1524, 1527 (9th Cir. 1993), rev'd on other grounds, 510 U.S. 517 (1994). Because of "the limited importance of pleadings in federal practice," motions to strike pursuant to Rule 12(f) are disfavored. Bureerong v. Uvawas, 922 F. Supp. 1450, 1478 (C.D. Cal. 1996).

III. DISCUSSION

A. MOTION TO DISMISS PURSUANT TO FED. R. CIV. P. 9(b)

Defendants request that the Court dismiss plaintiff's FAC with prejudice pursuant to Fed. R. Civ. P. 9(b) for failure to plead with sufficient particularity. Defendants assert that plaintiff fails to identify who sent the e-mails at issue, how the e-mails violated Cal. Bus. & Prof. Code § 17529.5 and the CAN-SPAM Act and what was false in the headers and subject lines at issue. Def. Mem. of P. & A. in Supp. of Mot. at 1, 3-4. Defendants further argue that the complaint is deficient because plaintiff fails to state "how *all* of the Defendants violated the statutes at the same time." Id. at 3 (emphasis in original). Defendants state that plaintiff again fails to attach any offending e-mail to the FAC or to otherwise provide defendants' with the same, despite their requests. Id. at 4. Defendants argue that plaintiff's third, fourth and fifth claims for relief should similarly be dismissed with prejudice because these claims require plaintiff to plead and prove that defendants are responsible for the allegedly illegal e-mails. Id. at 5.

In their reply, defendants further argue that plaintiff's attachment of examples is inadequate because it "is list of unknown origin that Plaintiff purports includes the 'from' and 'subject' lines of 99 allegedly offending e-mails." Def. Reply at 3 (referring to FAC, Ex. A (Examples of Deceptive Subject & Header Lines)). Defendants further argue that plaintiff provides "no factual support" that the allegedly illegal e-mails lacked a valid return address. Id. (citing Pl. Opp'n at 5). Defendants contend that plaintiff's refusal to produce the e-mails "raises an inference that must be construed against Plaintiff." Def. Reply at 3.

The Court concludes that plaintiff has sufficiently pled the nature of the misconduct alleged. As this Court advised in its June 25, 2007 order, the FAC specifies the manner in which the header and subject lines were false or misleading. Plaintiff sufficiently identifies the nature of the fraud by alleging that the header was deceptive because it purported to identify the sender of the e-mail, but failed to do

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

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so. FAC ¶¶ 42, 60, 28; Ex. A (Examples of Deceptive Subject & Header Lines). The FAC alleges that the header information included multiple domain names in order to “deceive the spam filters in an attempt to trick the recipient into opening and reading the e-mail.” FAC ¶¶ 48-51. Additionally, plaintiff alleges that the subject lines are deceptive because they falsely indicate that defendants are selling discounted brand name products, when in fact defendants are selling counterfeit products. FAC ¶¶ 61-62. Plaintiff also attaches examples of deceptive subject and header lines. FAC, Ex. A (Examples of Deceptive Subject & Header Lines). Plaintiff’s allegations give defendants sufficient notice to enable them to defend against the misconduct alleged. Accordingly, the Court DENIES defendants’ motion to dismiss plaintiff’s FAC for failure to plead with particularity.

B. MOTION TO DISMISS PURSUANT TO 12(b)(6)

1. FIRST (CAL. BUS. & PROF. CODE § 17529.5) AND SECOND CLAIMS (CAN-SPAM ACT) FOR RELIEF

Defendants argue that this Court should dismiss plaintiff’s second claim for relief because there is no private right of action under the CAN-SPAM Act. Def. Mem. of P. & A. in Sup. of Mot. at 5. According to defendants, plaintiff’s allegations demonstrate that he seeks “to remedy an individual harm,” because they all reference e-mails sent to plaintiff’s personal e-mail account. *Id.* at 5-6 (citing FAC ¶ 38).

