

1 BRET A. FAUSETT (CA Bar No. 139420)
 bfausett@adorno.com
 2 IMANI GANDY (CA Bar No. 223084)
 igandy@adorno.com
 3 ADORNO YOSS ALVARADO & SMITH
 A Professional Corporation
 4 633 W. Fifth Street, Suite 1100
 Los Angeles, CA 90071
 5 Tel. (213) 229-2400
 Fax. (213) 229-2499
 6
 Attorneys for Defendants Tucows Inc., Tucows
 7 Corp., Elliot Noss, and Paul Karkas

8 **UNITED STATES DISTRICT COURT**
 9 **NORTHERN DISTRICT OF CALIFORNIA – SAN FRANCISCO**

11 DANIEL L. BALSAM, an individual,
 12 Plaintiff,
 13 v.
 14 TUCOWS INC., a Pennsylvania corporation,
 TUCOWS CORP., a Mississippi corporation,
 15 ELLIOT NOSS, an individual, and PAUL
 KARKAS, an individual, and DOES 1-100,
 16 Defendants.

Case No. 09-CV-03585-CRB

Hon. Charles R. Breyer

**REPLY TO PLAINTIFF’S OPPOSITION TO
 DEFENDANTS TUCOWS’ MOTION TO
 DISMISS PLAINTIFF’S COMPLAINT**

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

Action Filed: June 26, 2009

ADORNO YOSS ALVARADO & SMITH
 ATTORNEYS AT LAW
 LOS ANGELES

MEMORANDUM IN REPLY TO PLAINTIFF'S OPPOSITION

I. INTRODUCTION

At bottom, this is an action against a "deep-pockets" corporation and two of its employees to recover an otherwise uncollectible default judgment entered in Plaintiff's favor against a known entity, Angeles Technology, Inc., not a party to the present lawsuit. *See*, Complaint, at ¶¶37, 57 (referencing the action *Balsam v. Angeles Technology, Inc. et al.*, No. CV 06-04114 JF, USDC, No. Dist. of Cal.). Plaintiff alleges that Defendant Tucows, Inc. ("Tucows"), a domain name registrar, allowed Angeles Technology, Inc. – after its identity became known to Plaintiff – to opt into a privacy service that removed the contact data for the domain name "adultactioncam.com" from the worldwide whois database. Complaint, at ¶38. Plaintiff's incredible theory is that but for his inability to access the domain name registrant's contact details after they changed he would have been able to collect on his default judgment. *Id.*, at ¶¶67-70. Just as this self-proclaimed anti-spam combatant builds honey pots to catch spam he claims he does not want, he has not undertaken *any discovery* to find the allegedly indispensable information he claims he needs. By this lawsuit, Plaintiff attempts to convert his own deliberate inaction into another's financial liability.

In this Reply Memorandum, Tucows and the other Defendants (Tucows Corp., Elliot Noss, and Paul Karkas) will demonstrate that Plaintiff Daniel Balsam's claims are wholly without merit. Each of the causes of action is based on a misreading of the operable contracts and the governing law, which the points of this Reply Memorandum will address in turn.

II. POINTS IN REPLY

A. Plaintiff's Interpretation of the RAA Is Not Supportable

All of the causes of actions in this Complaint, even those sounding in tort, arise from supposed obligations to the public based on the Registrar Accreditation Agreement ("RAA") between ICANN and Tucows. Relying on contact interpretation precedent, which he applies when useful and ignores when convenient, Plaintiff claims that specific language controls over general language and contracts should be interpreted in a way that gives meaning to all provisions. *See*, Opposition, at pp. 5-9. These propositions are, of course, true. In this case, however, Plaintiff applies them to absurd results.

1 First, to claim he is an intended third-party beneficiary, Plaintiff reads the word "third-" into the
 2 contract where it references only "party." The key to his contextual interpretation is a deliberate
 3 misreading of the RAA's Paragraph 3.7.7.3. In his Opposition Plaintiff explains: "*Liability in this*
 4 *Action turns on the phrase 'to a party.'* Balsam submits that '*to a party*' really means '*to a third party*
 5 *who has been harmed.*'" See, Opposition, at 7. That is an incredible statement. The phrase "to a party"
 6 in a contract between two parties is not ambiguous. As normally understood, a "party" to a contract is
 7 the opposite of a "third-party." Put another way, a "third-party" is "not a party." Plaintiff reads them
 8 as interchangeable.