The CAN-SPAM Act creates a private right of action for providers of Internet access service. 15 U.S.C. § 7706(g). “The term ‘Internet access service’ means a service that enables users to access content, information, electronic mail, or other services offered over the Internet . . .” 47 U.S.C. § 231(e)(4). Plaintiff alleges that operating as a sole proprietor, he utilizes computers that he owns and maintains to “[provide] registered users the ability to send or receive electronic mail.” FAC ¶¶ 1-3. Plaintiff further alleges that “Defendants used Plaintiff’s servers to relay spam without authorization.” FAC ¶ 90. Based on the foregoing, the Court concludes that plaintiff has sufficiently stated a claim for relief under the CAN-SPAM Act. Defendants’ arguments to the contrary are better addressed on a motion for summary judgment. Accordingly, the Court DENIES defendants’ motion to dismiss the plaintiff’s second claim for relief under the CAN-SPAM Act.

Defendants further argue that the first and second claims should in any event be dismissed as to defendant Moniker. Def. Mem. of P. & A. in Sup. of Mot. at 6.¹ Defendants contend that Cal. Bus. & Prof. Code § 17529.5 requires a defendant to “actually send the alleged spam or cause it to be sent.” *Id.* Defendants claim that the “the Declaration of Eric Harrington makes clear that Plaintiff’s specious allegations cannot be inferred to mean that Defendant Moniker sent or caused to be sent the allegedly offending emails.” *Id.* Defendants further argue that plaintiff nowhere alleges that Moniker

¹ The second claim for relief is not alleged against defendant Moniker. FAC at 14 (“Against All Defendants, Except Moniker”). Accordingly, the Court DENIES defendants’ motion to dismiss the second claim for relief as against defendant Moniker as moot.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

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| Case No. | CV 07-2835 CAS (VBKx) | Date | October 1, 2007 |
| Title | WILLIAM SILVERSTEIN, an individual v. E30INSIGHT, LLC, BARGAIN DEPOT ENTERPRISES, LLC, AKA BARGAINDEPOT.NET, DAVID LINHARDT, an individual, MONIKER ONLINE SERVICES, LLC, And DOES 1-50; inclusive | | |

“advertised” in the illegal e-mails. Id. at 7-8.

California Business and Professions Code § 17529.5(a)(2) provides that “[i]t is unlawful for any person or entity to advertise in a commercial e-mail advertisement either sent from California or sent to a California electronic mail address . . . [which] contains or is accompanied by falsified, misrepresented, or forged header information.” “Commercial e-mail advertisement” means any electronic mail message initiated for the purpose of advertising . . .” Cal. Bus. & Prof. Code § 17529.1. In Asis Internet Servs. v. Optin Global Inc., Case No. C 05-5124 CW, 2006 U.S. Dist. LEXIS.46309 *21 (N.D. Cal. 2006), the court stated that “the language of the statute . . . appears to extend liability to anyone who ‘advertises’ in a commercial e-mail containing a misleading header or subject line, regardless of whether the advertiser was also the one who sent the spam or caused it to be sent. Cf. Cal. Bus. & Prof. Code § 17529.2 (prohibiting the initiation or advertisement in unsolicited commercial emails sent from or to California).” Thus, whether or not Moniker sent or caused the e-mail to be sent, it would be liable if it advertised in the prohibited e-mail. Plaintiff alleges that Moniker is liable under Cal. Bus. & Prof. Code § 17529.5 because the illegal e-mails advertise domain names that are registered and/or owned by Moniker. Pl. Opp’n at 3 (citing FAC ¶ 57, 79).² Based on these allegations the Court DENIES defendants’ motion to dismiss the first claim for relief as against defendant Moniker without prejudice to defendants’ bringing a motion for summary judgment on a complete evidentiary record.

2. THIRD CLAIM FOR RELIEF (TRESPASS TO CHATTELS)

Defendants argue that plaintiff’s third claim for relief should be dismissed because plaintiff does not allege that defendants interfered or threatened to interfere with “an ISP’s computer system functionality.” Def. Mem. of P. & A. in Supp. of Mot. at 8. Defendants argue that a claim for trespass to chattel cannot be predicated on the misconduct alleged in the FAC: sending illegal e-mails “that passed through Plaintiff’s computer” and caused injury because of their content. Id. (citing Intel Corp. v. Hamidi, 71 P.3d 296, 302 (Cal. 2003)). Defendants further argue that the trespass to chattels claim should be dismissed because plaintiff fails to allege that he suffered more than nominal damages. Id. at 9 (citing Intel Corp. v. Hamidi, 71 P.3d at 302).

Plaintiff responds that his claim for trespass to chattel is not predicated on a content based injury, but instead, “on lack of permission.” Pl. Opp’n at 8. Plaintiff argues that “Defendants’ unauthorized use of Plaintiff’s [computer] system caused or threatened to cause harm.” Id. Plaintiff further argues that he need not be an ISP to state a claim for trespass to chattel. Id. at 9.

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² Plaintiff also appears to argue that his first claim for relief should not be dismissed as against defendant Moniker because Moniker’s activities subject it to liability under 18 U.S.C. § 1037(4). Pl. Opp’n at 3. Count One does not allege a violation of 18 U.S.C. § 1037(4), nor could it because as plaintiff concedes, 18 U.S.C. § 1037(4) is a criminal statute under which he has not private right of action. Pl. Opp’n at 12.

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Defendants reply that plaintiff "does not, and cannot, allege [that he sustained] any physical damage." Def. Reply at 6.

"Trespass to chattel . . . lies where an intentional interference with the possession of personal property has proximately caused injury." Thrifty-Tel, Inc. v. Bezenek, 54 Cal. Rptr. 2d 468, 473 (Cal. Ct. App. 1996). "Defendant's interference . . . must . . . have caused some injury to the chattel or plaintiff's right to it." Intel Corp. v. Hamidi, 71 P.3d 296, 301 (Cal. 2003). However, the mere sending of unsolicited e-mail with objectionable content, without harm to the computer system or its functioning, does not give rise to a claim for trespass to chattel. Id. at 300. In the present case, plaintiff alleges that defendants' misconduct caused harm to, overburdened and impaired the functioning of his computer systems. FAC ¶¶ 99-104. Defendants cited cases, Intel Corporation and Omega World Travel v. Mummargraphics, Inc., 469 F.3d 348 (4th Cir. 2006), both arose in connections with motions for summary judgment. The Court finds that defendants' arguments are better addressed on a motion for summary judgment. Because the FAC alleges that defendants' commercial e-mail messages burdened plaintiff's computer systems and caused damage, plaintiff has stated a claim for trespass to chattel. The Court therefore DENIES defendants' motion to dismiss plaintiff's third claim for relief without prejudice to defendants' bringing a motion for summary judgment on a complete evidentiary record.

3. FOURTH CLAIM FOR RELIEF (CAL. PENAL CODE § 502)

Defendants argue that plaintiff's claim under Cal. Penal Code § 502 should be dismissed. Defendants argue that the FAC does not allege that they "[accessed] Plaintiff's computers as that term is defined in Cal. Penal Code § 502, since "[a]t most, Plaintiff received e-mails he did not want, and nothing more." Def. Mem. of P. & A. in Supp. of Mot. at 11. Defendants state that "'access' means 'to gain entry to, instruct, or communicate with the logical, arithmetical, or memory function resources of a computer, computer system or computer network.'" Id. at 10 (citing Cal. Bus. & Prof. Code § 502(b)(1)). Defendants further argue that "[n]o court has concluded that [Cal. Penal Code] § 502 applies to the conduct alleged in this case." Def. Mem. of P. & A. in Supp. of Mot. at 11. Defendants claim that because Cal. Bus. & Prof. Code § 17529.5 addresses the activities alleged in the FAC, the legislature could not have intended Cal. Penal Code § 502 to apply to those same activities. Id. Finally, defendants argue that the FAC does not allege that they sent or authorized the sending of any illegal e-mail. Id.