9 Any fair reading of the RAA shows that Plaintiff's black-really-means-white interpretation is
 10 not reasonable.¹ The "parties" to the RAA are defined in the Definitions Section, Paragraphs 1.5 and
 11 1.9 (in which both ICANN and the registrar are defined as "a party to this Agreement"). The RAA
 12 meticulously distinguishes between "party" and "third-party" throughout, using each word at least a
 13 dozen times. Rather than reading the Agreement as it was written, Plaintiff reads it as it suits him for
 14 his present purposes. An unreasonable interpretation of a contract provision is not sufficient, however,
 15 to defeat a motion to dismiss.

16 Second, Plaintiff argues that the RAA's "no third-party beneficiaries clause" should be read out
 17 of the contract entirely as a matter of contract interpretation. In doing so, Plaintiff virtually ignores
 18 existing federal court precedent interpreting the very contract provision at issue. *Register.Com, Inc. v.*
 19 *Verio, Inc.*, 356 F.3d 393 (2d Cir. 2004) is summarily dismissed in Plaintiff's Opposition as "not
 20 binding on this Court" (Opposition, at 12). That case is important, however, not only because it was
 21 decided by a sister court, but also because in it, ICANN, one of the parties to the RAA, offered its
 22 interpretation and contextual background for the clause and its important regulatory purpose.

23 In the Amicus Brief it filed in that case, ICANN wrote of the "no third party beneficiaries"
 24 clause:

25 It is difficult to imagine how the contractual language quoted above could more
 26 clearly exclude third-party beneficiary status. This language is by no means

27 ¹ A copy of the Registrar Accreditation Agreement at issue is attached to Tucows' Request for
 28 Judicial Notice, filed with this motion, at Exhibit "A."

1 "boilerplate," as characterized by Verio. Instead, it is language that was
 2 specifically drafted for the original Registrar Accreditation Agreement. It is vital
 3 to the overall scheme of the various agreements that enforcement of agreements
 4 with ICANN be informed by the judgment of the various segments of the Internet
 5 community as expressed through ICANN. In the fast-paced environment of the
 6 Internet, new issues and situations arise quickly, and sometimes the language of
 7 contractual provisions does not perfectly match the underlying policies. For this
 8 and other reasons, hard-and-fast enforcement of the letter of every term of every
 9 agreement is not always appropriate. An integral part of the agreements that the
 10 registrars and other participants entered with ICANN is the understanding that
 11 these situations would be handled through consultation and consideration within
 12 the ICANN process, including the various reconsideration, independent review,
 13 and other mechanisms available in that process. In the event a dispute cannot be
 14 resolved by these means, the parties further provided that a carefully calibrated
 15 procedure culminating in arbitration must be followed. See Registrar
 16 Accreditation Agreement sections II.P and II.N.

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1 present case, that means that Plaintiff's claims are plainly barred by the contract on which it seeks to
2 build its case, and the Complaint must be dismissed.

3 **B. The Wrongs In This Case Are of Plaintiff's Own Doing**

4 Plaintiff claims he has been wronged and that, therefore, under the theory that "every wrong
5 has a remedy," something in his Complaint must stick. *See*, Opposition at 5. The wrong alleged here
6 is that contact information for the domain name adultactioncam.com was withheld from him upon an
7 email request. By his own admission, however, he did not seek discovery from Tucows about the
8 registrant's contact information, even though he was a party to an action in this very court in which he
9 claimed that information was relevant. His claim that requiring a person to use legal process creates a
10 chicken-and-egg problem because it would require him to file suit against someone whose identity was
11 unknown to him (Opposition, at 10) ignores two core facts of which he is clearly aware: he can file suit
12 against Doe defendants (this case names Does 1-100) and, most importantly, that he was already a
13 plaintiff in an existing action.

14 He further claims he did not seek discovery because he thought that Tucows would not respond
15 anyway, based on anecdotal evidence that Tucows does not respond to subpoenas. *See*, Opposition, at
16 10-11. In the normal case, however, a party seeking information from a third-party files third-party
17 discovery. If the third-party doesn't respond, the party seeking discovery files a motion to compel. If
18 the motion to compel is not answered, the party seeks sanctions, including a finding of contempt.
19 Plaintiff had no problem finding and serving Tucows for purposes of filing this action. The idea that it
20 can be forgiven its own procedural failings because it believed Tucows wouldn't respond is belied by
21 this very motion. Tucows takes seriously its obligations to the Courts and responds when served.