Plaintiff responds that "Defendants, without authorization, communicated with Plaintiff's computer system, instructed Plaintiff's server to create a copy of their spam and deposit it into a mailbox for the user to retrieve," in violation of Cal. Penal Code § 502(c). Pl. Opp'n at 10. Plaintiff argues that defendants fail to cite authority prohibiting the application of Cal. Penal Code § 502(c) to the present situation. Id. at 11. Plaintiff further argues that both Cal. Bus. & Prof. Code § 17529.5 and Cal. Penal Code § 502 can and do prohibit the misconduct alleged in the present case. Id.

Defendants reply that "[i]t is axiomatic that the California legislature would not enact two separate laws to address the same wrong." Def. Reply at 6. Defendants argue that in any event, plaintiff fails to state a claim under Cal. Penal Code § 502, because the FAC does not allege the statutory elements of "access" or "injury" as those terms are defined in the statute. Id.

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California Penal Code § 502(a) states that “[i]t is the intent of the Legislature in enacting this section to expand the degree of protection afforded to individuals, businesses, and governmental agencies from tampering, interference, damage, and unauthorized access to lawfully created computer data and computer systems.” Thus, Cal. Penal Code § 502(e)(1) provides a private right of action for persons who “[suffer] damage or loss by reason of a violation of any of the provisions of [Cal. Penal Code § 502(c)].” A plaintiff may utilize the statute to proceed against transmitters of unsolicited bulk e-mail, but only if the plaintiff suffered “damage or loss.” See Lily Zhang, Note, The CAN-SPAM Act: An Insufficient Response to the Growing Spam Problem, 20 Berkeley Tech. L.J. 301, 316 n107 (2005) (stating Cal. Penal Code § 502(e)(1) “[allows] individuals to bring a private cause of action against spammers”); David E. Sorkin, Technical and Legal Approaches to Unsolicited Electronic Mail, 35 U.S.F. L. Rev. 325, (Winter 2001) (noting that Cal. Penal Code § 502 punishes “spammers”). Plaintiff alleges that he “suffered damages as a result of Defendant’s wrongful conduct.” FAC ¶ 104 (incorporated into plaintiff’s fourth claim for relief through FAC ¶ 108). The Court therefore DENIES defendants’ motion to dismiss plaintiff’s fourth claim for relief.

4. FIFTH CLAIM FOR RELIEF (NEGLIGENCE PER SE)

Defendants argue that plaintiff’s claim for negligence per se should be dismissed because “Defendants have not violated any of the statutes or codes on which Plaintiff seeks to hold Defendants liable.” Def. Mem. of P. & A. at 11-12.

Because the Court has not dismissed plaintiff’s other claims for relief, plaintiff has sufficiently pled a claim for negligence per se. Accordingly, the Court DENIES defendants’ motion to dismiss plaintiff’s fifth claim for negligence per se.

5. SIXTH CLAIM FOR RELIEF (LIBEL PER SE)

Defendants further seek to dismiss plaintiff’s sixth claim for relief against E360 and Linhardt for libel per se. Defendants argue that the FAC makes no allegations against E360, but only against Linhardt individually. Def. Mem. of P. & A. in Supp. of Mot. at 12. Defendants argue that Fed. R. Civ. P. 15 contemplates that “amendments will be based on the same transactions and occurrences,” however, plaintiff’s libel per se claim is unrelated to the allegations in the original complaint. Id. at 13 (citing Fed. R. Civ. P. 15(a), (c); Martell v. Trilogy, 872 F.2d 322, 325 (9th Cir. 1989)). Defendants further contend that plaintiff has “misrepresented the allegedly libelous statement” and therefore provide the Court with full statement in their motion. Def. Mem. of P. & A. in Supp. of Mot. at 13-16.³ According to defendants, the statement refers to “[the] audience at large . . . as ‘criminal vigilantes,’” and this “reference . . . necessarily excludes Plaintiff.” Id. at 17.

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³ In considering a motion to dismiss, the Court does not consider evidence offered in material outside of the four corners of the Complaint.

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In their reply defendants argue that plaintiff's failure to plead the necessary elements of "respondeat superior" is fatal to his libel per se claim against E360. Def. Reply at 8-9.

Under Federal Rule of Civil Procedure 15(d), "[u]pon motion of a party[,] the court may . . . permit the party to serve a supplemental pleading setting forth transactions or occurrences or events which have happened since the date of the pleading sought to be supplemented." Plaintiff filed the FAC and added new claims in response to the Court's June 25, 2007 order dismissing plaintiff's complaint with leave to amend. Therefore, the Court concludes that plaintiff has properly added the sixth claim for relief in the FAC.

Moreover, plaintiff has sufficiently identified the allegedly libelous statement. "The general rule is that words constituting an alleged libel must be specifically identified, if not pleaded verbatim, in the complaint." Vogel v. Felice, 26 Cal. Rptr. 3d 350, 359 n.3 (Cal. Ct. App. 2005) (citing Kahn v. Bower, 284 Cal. Rptr. 244, 253 n.5 (Cal. Ct. App. 1999)). Plaintiff alleges that "[o]n June 28, 2007, Linhardt [, "acting in his official capacity as president of e360,"] published a statement onto Usenet, using Google News, that plaintiff is a 'criminal vigilante,'" and implying that plaintiff illegally used E360's servers to send pornographic e-mails to E360's clients. FAC ¶¶ 135, 138, 146. Accordingly, the Court concludes that plaintiff sufficiently pleads a claim for libel per se against E360. The Court therefore DENIES defendants' motion to dismiss plaintiff's sixth claim for relief as against defendant E360.

This Court dismissed defendant Linhardt for lack of personal jurisdiction through its August 6, 2007 order. The Court also denies plaintiff's motion for reconsideration of that order below. Therefore, the Court DENIES defendants' motion to dismiss plaintiff's claim against Linhardt as moot.

C. MOTION TO STRIKE PLAINTIFF'S REQUEST FOR PUNITIVE DAMAGES

Defendants argue that plaintiff's claim for punitive damages should be stricken since each of his other claims on which punitive damages is predicated, fails to state a claim for relief. Def. Mem. of P. & A. in Supp. of Mot. at 18.

In light of the Court's other rulings herein, the Court DENIES defendants' motion to strike plaintiff's request for punitive damages.

D. PLAINTIFF'S MOTION FOR RECONSIDERATION

By the present motion, plaintiff requests that the Court find defendant Linhardt subject to this Court's jurisdiction. Plaintiff argues that exercising personal jurisdiction is appropriate in light of Goldhaber v. Kohlenberg, 395 N.J. Super. 380 (NJ. Super. Ct. App. Div. 2007), wherein the court exercised personal jurisdiction over a nonresident defendant who posted defamatory statements on a Internet newsgroup. Pl. Mot. at 6-7. Plaintiff further argues that because defendant Linhardt argued in E360Insight, LLC and David Linhardt v. Mark James Ferguson, et. al., Case No. 07 L 004983 (Ill. Cir. Ct. 2007), that "a newsgroup posting made by a person with no ties to Illinois is subject to Jurisdiction

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[sic] in Illinois where the internet posting would be read by an Illinois resident,” he is judicially estopped from taking a contrary position in the present action. Id. at 4, 7, 10. Plaintiff also contends that Linhardt would not have standing to bring suit in E360 Insight, LLC and David Linhardt v. The Spamhaus Project, Case No. 06-CV-03958 (N.D. of Ill.), unless he personally suffered loss of business and business opportunities. Id. at 9. Plaintiff further contends that Linhardt is judicially estopped from arguing lack of personal jurisdiction because he sought damages in The Samphaus Project while acting in an individual capacity. Id. 9-10. Plaintiff argues that the Court failed to address this issue in its August 6, 2007 order. Id. at 8-9.