22 **C. Non-Registrar Defendants Must Be Dismissed**

23 As described above, this action was brought because of a privacy service offered by Tucows,
24 Inc. (the party referenced in this Reply Memorandum as "Tucows"), an ICANN-accredited domain
25 name registrar. It centers on the interpretation of the RAA, a contract to which Tucows is a party, and
26 all of the causes of actions, even those sounding in tort, arise from supposed obligations to the public
27 based on the RAA. None of the other three Defendants is a registrar or a party to the RAA. The
28 Defendants believe that the entire complaint should be dismissed without leave to amend, but the

1 causes of action against the non-Tucows Defendants must be highlighted, if only because they
2 underscore the bad faith behind this action.

3 Defendant Elliot Noss is the President and CEO of Tucows. The sole factual allegation in the
4 Complaint regarding Mr. Noss is Paragraph 21: "BALSAM is informed and believes and thereon
5 alleges that Defendant ELLIOT NOSS ("NOSS") is now, and was at all times relevant herein,
6 President and Chief Executive Officer of TUCOWS INC. and President of TUCOWS CORP." From
7 that allegation alone, Plaintiff sues Mr. Noss for Negligence (Complaint, at ¶¶94-105), Civil
8 Conspiracy (Id., at ¶¶106-110), and Declaratory Relief (Id., at ¶¶111-114). In his Opposition, Plaintiff
9 claims only that "[o]fficers of corporations can be held liable for their personal unlawful conduct,"
10 (Opposition, at 13), yet he neither pleads "personal unlawful conduct" in his Complaint nor references
11 any in his Opposition. What this makes clear is that Mr. Noss was sued only because he is the
12 President and Chief Executive Officer, not because he personally participated in any way in the events
13 described in the Complaint. The claim is clearly frivolous, and it is difficult to find any good faith basis
14 on which it could have been brought.

15 For Mr. Karkas, Plaintiff alleges only that he is the Tucows employee with whom Plaintiff
16 corresponded when he attempted to learn the identity of Tucows' domain name registration customer.
17 Again, Mr. Karkas did not breach any contract provision to which he was a party or any duty that he
18 owed expressly to Mr. Balsam. Tucows Corp., one of the four named Defendants, is not a registrar,
19 nor has Plaintiff pleaded that it is. See, Complaint, at ¶¶16-20. Tucows Corp. is a subsidiary
20 corporation that makes billing software. The fact that it is included in the Complaint, with the absurd
21 allegation that it is a mere instrumentality of Tucows, underscore the lack of due diligence that
22 Plaintiff put into its work. It appears to have been named only because it has a U.S. principal place of
23 business, as opposed to Tucows, which has its main offices in Toronto, Ontario.

24 **D. No Leave To Amend**

25 Plaintiff claims that his Complaint should not be dismissed because he could amend it to state
26 claims that would entitle him to relief. The amendments he proposes, however, are not to the causes of
27 action he pleaded. His argument is that he could bring *new* causes of action under a variety of
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1 California statutes not now at issue. That is not a justification for granting him leave to amend the four
2 causes of action now before this Court.

3 **III. CONCLUSION**

4 Although he claims now that he was well aware of the no third-parties beneficiaries clause
5 before he filed, all the evidence is to the contrary. Balsam and his counsel failed to read the contract
6 before filing. To now defend himself against a motion to dismiss, Balsam makes argument that "party"
7 means "third-party," and ignores an ICANN amicus brief on the public policy underpinnings of the "no
8 third-party beneficiaries" clause, while arguing that the clause should be read out of the contract on
9 public policy grounds. None of these arguments entitle him to maintain this action.

10 Plaintiff's theory that Defendants should be on the hook for a \$1,250,000 default judgment
11 issued against another entity is pure nonsense, and this Court should acknowledge it as such and
12 dismiss the Complaint without leave to amend.

13
14 Respectfully submitted,

15 DATED: October 2, 2009

ADORNO YOSS ALVARADO & SMITH
A Professional Corporation

17 By: /s/ Bret A. Fausett

BRET A. FAUSETT
IMANI GANDY

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

ADORNO YOSS ALVARADO & SMITH
ATTORNEYS AT LAW
LOS ANGELES