Defendants respond that plaintiff does not address “new” law because Goldhaber relies upon judicial precedent predating the Court’s August 6, 2007 ruling. Def. Opp’n at 2.⁴ Defendants further argue that Goldhaber is distinguishable because the defendant “not only knew that the plaintiffs resided in New Jersey, he knew the municipality in which they resided and made specific disparaging reference to that municipality in many of his posting . . . [sic] made insulting comments about that municipality’s police department . . . [sic] referred to plaintiff’s neighbors in the apartment complex in which they resided and at one point even posted their addresses.” Id. at 3 (citing Goldhaber, 395 N.J. Super. at 389-90). Defendants argue that in the present case Linhardt made a single posting and did not purposely target or otherwise make reference to the state of California. Def. Opp’n at 3. Defendants further argue that estoppel is not applicable because Linhardt was not “successful” in taking a position contrary to the one taken in the instant case since the court dismissed the Ferguson action. Id. at 4. Finally, defendants contend that this Court already determined that Linhardt’s participation in Spamhaus did not confer personal jurisdiction over him in the present action. Id. at 5.

Plaintiff replies that because E360 and Linhardt voluntarily dismissed the case in Ferguson judicial estoppel still applies. Pl. Reply at 2. Plaintiff further argues that Goldhaber is not only “new” law, because it was decided just two days prior to this Court’s August 6, 2007 ruling, but it is “the first appellate case (that Plaintiff is aware of) that applies [Calder v. Jones, 465 U.S. 783 (1984)] to a USENET newgroup posting – as opposed to a website.” Id. at 3. Plaintiff argues that unlike a website that remains at “one location on the internet,” a “USENET posting is . . . replicated to other servers around the world.” Id. Plaintiff further argues that unlike in Blakely v. Continental Airlines, 164 N.J. 38, 64 (N.J. Supp. 2000), where the website was only accessible by Continental employees, Linhardt’s posting was accessible to the general public. Id. (citing Blakely, 164 N.J. at 48). Plaintiff contends that the Goldhaber court referred to the specific municipality mentioned in the newgroup posting because “the municipality indicates the precise knowledge of where the harm is directed,” but “failing to specify the municipality would [not] have divested New Jersey of jurisdiction.” Pl. Reply at 3. Plaintiff further argues that Linhardt made the libelous statements with knowledge that plaintiff resided in the state of California and that he would therefore suffer harm in the same. Id.

⁴ Defendants contend that in reaching its decision the Goldhaber court applies Calder v. Jones, 465 U.S. 783 (1984), and Blakely v. Continental Airlines, 164 N.J. 38 (N.J. Supp. 2000). Def. Opp’n at 2-3.

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In Goldhaber, the court applied traditional principles to analyze whether the “defendant’s conduct and connection with the forum State [were] such that he should [have] reasonably [anticipated] being haled into court there.” Goldhaber, 395 N.J. Super at 386-87. Thus, the court focused on whether the defendant sufficiently targeted or directed his activities at the forum state. Id. at 388-90. The court determined that the evidence demonstrated the defendant “[targeted]” the forum state with his defamatory statements. Id. at 389-390. The court reasoned, defendant

not only knew that plaintiffs resided in New Jersey, he knew the municipality in which they resided and made specific disparaging references to that municipality in many of his postings. Certain of his postings were made in response to plaintiffs’ replies to the offending comments. He also made insulting comments about the municipality’s police department. In addition, he referred to plaintiffs’ neighbors in the apartment complex in which they resided and at one point even posted their address.

Id. Based on this conduct, the court concluded that “[defendant] should reasonably [have] anticipate[d] being haled into court” in New Jersey. Id. In the present case, the Court is urged to find purposeful availment on two evidentiary grounds: (1) defendant’s knowledge that plaintiff resides in the state of California and (2) defendant’s use of a server located in the forum state. This Court has already stated that the latter fact is insufficient. See June 25, 2007 Order; August 6, 2007 Order; but see Bochan v. La Fontaine, 68 F. Supp. 2d 692, 699 (E.D. Va. 1999) (exercising jurisdiction under long-arm statute conferring jurisdiction where a defendant “[causes] tortious injury by an act or omission in [the forum],” where online defamatory postings were transmitted through a server in the forum state). Moreover, mere knowledge of a person’s residence, without conduct reaching out and into the forum state, does support a finding of specific jurisdiction. The Court concludes that plaintiff’s proffered evidence does not suggest that Linhardt sufficiently directed or focused the allegedly defamatory statements to the state of California.

The Court finds plaintiff’s additional arguments similarly unpersuasive. The Court has already considered Linhardt’s participation in The Spamhaus Project, and found that it did not subject Linhardt to this Court’s jurisdiction. Moreover, judicial estoppel cannot be properly invoked to subject Linhardt to jurisdiction based on his representations in Ferguson. While judicial estoppel “is not confined to inconsistent positions in the same litigation,” its application is limited to cases where the “court has relied on the party’s previously inconsistent statement.” Rissetto v. Plumbers & Steam Fitters Local 343, 94 F.3d 597, 605 (9th Cir. 1996); Interstate Fire & Casualty Co. v. Underwriters at Lloyd's, London, 139 F.3d 1234, 1239 (9th Cir. 1998) (citing Masayeva v. Hale, 118 F.3d 1371, 1382 (9th Cir. 1997)). Plaintiff concedes that the Ferguson court did not “rely” on defendant’s “inconsistent position.” See Pl. Opp’n at 2; Interstate Fire & Casualty Co., 139 F.3d at 1239. In accordance with the foregoing, the Court hereby DENIES plaintiff’s motion for reconsideration.

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11 Attorneys for Plaintiff
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14 **UNITED STATES DISTRICT COURT**

15 **NORTHERN DISTRICT OF CALIFORNIA – SAN FRANCISCO**

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|---|---|--------------------------------------|------------------------|
| 16 DANIEL L. BALSAM, |) | Case No.: | 09-CV-03585-CRB |
| |) | | |
| 17 Plaintiff, |) | [PROPOSED] ORDER DENYING | |
| |) | DEFENDANTS’ MOTION TO DISMISS | |
| 18 v. |) | | |
| |) | | |
| 19 |) | | |
| 20 TUCOWS INC., a Pennsylvania corporation, |) | Date: | Oct. 16, 2009 |
| TUCOWS CORP., a Mississippi corporation, |) | Time: | 10:00 a.m. |
| 21 ELLIOT NOSS, an individual, |) | Courtroom: | 8 – 19th floor |
| PAUL KARKAS, an individual, and |) | Judge: | Hon. Charles R. Breyer |
| 22 DOES 1-100, |) | | |
| |) | | |
| 23 Defendants. |) | Action Commenced: | June 29, 2009 |

24
25 Defendants’ Motion to Dismiss came on regularly for hearing before the Court on
26 October 16, 2009, in Courtroom 8, in the U.S. District Court for the Northern District of
27 California in San Francisco. The Parties appeared through their counsel of record.
28

1 This Court finds that ¶ 3.7.7.3 of the ICANN Registrar Accreditation Agreement
2 (“RAA”), to which Defendant Tucows Inc. is a signatory, describes harm to third parties by the
3 wrongful use of privately registered Internet domain names, and provides a remedy for those
4 same harmed third parties: the Registered Name Holder must provide the harmed third party with
5 the identity of its licensee operating the privately registered domain name, or the Registered
6 Name Holder shall accept all liability for the wrongful use of its domain name.

7 Defendants’ interpretation of ¶ 3.7.7.3 of the RAA, such that parties who are harmed by
8 wrongful use of privately registered Internet domain names cannot enforce the paragraph against
9 Registered Name Holders, and ICANN could theoretically enforce the paragraph but ICANN
10 would not be harmed by the wrongful use of domain names as to those parties and has no
11 standing to enforce the rights of those parties, would render ¶ 3.7.7.3 superfluous, unenforceable,
12 absurd, and incompatible with public policy goals of restricting deceptive advertising and
13 providing remedies for persons who are harmed.

14 This Court holds that Balsam is an intended third party beneficiary of ¶ 3.7.7.3 of the
15 RAA, notwithstanding the general catch-all “no third party beneficiaries” language of ¶ 5.10.
16 Defendants’ Motion to Dismiss is DENIED.

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18 IT IS SO ORDERED.

19
20 Dated: _____

By _____
HON. CHARLES R. BREYER
JUDGE OF THE U.S. DISTRICT COURT